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New Export Controls for Chemicals on the Horizon?

The Chemical Weapons Convention (CWC or Convention) of January 13, 1993,¹ signed by over 150 nations, including the United States, Russia, the European nations, and Japan,² sets its sights on prohibiting the development, production, stockpiling, or use of chemical weapons;³ the destruction of such weapons and facilities for their production;⁴ obligatory disclosure regarding chemical weapons and facilities producing such weapons;⁵ and inspections designed to verify compliance with the strictures of the Convention.⁶ The CWC builds upon the Geneva Protocol of 1925,⁷ which prohibits combat use of chemical or biological weapons, but not their production or storage,⁸ and the Biological Weapons

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1. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, *reprinted in* 32 I.L.M. 800 (1993) [hereinafter CWC]. For discussion concerning the Convention, see *Chemical Weapons Convention (Treaty Doc. 103-21): Hearings Before the Committee on Foreign Relations of the United States Senate*, 103d Cong., 2d Sess. (1994).

2. Conspicuously absent, however, are Libya, Iraq, North Korea, and Syria, among others. See *Legislative Summary: Chemical Weapons Convention*, 52 CONG. Q. WKLY. REP. 3191 (1994).

3. CWC, *supra* note 1, art. I(1).

4. *Id.* arts. I(2)-(4), IV-V, & Annex on Implementation and Verification (Verification Annex), pts. IV(A), (B), & V.

5. *Id.* art. III.

6. *Id.* arts. IV-VI, IX, & Verification Annex.

7. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 573, 94 L.N.T.S. 65.

8. This prohibition led many nations, including the United States, which ultimately became a state party in 1975, to take reservations preserving the right to use such weapons in retaliation. See Elizabeth Palmer, *For Business, a High Price for Chemical Weapons Ban*, 52 CONG. Q. WKLY. REP. 2584 (1994).

Convention of 1972,⁹ which addresses development, production, stockpiling, and destruction of biological and toxin weapons, but not verification.¹⁰ Those interested in the laws of war¹¹ will have an obvious interest in the CWC.¹² The focus of attention in this article, however, is on the effect the Convention is likely to have on businesses involved in exporting chemicals to foreign entities.¹³

Given that the principal motivation for the Convention was the elimination of the availability of chemicals for use during conflict situations, its relevance to export businesses not involved in dealing in weaponry and armaments may seem strange.¹⁴ Yet as an example of the wide scope of the CWC's provisions, a notice of the development of regulations, published by the U.S. Department of Commerce's Bureau of Export Administration, indicated that thiodiglycol, a solvent used in the manufacture of ball point pens, is a chemical the Convention controls.¹⁵ In the United States alone, the chemical industry numbers upwards of 12,000 facilities em-

9. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, T.I.A.S. No. 8062, 1015 U.N.T.S. 163.

10. The Biological Weapons Convention entered into force on March 26, 1975, and the United States is a party thereto. For a brief description of the Biological Weapons Convention's place in the development of the Chemical Weapons Convention, see Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 312, 323-24 (1994) (reprinting an excerpt from a report by Acting Secretary of State Peter Tarnoff accompanying President Clinton's letter transmitting the CWC to the Senate for advice and consent).

11. On certain aspects of the laws of land warfare involved in the Gulf War, see Rex J. Zedalis, *Military Necessity and Iraqi Destruction of Kuwaiti Oil*, 23 REVUE BELGE DE DROIT INTERNATIONAL 333 (1990); Rex J. Zedalis, *Gulf War Compensation Standard: Concerns Under the Charter*, 26 REVUE BELGE DE DROIT INTERNATIONAL 333 (1993).

12. For some literature dealing with the CWC, see THOMAS BERNAUER, *THE PROJECTED CHEMICAL WEAPONS CONVENTION: A GUIDE TO THE NEGOTIATIONS IN THE CONFERENCE ON DISARMAMENT* (1990); SIPRI CHEMICAL & BIOLOGICAL WARFARE STUDIES NO. 11, NATIONAL IMPLEMENTATION OF THE FUTURE CHEMICAL WEAPONS CONVENTION (Thomas Stock & Donald Sutherland eds., 1990); Richard Luce, *Chemical Weapons: Negotiating a Total Ban*, NATO REV., June 1985, at 8.

13. On exports being tied to chemical weapons production in the past, see Robert J. McCartney, *Bonn Names 4 More Firms Linked by U.S. to Libya*, WASH. POST, Jan. 10, 1989, at A16; John J. Eialka, *Western Industry Sells Third World the Means to Produce Poison Gas*, WALL ST. J., Sept. 16, 1988, at 1, col. 1; Stephen Engelberg, *U.S. Sees Gains in Effort to Stop West German Aid to Libya Chemical Plant*, N.Y. TIMES, Jan. 14, 1989, at A5; R. Jeffrey Smith, *CIA Cites European Role in More Gas-Weapon Sites; Syrian, Iranian Chemical Plants Noted*, WASH. POST, Feb. 9, 1989, at A24. American businesses have another reason to be interested in the Convention: the on-site inspection provisions. Stated succinctly, the CWC provisions require each party to make sure all locations are held open to international inspections to assure compliance with the prohibitions of the CWC. See generally David A. Koplow, *Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States*, 63 N.Y.U. L. REV. 229 (1988).

14. Indeed, both Michael Moodie, president, Chemical and Biological Arms Control Institute, and Don Mahley, Acting Assistant Director for Multilateral Affairs, U.S. Arms Control and Disarmament Agency, reportedly have found the American business community to react with disinterest. Apparently, the business community has assumed that the Convention does not concern businesses involved in fields other than weapons production. See Palmer, *supra* note 8, at 2587.

15. Notice of the Development of Regulations to Implement U.S. Industry Obligations Under the Chemical Weapons Convention, 59 Fed. Reg. 66,291, 66,292 (1994).

playing nearly 900,000 individuals.¹⁶ The industry's direct interest in the CWC is apparent from the fact that chemicals represent the United States' single largest export sector, producing approximately \$43 billion in export revenues during 1993.¹⁷ To the extent that the Convention purports to restrain exports of chemicals, its potential impact on enterprises in that sector is not simply speculative.¹⁸ While it is true that, if one focuses on the United States, exports by chemical businesses are currently regulated under the terms of the Export Administration Regulations (EAR),¹⁹ the CWC imposes restraints where the EAR may not. Specifically, highly toxic chemicals under the EAR's most stringent control—the validated license—may be exportable for end uses not tolerated by the restraints imposed by the CWC.²⁰ The same or similar kind of situation may exist in other signatories as well. Let us now turn our attention to those aspects of the Convention relating to exports and examine the precise dimensions of its reach.²¹

16. *Id.* Other estimates have placed the number of facilities at 20,000. See Palmer, *supra* note 8, at 2586 (citing 1991 data from the Office of Technology Assessment).

17. U.S. DEPT OF COMMERCE, UNITED STATES INDUSTRIAL OUTLOOK ch. 11(1), SIC 28 (35th ed. 1994).

18. Apart from export restraints, the verification measures prescribed by the CWC and alluded to *supra* in note 13 present an additional set of obligations to which the chemical industry, and others, even though not engaged in export business, must attend.

19. See 15 C.F.R. § 770.1-15 (1995). These regulations implement the Export Administration Act, 50 U.S.C. app. § 2401 (1988). (The Act expired on August 20, 1994, and as of the writing of this article [Spring 1995], Congress has not adopted a new version. The regulations have been continued under the International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701-1706 (1988)). Additionally, the Department of State's International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120.1-29 (1993), govern exports of chemicals with military applications. For an illustrative enumeration of such chemicals, see *id.* § 121.7 (Munitions List).

20. Under the CWC, so-called Schedule 1 chemicals and precursors, those with high potential for use in prohibited activities (see the "Guidelines for Schedules of Chemicals" in the CWC, *supra* note 1, Annex on Chemicals (A)) can be transferred to parties to the Convention only for protective, research, medical, or pharmaceutical purposes (*id.*, Verification Annex, pt. VII(A)). Nothing in the Export Administration Act or the EAR would prevent the transfer of such chemicals, even though under validated license, for other peaceful purposes, including industrial or agricultural uses, in the event such uses exist. See 15 C.F.R. §§ 778.8, 799.1 (ECCN 1C, 60C), 799.2, Interpretation 23 (1995). Though as a factual matter the Department of State, pursuant to the provisions of the ITAR, may refuse to authorize exports of such chemicals for peaceful purposes not considered research, medical, or pharmaceutical, nothing in the controlling regulations, unlike in the CWC, requires that approach.

21. With regard to the range of chemicals affected by the Convention, the following specifically named chemicals are mentioned in the CWC, *supra* note 1, Annex on Chemicals. Some of these more common uses of the chemicals are identified in order to give the reader an indication of the CWC's breadth of coverage.

CHEMICALS	USES
Amiton	miticide/insecticide
Arsenic trichloride	production of ceramics
Phosgene	preparation of organic chemicals; polymers
Cyanogen chloride	chemical synthesis
Sulfur monochloride	cold vulcanization of rubber; production of vegetable oils
Triethanolamine	in manufacture of polishes, waxes, toilet goods, cement, dyes
Hydrogen cyanide	rodenticides; forestry

I. Structure of the Convention's Export Controls

The CWC's complexity and breadth can be simplified in the area of export controls to four basic concepts. First, as provided in article I, all transfers of chemical weapons are prohibited.²² This prohibition includes not only transfers of munitions and devices designed to inflict injury through the release of toxic chemicals,²³ and equipment used in connection with employing such munitions and devices,²⁴ but prohibits transfers of toxic chemicals and their precursors as well.²⁵ The CWC defines toxic chemicals and their precursors as all chemicals, regardless of where they originate or are produced, that cause at least temporary incapacitation to humans or animals through chemical action on life processes,²⁶ and all chemical reactants that take part in the production of toxic chemicals.²⁷

Second, the CWC permits toxic chemicals and their precursors (but not toxic munitions and devices, or equipment used in connection with them) to be transferred whenever intended for "purposes not prohibited under the Convention."²⁸ Article II, paragraph 1(a) structures the definition of chemical weapons so as to exclude from coverage under the prohibition of article I toxic chemicals and their precursors transferred for nonprohibited purposes. The language of articles VI, X, and XI solidify this permission. Article VI provides that each party has a right, subject to the CWC, to make transfers for purposes not prohibited by the Convention.²⁹ Article X declares that nothing in the Convention impedes the right of each party to transfer, for nonprohibited purposes, means of protection against chemical weapons.³⁰ And article XI states that the CWC shall not be implemented in a way that hampers economic or technological development, or international cooperation, in the field of chemical activities for purposes not prohibited by the Convention.³¹

Third, in view of the definition of "purposes not prohibited by the Convention" contained in article II, paragraph 9, transfers of toxic chemicals and their precursors for industrial, agricultural, research, medical, pharmaceutical, or other

22. *Id.* art. 1, para. 1 reads, in part, "[e]ach State Party to this Convention undertakes never under any circumstances: (a) To . . . acquire . . . or transfer, directly or indirectly, chemical weapons to anyone." Art. VII then obligates parties to adopt implementing legislation prohibiting businesses or individuals from undertaking activities prohibited to parties. *Id.* art. VII, para. 1.

23. *Id.* art. II, para. 1(b).

24. *Id.* para. 1(c).

25. *Id.* para. 1(a).

26. *Id.* para. 2. Herbicides are not covered by the Convention. However, it has been said they would be covered if they are used in such a way as to transform their toxic effect into something intentionally directed at humans or animals. See WALTER KRUTZSCH & RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION 25, 30, 31 (1994) [hereinafter A COMMENTARY].

27. CWC, *supra* note 1, art. II, para. 3.

28. *Id.* paras. 2, 3.

29. *Id.* art. VI, para. 1.

30. *Id.* art. X, para. 2.

31. *Id.* art. XI, paras. 1, 2(c). On the compromise, yet flawed, nature of this provision, see A COMMENTARY, *supra* note 26, at 215-17.

peaceful purposes³² appear to fall outside the prohibition of article I.³³ In every case, however, the types and quantities of items transferred must be consistent with the purposes concerned.³⁴ That is to say, one could not cite the concept of nonprohibited purposes as authorizing transfer of a toxic chemical if the chemical were one that had no actual use in industry, agriculture, research, medicine, pharmacology, or some other peaceful activity. Nor could one rely on that concept to rationalize the transfer of an incredibly large volume of a toxic chemical if a much smaller quantity would be more than sufficient to meet needs associated with the permitted purposes.

Fourth, even though the CWC permits transfers of toxic chemicals and their precursors for industrial and agricultural use, and peaceful purposes generally, it makes a distinction between transfers to other parties to the Convention and transfers to states that have not agreed to the Convention's terms. The CWC also attaches specific conditions to otherwise permitted transfers. In regard to permitted transfers, article XVII makes the CWC's annexes, including that on verification, as much a part of the Convention's terms as its twenty-four articles.³⁵ Parts VI-VIII of the Verification Annex then set out a transfer scheme that affects parties and nonparties differently, and imposes particular conditions on generally permitted transfers of toxic chemicals and their precursors.³⁶ The idea is to restrict transfers made to nonparties and impose conditions on permitted transfers to parties or nonparties.

II. General Concerns in Exports by Private Entities

By its very terms, the CWC applies to all states that are party to its provisions.³⁷ It is not cast in language suggesting that private entities, business or otherwise, have certain obligations to restrict their conduct in any particular way.³⁸ Article

32. CWC, *supra* note 1, art. II, para. 9(a). Also included are so-called "[p]rotective purposes" and "[m]ilitary purposes not connected with the use of chemical weapons." *Id.* art. II, para. 9(b), (c).

33. The reference to transfers for industrial, agricultural, research, medical, pharmaceutical, or other peaceful purposes appearing to fall beyond the gambit of art. I's prohibition is deliberate. As will become apparent below, the purposes for which the chemicals of most concern, those listed in Schedule 1 of the Verification Annex, may be transferred are even more limited than the purposes set forth in the definition of nonprohibited purposes.

34. This limitation arises out of the fact that the exception from the definition of chemical weapons in art. I, para. 1(a), of toxic chemicals and their precursors intended for purposes not prohibited under the CWC, links such chemicals and precursors to types and quantities consistent with the nonprohibited purposes upon which reliance is placed.

35. *Id.* art. XVII.

36. *See id.*, Verification Annex.

37. The provisions that establish obligations are not just those found in the 24 articles of the Convention. By virtue of art. XVII, the provisions of the three annexes also establish obligations that must be fulfilled. *Id.* art. XVII.

38. For instance, the basic prohibition of the Convention, contained in art. I, states "Each State Party to this Convention undertakes never under any circumstances . . . [t]o develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical

VII, however, assures that the basic prohibition on transfers will serve to restrain the conduct of natural and legal persons, by virtue of requiring each party to the Convention to adopt internal domestic measures extending the Convention's obligations to such persons.³⁹ The Convention in effect imposes direct restrictions on transfers by any branch or agency of the governmental authority adhering to its terms, as well as indirect restrictions on natural or legal persons through adoption of local law implementing the Convention's obligations, in particular the prohibition on transfers.⁴⁰

Apart from questions about the CWC's prohibition on transfers reaching conduct by business enterprises, one might wonder whether any inference may be drawn from the fact the term "transfer" is used in some provisions of the Convention,⁴¹ and "export" is used in others.⁴² Might this usage suggest that, since article I, which contains the Convention's basic prohibition, and article VI, which contains its basic permission regarding nonprohibited purposes, use the term "transfer" they are referring to something other than an "export" transfer? A couple of pieces of evidence suggest the perverseness of such a reading. Initially, the instances in which the term "export" appears are few and are confined to what declarations each state party must make concerning national data on exports of chemicals.⁴³ "Transfer," on the other hand, tends to be used in connection with the basic provisions addressing prohibited and permitted conduct.⁴⁴ The implication is that "export" is a technical term connoting movement across the

weapons to anyone." *Id.* art. I, para. 1(a). The exception concerning "purposes not prohibited by the Convention" also speaks of each "State Party" having a right to develop, produce, acquire, transfer, etc., chemical weapons for such purposes. *See id.* art. VI, para. 1.

39. Art. VII provides in part:

1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

(b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

(c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

40. *Id.* art. VII, para. 1. While the CWC's use of "State Party" and "natural or legal persons" indicates that in a federal system the national government (which has obligated itself by signature and ratification), individuals, businesses, and other legal entities may be obligated to observe the terms of the Convention, one may wonder about state and local governments. These governments would seem to fall within the ambit of art. VII, which obligates parties to prohibit conduct "in any place under [their] control." *Id.* art. VII, para. 1(b). For a discussion of the flip side of whose transfers are controlled, that is, to whom transfers are controlled, see *infra* notes 88-92 and accompanying text.

41. *See, e.g.*, CWC, *supra* note 1, arts. I, VI, X, XI.

42. *See, e.g.*, *id.*, Verification Annex, pt. VII(A), para. 1, & pt. VIII(A), para. 1.

43. *See id.*

44. *See* provisions cited *supra* note 40.

borders of a country, while "transfer" is a broader term capable of encompassing the idea of export.⁴⁵ Another piece of evidence supports the notion of "transfer" having a broader meaning, and the view that it is wrong to conclude the use of "transfer," in conjunction with "export," suggests the prohibition of article I and the permission of article VI do not concern the movement of chemicals from one country to another. Specifically, various provisions exist in the Convention that clearly use the term "transfer" to refer to the movement of chemicals across international borders. Most significant in this respect are the provisions dealing with chemicals the parties consider of the greatest concern, the scheduled chemicals. In all such cases, the language speaks of a state party making a transfer "outside its territory,"⁴⁶ or "to . . . States Parties,"⁴⁷ or "to States not Party to this Convention."⁴⁸

The other general concern that merits attention in the context of exports by business enterprises of toxic chemicals and their precursors involves the ability of such entities to avail themselves of article VI's permission regarding exports for purposes not prohibited by the CWC, including industrial, agricultural, research, medical, pharmaceutical, and other peaceful purposes.⁴⁹ Admittedly, no language is present in article VII, or elsewhere, providing that the Convention's permission can be exercised by natural or legal persons. In speaking to the requirement that parties adopt domestic legislation implementing their obligations, article VII, as noted above,⁵⁰ focuses on ensuring that states extend to other actors the prohibitions imposed by the CWC. Not a word appears about any permission being so extended. Even article VI, and the other provisions addressing the departure for nonprohibited purposes, happen to be in terms referencing only sovereign states.⁵¹ Nonetheless, given that the CWC's prohibitions relate, among other things, to chemical weapons, and chemical weapons are defined as excluding toxic chemicals and their precursors intended for nonprohibited purposes, article VII does not seem to require the adoption of domestic legislation allowing only states and their official organs the right to make transfers for such purposes.⁵² As a general

45. Indeed, given the use of the term "transfer," one would find it impossible to argue that the Convention does not control situations where possession of toxic chemicals or their precursors passes within the borders of a state party, with the recipient then seeking to remove them from the country under the justification that the CWC regulates exports, and exports involve one entity in possession of an item sending it outside the borders of the nation to another who then takes up possession. Apart from this being a strained interpretation of the notion of export, utilization of the term "transfer" neutralizes all such arguments, supporting the idea of transfer encompassing many types of transactions, including exports. See A COMMENTARY, *supra* note 26, at 13-14.

46. CWC, *supra* note 1, Verification Annex, pt. VI(A), para. 1.

47. *Id.*, Verification Annex, pt. VII(C), para. 31.

48. *Id.*, Verification Annex, pt. VIII(C), para. 26.

49. See *supra* notes 27-33 and accompanying text.

50. See *supra* note 38 and accompanying text.

51. See, e.g., CWC, *supra* note 1, art. VI, para. 1 & art. X, para. 2.

52. The Convention leaves open the possibility that such authority may be exercised by a state party possessing the internal constitutional power to prohibit natural and legal persons from exporting toxic chemicals and their precursors for nonprohibited purposes.

matter, natural and legal persons should be viewed as having fixed upon them the same obligations under the Convention as faced by states parties to the Convention. Also, as the character of those obligations happens to be affected by the permission contained in article VI, the obligations are as capable of changing their appearance for natural and legal persons as they are as for states.

III. Exports by Businesses Based in States Parties

The prohibitions of the CWC, and in particular the prohibition regarding exports, clearly apply to business enterprises and private persons.⁵³ Further, the permission to export for purposes of a nonprohibited nature, like industrial, agricultural, or medical use, does not apply only to government entities.⁵⁴ Thus, no doubt exists that the CWC provides for controls over exports of toxic chemicals and their precursors by business enterprises based in states parties. This section now examines the precise nature of these controls in connection with business exports from an adherent to the Convention. The focus is on exports of controlled chemicals produced in the adhering country, not on reexports of chemicals originally imported from elsewhere.⁵⁵

Business enterprises based in a state party may be purely local,⁵⁶ or they may be extensions of enterprises located in another country.⁵⁷ If one were to use the concept of affiliate to refer to all forms of enterprises based in a party yet owned by an enterprise situated in another country, one might employ the notion of a domestic affiliate of a foreign business. By this standard, a free-standing, wholly local enterprise might be termed simply a domestic business. But whether concerned with a domestic affiliate of a foreign business, or with a domestic business alone, the CWC appears to make no distinction with regard to exports from a party to the Convention. If an affiliate of a foreign enterprise organizes under the laws of, or does business within, a state party, it can be said to be "on its [(i.e., the state party's)] territory"⁵⁸ and therefore subject to legislation the party must adopt to implement its obligation prohibiting exports.⁵⁹ This approach con-

53. See *supra* notes 36-39 and accompanying text.

54. See *supra* notes 46-50 and accompanying text.

55. For discussion of the reexport problem, see *infra* part V.

56. "Local" means an enterprise indigenous to the state party concerned. The enterprise is not under the ownership of another entity located in a foreign nation.

57. Here the enterprise in the state party is under the ownership of an entity located in a foreign nation.

58. CWC, *supra* note 1, art. VII, para. 1(a); see also A COMMENTARY, *supra* note 26, at 112-13 (indicating coverage of "companies and corporations organized under the law of the State Party itself, of another State Party or of a State not Party to the Convention" when such are within the territory of a state party).

59. Whether the CWC also provides for the foreign nation serving as the home of the enterprise owning the affiliate to exercise control is a matter taken up below, see *infra* part IV.

firms territoriality as a basis of jurisdiction recognized by international law.⁶⁰ Moreover, it also guarantees that businesses located in nations not bound by the terms of the CWC cannot obtain transfers from affiliates established in states parties to the Convention. Not only are wholly domestic enterprises based in a state party subject to the general prohibition on transfers, so are foreign-held domestic affiliates, given their location in such a party's territory.

Implementing legislation may permit domestic affiliates and free-standing domestic enterprises to depart from the basic prohibition on transfers when such transfers are for purposes not prohibited by the Convention.⁶¹ Again, this measure would appear to include exports of toxic chemicals and their precursors for industrial, agricultural, research, medical, pharmaceutical, and other peaceful purposes. In such cases, however, exporters must comply with the provisions of the Convention distinguishing between transfers to parties and those to nonparties, and with the provisions imposing limitations on permitted transfers generally.⁶² This requirement means exports of Schedule 1 chemicals to countries not party to the CWC are prohibited.⁶³ Additionally, exports to state parties, though permitted, must be for research, medical, or pharmaceutical purposes, but not for industrial, agricultural, or other peaceful purposes.⁶⁴ Further, transfers destined for countries party to the Convention must also be strictly limited to the types and quantities justified by the permitted purposes;⁶⁵ must not exceed one ton in any given year;⁶⁶ must not be retransferred to a third state;⁶⁷ require thirty days' advance notice to the Technical Secretariat of the Organization for the Prohibition of Chemical Weapons in the Hague;⁶⁸ and must be followed by an annual declaration detailing all Schedule 1 transfers, including information on the recipient of each transfer and the purpose involved.⁶⁹

Schedules 2 and 3 chemicals, those with a lesser degree of military usefulness and a greater amount of commercial application, do not fall under the same highly restrictive regime. Implementing legislation adopted by a state party to carry out obligations with regard to the export of such chemicals by business enterprises can be more liberal. With respect to Schedule 2 chemicals, the CWC permits transfers

60. See *Schroeder v. Bissell*, 5 F.2d 838 (D. Conn. 1925); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983).

61. See *supra* notes 30-33 and accompanying text.

62. See *supra* notes 34-35 and accompanying text.

63. See CWC, *supra* note 1, Verification Annex, pt. VI(A), para. 1.

64. *Id.*, Verification Annex, pt. VI(A), para. 2(a); see A COMMENTARY, *supra* note 26, at 418 (limited purposes of permitted transfer). Observe that para. 2(a) references "protective purposes" as well. These purposes come within the general definition of "purposes not prohibited by the Convention" in art. II. CWC, *supra* note 1, art. II, para. 9.

65. CWC, *supra* note 1, Verification Annex, pt. VI(A), para. 2(b).

66. *Id.* para. 2(c)-(d).

67. *Id.*, Verification Annex, pt. VI(B), para. 4.

68. *Id.* para. 5.

69. *Id.* para. 6.

to nonparties during an interim period to run for three years after the Convention enters into force.⁷⁰ It does this by permitting only transfers to states parties, and then providing that this obligation commences three years after the CWC becomes effective. Obviously, given the Convention's basic prohibition on the transfer of chemical weapons, including the transfer of toxic chemicals and their precursors,⁷¹ allowing the transfer of Schedule 2 chemicals to states parties implies that the transfer has to be for a nonprohibited purpose. Indeed, during the three-year interim period following the entry into force of the Convention, shipments destined for states not party to the CWC require a certificate from the recipient declaring that the chemicals will only be used for purposes not prohibited by the Convention.⁷² This requirement corroborates the idea that, in order to be permitted, a transfer to anyone, whether state party or not, must be for a nonprohibited purpose.⁷³ The certificate must also indicate that the chemicals will not be retransferred,⁷⁴ the types and quantities involved,⁷⁵ the end use,⁷⁶ and the identity of the end user.⁷⁷ The purposes for which exports of Schedule 2 chemicals may be made include industrial, agricultural, research, medical, pharmaceutical, and other peaceful purposes. These purposes are more inclusive than the research, medical, and pharmaceutical purposes capable of supporting exports of Schedule 1 chemicals to another state party.⁷⁸

Schedule 3 chemicals may also be transferred to nonparties as well as parties.⁷⁹ The CWC explicitly subjects transfers to nonparties to the requirement that the transfers be for purposes not prohibited by the Convention.⁸⁰ The language of the annex attaching this requirement tracks the language of the identical requirement regarding Schedule 2 chemicals. Therefore, the transfers can involve industrial, agricultural, and other peaceful purposes, in addition to the research, medical, and pharmaceutical purposes that limit transfers to states parties of chemicals

70. *Id.*, Verification Annex, pt. VII(C), para. 31. According to art. XXII, the Convention enters into force 180 days after 65 states ratify its provisions.

71. See *supra* notes 21-24 and accompanying text.

72. CWC, *supra* note 1, Verification Annex, pt. VII(C), para. 32(a).

73. After all, the requirement of a certification of intended use in connection with transfers to nonparties during the three-year interim period is simply that. In and of itself it does not dictate (though it may indicate) that transfers can only be made for nonprohibited purposes. However, given that art. I prohibits all transfers of toxic chemicals and their precursors, unless for purposes not prohibited by the Convention, the only way that any transfer would seem authorized is if it were for a nonprohibited purpose. Thus, whether to a party or a nonparty, transfers of Schedule 2 chemicals are prohibited, unless for purposes not prohibited, peaceful purposes like industrial, agricultural, research, medical, or pharmaceutical use.

74. *Id.*, Verification Annex, pt. VII(C), para. 32(b).

75. *Id.* para. 32(c).

76. *Id.* para. 32(d).

77. *Id.* para. 32(e).

78. Compare *id.*, Verification Annex, pt. VI(A), para. 2(A), with *id.*, Verification Annex, pt. VII(C), para. 32(a).

79. See *id.*, Verification Annex, pt. VIII, para. 26.

80. *Id.* para. 26(a).

listed in Schedule 1. Again, as with Schedule 2 transfers to states not party to the CWC, transfers of Schedule 3 chemicals must be supported by a certification indicating that the chemicals are to be used for nonprohibited purposes;⁸¹ that they will not be retransferred;⁸² their specific type, quantity, and end use;⁸³ and the precise identity of the end user.⁸⁴ Transfers of Schedule 3 chemicals destined for states parties must be supported by some nonprohibited purpose, just as with Schedule 2 chemicals. However, the Convention does not obligate parties to require certification of the sort involved with transfers going to a state not a party to the CWC.⁸⁵

What about exports by businesses of toxic chemicals and their precursors not listed in the three schedules of chemicals annexed to the Convention? What, if any, restrictions, requirements, or conditions are imposed on their export? Part IX of the Verification Annex addresses such unscheduled chemicals.⁸⁶ The thrust of Part IX, however, seems to be facilities producing chemicals of that type, not the establishment of specific obligations relative to the transfer of such.⁸⁷ This approach places reliance upon the general prohibition on exports set forth in article I, and on the basic permission of article VI, confirmed in the language of articles X and XI, regarding exports for purposes not prohibited by the Convention.⁸⁸ Essentially, this approach results in exports to parties or nonparties being permitted as long as the exports are for peaceful purposes, like industrial, agricultural, research, medical, or pharmaceutical use.⁸⁹ The definition of "chemical weapons" contains the only condition: requiring that the types and quantities of chemicals transferred be consistent with the permitted purposes justifying the transfer.⁹⁰

Somewhat related to the distinction between scheduled and unscheduled toxic chemicals and their precursors is the matter of to whom the Convention prohibits, restricts, or conditions exports.⁹¹ This question arises as a result of language that

81. *Id.*

82. *Id.* para. 26(b).

83. *Id.* para. 26(c)-(d).

84. *Id.* para. 26(e).

85. Nonetheless, according to the terms of the Verification Annex, parties to the CWC must submit annual declarations concerning exports of Schedules 2 and 3 chemicals. *Id.*, Verification Annex, pt. VII(A), para. 1, & pt. VIII(A), para. 1. For a similar obligation concerning Schedule 1 chemicals, see *id.*, Verification Annex, pt. VI(A), para. 6.

86. See *id.*, Verification Annex, pt. IX.

87. Indeed, nothing in part IX of the Verification Annex obligates state parties to make periodic declarations concerning exports of unscheduled chemicals. As observed above, however, such an obligation does exist with regard to scheduled chemicals.

88. See *supra* notes 21-33 and accompanying text.

89. Recall that the definition of "Purposes Not Prohibited under this Convention" includes other noncommercial type uses. See CWC, *supra* note 1, art. II, para. 9.

90. See *id.* art. II, para. 1(a).

91. The Convention unquestionably distinguishes transfers to state parties from transfers to states not party to its terms. The following text deals with whether any distinction exists between transfers to governments and transfers to nongovernment entities.

appears in various provisions of the CWC suggesting the recipients targeted are states, not natural or legal persons.⁹² But not only would it make little sense to regulate exports to states if businesses and other private entities located there were left free to receive such, the Convention itself clearly refuses to draw a differentiation of this character. The terms of article I's basic prohibition on exports of toxic chemicals explicitly extends to direct or indirect transfers "to anyone."⁹³ Admittedly, exports for nonprohibited purposes may be undertaken. Yet, as already seen, the basic language in article I, and in particular its reference to transfers "to anyone," controls exports of unscheduled chemicals. Parts VI-VIII of the Verification Annex, which control exports of scheduled chemicals, include equally broad terminology like "shall not transfer such chemicals outside its territory,"⁹⁴ and shall require the "name(s) and address(es) of the end-user(s)."⁹⁵ As the latter language appears in the very provisions that indicate the Convention's focus is on states, not private entities, and clearly connotes that any transfer going out of the country is of concern, there is no reason to accept the view that transfers to businesses or other private entities in another nation fall outside the ambit of the CWC.

IV. Exports by Overseas Affiliates of Party-Based Enterprises

The preceding section concentrated on exports from a state party of controlled chemicals produced there and shipped by either free-standing domestic enterprises or by domestic affiliates of foreign enterprises. The present section directs attention to exports of toxic chemicals and their precursors by overseas affiliates of enterprises located in parties to the Convention. Again, the exports of concern are chemicals produced in the country in which the affiliate is located, not those originating elsewhere.⁹⁶ In order to avoid overlap with material already covered, the focus here is not on controls of the country in which the affiliate is located, but on controls of the country where the holding enterprise is located. Thus, this section examines the extraterritorial reach the CWC envisions the holding enterprise's state to have over the activities of that enterprise's affiliate.

The Convention contains three sets of language that speak very directly to the issue of extraterritorial jurisdiction. All of these appear in article VII, which, as seen above, obligates parties to adopt legislation guaranteeing that natural and

92. See, e.g., *id.*, Verification Annex, pt. VI(A), para. 1 (referencing transfers to "another State Party"), pt. VII(C) para. 31 (referencing transfers "only . . . to . . . States Parties"), & pt. VIII(C), para. 26 (referencing transfers to "States not Party" to the Convention).

93. *Id.* art. I, para. 1(a); see A COMMENTARY, *supra* note 26, at 419 n.10 (indicating that the Convention's provisions with regard to Schedule 1 chemicals apply to natural or legal persons, not just states); see also *id.* at 419 n.13 (indicating the implication of universality in the term "anyone").

94. CWC, *supra* note 1, Verification Annex, pt. VI(A), para. 1.

95. *Id.*, Verification Annex, pt. VII(C), para. 32(e) & pt. VIII(C), para. 26(e).

96. For discussion of the reexport problem as it relates to overseas affiliates, see *infra* part V.

legal persons will not violate the terms of the Convention.⁹⁷ The first set, in paragraph 1(a), provides for the adoption of domestic legislation prohibiting and penalizing violations by natural and legal persons "on its territory or in any other place under its jurisdiction as recognized by international law."⁹⁸ The second set, in paragraph 1(b), provides for implementing legislation prohibiting violations "in any place under . . . [a party's] control."⁹⁹ The third set, in paragraph 1(c), requires each party to extend its penal legislation to prohibit violations of the Convention "undertaken anywhere" by "natural persons, possessing its nationality, in conformity with international law."¹⁰⁰

Paragraph 1(c) makes it clear that a national of a state party must be subjected to the laws of the state of nationality, regardless of where that national is located. For instance, if The Netherlands, a signatory, ratified the Convention through its own domestic constitutional processes, it would be required to adopt implementing legislation prohibiting its nationals, even though situated in another nation, party or not, from engaging in activities, like exporting, outlawed under the CWC.¹⁰¹ Such extraterritorial reach is confined to natural persons. Paragraph 1(c) will not support the view that hypothetical overseas affiliates of Netherlands-based enterprises are subject to Netherlands export controls on toxic chemicals because the affiliates are controlled through ownership, or otherwise, by Netherlands-based businesses.¹⁰²

97. See *supra* note 39.

98. CWC, *supra* note 1, art. VII, para. 1(a).

99. *Id.* para. 1(b).

100. *Id.* para. 1(c).

101. A national of The Netherlands located in the territory of another party to the CWC would also fall within the reach of laws that that other country must adopt in order to implement its own obligations under the Convention. See *infra* note 127 and accompanying text. The language of para. 2 of art. VII, which requires parties to cooperate with each other to facilitate implementation of the obligations in para. 1, can be seen as speaking to, among other things, the matter of concurrent authority.

102. Under the U.S. Department of Commerce's export administration regulations, 15 C.F.R. § 770.1-.15 (1995), overseas affiliates of U.S. entities have been subjected to export restrictions in situations in which the U.S. entities are said to have control of the affiliate. See 47 Fed. Reg. 27,250, 27,251 (1982) (defining "person subject to the jurisdiction of the United States" as meaning foreign businesses owned or controlled by some U.S. entity). This extension led Commerce to assert jurisdiction over a French company, Dresser (France), concerning exports from France of gas compressors built by the company in France. On the case and ensuing controversy with the European allies, see *Dresser Indus., Inc. v. Baldrige*, No. 82-2385 (D.D.C. Aug. 25, 1982); *Dresser Indus., Inc. v. Baldrige*, 549 F. Supp. 108 (D.D.C. 1982); *Dresser (France) S.A.*, Initial Decision of Hearing Commissioner of Sept. 30, 1982, 18 U.S. Export Wkly. (BNA) 25 (1982); *Dresser (France) S.A.*, Decision and Order of Assistant Secretary for Trade Administration of Nov. 1, 1982, 47 Fed. Reg. 51,463 (1982); *Ordre de Requisition des Services*, Aug. 23, 1982 (from the French Minister of Research and Industry); Note, Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Administration Regulations, COM(82)558 final (*cited in* ANDREAS F. LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS* 295 n.f (1983)). For an identical controversy between the United States and Europe under the U.S. Department of Treasury foreign asset control regulations, see Judgment of May 22, 1965 (*Société Fruehauf Corp. v. Massardy*), Cours d'appel, Paris, 2 D.S. Jur. 86 (Fr.). For insight concerning the intent of para. 1(c) of art. VII of the CWC, see A COMMENTARY, *supra* note 26, at 115.

Paragraph 1(a) stands at the other end of the spectrum from paragraph 1(c)'s nationality-based extraterritorial reach.¹⁰³ This second set of language in article VII, fixing a requirement on parties to regulate conduct of private entities, is essentially territorial in nature. It envisions a CWC party addressing activities of private entities operating within the borders of that particular state.¹⁰⁴ Moreover, its reference to legal and natural persons indicates, as alluded to earlier, that the activities of business enterprises shall be regulated.¹⁰⁵ The difficulty in relying on paragraph 1(a) to argue that parties shall prohibit and penalize violative activities of overseas enterprises affiliated with entities located in the regulating state is that the only basis for the argument resides in the paragraph's reference to "any other place under its jurisdiction as recognized by international law."¹⁰⁶ This language surely speaks to situations in which an overseas affiliate (or, for that matter, a wholly domestic enterprise or a domestic affiliate of a foreign enterprise) engages in conduct, like prohibited transfers, on ships or aircraft registered in the regulating state while such vessels are in international waters or international airspace.¹⁰⁷ It does not, however, suggest any obligation to regulate transfers by such affiliates when occurring within the borders of another state, whether a party to the Convention or not.¹⁰⁸ In this sense, then, paragraph 1(a) extends very little beyond what is provided by paragraph 1(c).

The third set of language of article VII, that contained in paragraph 1(b), also addresses situations in which parties must adopt legislation, and that language may address the conduct of overseas affiliates.¹⁰⁹ As just observed, overseas affiliates do not fall within the extraterritorial legislation referenced in the context of nationality, and they do not have to be subjected to legislation on a territorial basis, except in those uncommon situations involving activities aboard registered vessels located in international common areas. The language of paragraph 1(b), however, goes further and refers to parties being obligated to adopt implementing legislation prohibiting violative conduct "in any place under . . . [their] con-

103. See CWC, *supra* note 1, art. VII, para. 1(a).

104. Domestic affiliates of foreign business enterprises are regulated under this language. See *supra* part III and accompanying notes.

105. See *supra* notes 36-39 and accompanying text.

106. CWC, *supra* note 1, art. VII, para. 1(a).

107. See A COMMENTARY, *supra* note 26, at 112-13. In the United States, during the 103d Congress, the domestic legislation submitted to the Senate, simultaneous with the submission of the CWC for advice and consent of that body, and the legislation submitted to the House of Representatives, contained language suggesting this very point. See S. 2221, 103d Cong., 2d Sess. §§ 5(b)(3), 201 (1994) (amending 18 U.S.C. ch. 11 with § 227D(8)). 140 CONG. REC. S7250, S7251 (daily ed. June 21, 1994); H.R. 4849, 103d Cong., 2d Sess. §§ 5(b)(3), 201 (1994). As of the time this article was completed, the Bureau of Export Administration, U.S. Department of Commerce, Washington, D.C., informed the author that the Clinton administration was in the process of preparing new implementing legislation that would differ in some respects from the earlier proposals.

108. See A COMMENTARY, *supra* note 26, at 113-14 (indicating that overseas affiliates of a domestic enterprise shall be reached if such affiliates are branches of the parent enterprise, that is, entities not separately organized under the laws of the overseas states in which they operate).

109. See CWC, *supra* note 1, art. VII, para. 1(b).

trol.”¹¹⁰ Looked at against the backdrop of paragraph 1(a), the reference to areas under a party’s control touches on a couple of situations. First, it requires extraterritorial legislation to deal with cases in which some private entity, such as an overseas affiliate, engages in violative activity, like prohibited transfers, from an overseas location that the nation of the affiliate’s holding enterprise may have under its control. Examples would include foreign territory under the military authority of the holding enterprise’s state, as well as areas beyond the national boundaries of any state where the holding enterprise’s state exercises authority.¹¹¹

Significantly more troublesome, however, is the second situation. That situation would involve an overseas affiliate’s conduct within a state not a party to the Convention, or within a state party that, we might assume, is delinquent in fulfilling its obligation to prohibit something like violative export activity. The problem is that the idea of control does not imply that it is enough that the state of the enterprise that holds the overseas affiliate have a desire, interest, or willingness to step into the void created by the affiliate locating in a nonparty,¹¹² or in a party remiss in implementing its obligations. The CWC does not envision the mere fact that one state exercises its discretion not to become an adherent to the Convention, or fails to administer its terms in a manner thought satisfactory to another, as requiring, or justifying, extraterritorial reach. Where control over a place exists, an overseas affiliate can and must be regulated. But even in such cases, the regulation springs from control’s linkage to the territorial basis of jurisdiction. Given the fact that paragraph 1(c) confines jurisdiction based on nationality to natural persons alone, the regulation cannot be understood as springing from the affiliate’s taking on the nationality of the holding enterprise itself.¹¹³

V. The Reexport Problem

The two preceding sections of this commentary focus on exports of toxic chemicals and their precursors produced in the country of the business enterprise involved in the exportation. Whether the concern has been regulation by a state party of transfers made by private entities located therein (free-standing domestic

110. *Id.*

111. See A COMMENTARY, *supra* note 26, at 115-16. The idea of control is plainly open to numerous interpretations and potentially capable of generating much controversy.

112. See *id.* at 114 (indicating with regard to para. 1(a) of art. VII that “neither the respective State Party nor the parent company could reasonably be expected to enforce legally a prohibition in the subsidiary in case its management continues collaboration with the government of the State, not Party, in which it is located.”); see also David A. Koplow, *Long Arms and Chemical Arms: Extraterritoriality and the Draft Chemical Weapons Convention*, 15 YALE J. INT’L L. 1, 68 (1990) (suggesting that the then draft Convention should not require states parties to exercise jurisdiction over affiliates of enterprises located within their own borders, when those affiliates locate overseas in a state not party to the CWC).

113. For examples of instances in which regulatory provisions of U.S. law have seemed to impute U.S. nationality to overseas affiliates of U.S. companies, see *supra* note 102.

businesses, or domestic affiliates of foreign enterprises) or has been extraterritorial regulation of overseas affiliates (entities operating in a country other than the regulating state where the enterprise that holds the affiliate is located), discussion has been based on the assumption that the chemicals transferred were produced in the country where the regulated enterprise was located. This section now briefly examines the situation where the regulated enterprise has received the chemicals of concern by way of import, and then wishes to make a transfer of those same chemicals outside the country.¹¹⁴ The discussion concentrates not on regulation by the country of the entity that receives the import, but on regulation by the country from which the import was initially shipped—another wrinkle in the idea of extraterritoriality.¹¹⁵ Regulation by the country of the importer who wishes to export what was imported is left aside because every state party to the CWC, as has already been pointed out,¹¹⁶ must adopt legislation prohibiting and penalizing violative conduct occurring within its borders.

With regard to extraterritorial regulation by the country that has supplied an import to an enterprise located elsewhere, from the vantage of the Convention states parties have a real interest in regulation. Not only is it unlikely that many nonparties would have an interest in extraterritorial regulation of reexports by recipients in other countries, the Convention itself, in speaking to reexports and

114. Obviously, since the limitations on reexport called for in the Convention (see *supra* notes 67 (Schedule 1 chemicals), 74 (Schedule 2 chemicals), 82 (Schedule 3 chemicals)) speak to the original exporting nation, if that nation is not a party to the CWC, those limitations are meaningless. As a consequence, the reexport problem examined below considers the interest in reexporting to have come from a state party to the Convention. While we speak of reexport, the proper term used in the CWC is retransfer. The concept of retransfer would seem broad enough to cover not only reexports, but transfers from the original importer to another business entity that may be located in the initial importing state—in other words, an intrastate, as opposed to an interstate, transfer. See A COMMENTARY, *supra* note 26, at 13, 419 (indicating that the concept of transfer in article I includes intrastate transfers between entities, but referencing only interstate transfers in the context of the concept of retransfer).

115. To state it in terms of particular countries, if controlled chemicals were imported from the United States by an enterprise in Germany, this section's focus would be on U.S. regulation of the German recipient's interest in a later export of the imported chemical, a reexport, to a third country. One may think that such U.S. regulation might be based on the mere fact that the exported chemical came from a supplier in the United States. In the past, assertions of regulatory authority under the U.S. export administration regime have been based on such facts. See, e.g., *Bay Laboratories Ltd. and Byron Williams, Order Denying Export Privileges for an Indefinite Period*, 33 Fed. Reg. 12,147 (1968) (imposing sanctions upon Irish defendants located abroad for reexporting, in violation of the export administration regulations, controlled items received from the United States). On this theory, extraterritorial reach could apply even to wholly independent and unaffiliated entities located overseas. See *SNAM Progetti, S.p.A., Consent Order*, 35 Fed. Reg. 2,460 (1970) (unaffiliated Italian company that received technology exported from the United States in compliance with export administration regulations charged with violating such after reexporting to prohibited third-country destination). In the event of any extraterritorial application of a regulatory regime, the obvious question is how sanctions for violative conduct are to be made effective. The United States, in the context of the export administration regulations, has attempted to prevent future U.S. exports from being made to overseas violators. See the two cases cited above.

116. See *supra* notes 103-06 and accompanying text (discussing the obligation to regulate activities within one's territory, or in areas under one's jurisdiction).

regulation by the initial supplying state, only deals with states parties. Thus, much of the reexport problem can be broken down according to the nature of the chemicals involved and the state to which the initial transfer is made.

Preliminarily, the CWC differentiates between scheduled and unscheduled chemicals. For all scheduled chemicals, the Convention contains language indicating that once supplied to an importer in another country, retransfers are unacceptable. The language simply provides that Schedule 1 "[c]hemicals transferred shall not be retransferred to a third State."¹¹⁷ Concerning Schedule 2 and 3 chemicals, the language provides that the transferring state party "shall require from the recipient State" a certificate declaring the chemicals "will not be retransferred."¹¹⁸ Transfers of unscheduled chemicals, however, are addressed in the articles of the Convention itself, not in the Verification Annex dealing with scheduled chemicals. Consistent with the idea of providing for little beyond limiting the purposes for which transfers of unscheduled chemicals may take place,¹¹⁹ nothing appears to suggest that the CWC controls reexports of unscheduled chemicals once they are supplied to an importer in another state.

The significance of this differentiation between scheduled and unscheduled chemicals is overlaid with another complexity. As alluded to earlier, the CWC prohibits supplying Schedule 1 chemicals to states not party to the Convention;¹²⁰ Schedule 2 chemicals fall under an identical prohibition three years after entry into force.¹²¹ Chemicals listed in Schedule 3,¹²² and all unscheduled toxic chemicals and their precursors, may be transferred to importers in any other country.¹²³ With the exception of the situation involving Schedule 2 chemicals transferred during the three-year interim period following the entry into force of the CWC, the matter of extraterritorial assertions by a state supplying an initial import of a Schedule 1 or 2 chemical that the importer now wishes to reexport will likely arise only when the supplying and the importing/reexporting states are parties to the Convention. Again, the Convention prohibits transfers to nonparties. On the other hand, as for Schedule 3 and unscheduled chemicals, as well as for Schedule 2 chemicals during the interim period, claims to extraterritorial regulation may arise with regard to initial transfers made to states parties or nonparties. Nothing in the Convention confines transfers of such to parties alone.

Accordingly, in instances of extraterritoriality on the basis of a Schedule 1 or a Schedule 2 (post-interim period) chemical's country of supply, both of the countries involved will be states parties. Transfers by a supplying state cannot be made to a nonparty. In the event the initial importing state party is delinquent

117. CWC, *supra* note 1, Verification Annex, pt. VI(B), para. 4.

118. *Id.*, Verification Annex, pt. VII(C), para. 32(b), & pt. VIII(C), para. 26(b).

119. *See supra* notes 86-90 and accompanying text.

120. *See supra* note 63.

121. *See supra* note 71.

122. *See supra* note 79.

123. *See supra* note 89.

in fulfilling its obligation regarding restrictions on reexports, tensions may surface as the supplying state manifests its concern. There seems no reason, however, to read the relevant provisions of the Convention as mandating any assertion of extraterritorial reach by the supplying state. The Convention merely speaks of retransfers being prohibited.¹²⁴ It does not suggest that delinquency by the importing state in meeting its responsibility requires, or empowers, the supplying state to act. From the previous discussion of article VII's extension of the CWC's prohibitions to natural and legal persons, as well as to areas under jurisdiction or control, such power may be found to exist.¹²⁵ To be sure, it would exist not by virtue of the chemicals having been supplied by the state asserting extraterritorial legislative reach,¹²⁶ but by virtue of jurisdiction over a natural person based on nationality, or over a legal or natural person based on some notion of conduct occurring in a place under the jurisdiction or control of the asserting state. In either of these instances, the extraterritoriality called for by the CWC would be tremendously confined and available in only the most unusual of business circumstances.¹²⁷

When it comes to Schedule 3 and unscheduled chemicals, as well as Schedule 2 chemicals during the interim period prior to the time the obligation not

124. See CWC, *supra* note 1, Verification Annex, pt. VI(B), para. 4, & pt. VII(C), paras. 31-32. In the case of pt. VII(C), paras. 31-32, there is no explicit language like in pt. VI(B), para. 4, which plainly states no retransfers. Nonetheless, one may reasonably infer that if Schedule 1 chemicals may not be transferred to nonparties (and once transferred to a party cannot be retransferred), and that if Schedule 2 chemicals may not be transferred to nonparties after the three-year interim period, then the parties initially importing such chemicals may not retransfer them. In the United States' proposed implementing legislation, sent forward during, but not acted upon by, the 103d Congress, the United States did not assert authority to deal with the matter of reexports of chemicals initially imported by another state from stocks located in the United States. See, e.g., S. 2221, 103d Cong., 2d Sess. § 203 (1994).

125. See *supra* part IV and accompanying notes.

126. The language of the Convention setting out the obligations about retransfers of Schedule 1 and 2 chemicals does not seem to establish powers in the initial supplying state. The language merely focuses on erecting prohibitions on retransfers, or on requiring certifications that such transfers will not occur.

127. In the context of a private, individual entrepreneur operating in, say, Great Britain and Belgium, the nationality basis would clearly allow the person's state of nationality, Great Britain, to assert jurisdiction to prohibit that person from exporting Schedule 1 or 2 (post-interim period) chemicals to Belgium, and from then later attempting to reexport them from Belgium to another destination. The Convention obligates Belgium to regulate exports of such chemicals, but also requires Great Britain to regulate the conduct of its own nationals, wherever located. In the context of an overseas Belgian affiliate of a British entity, the import by the affiliate of the same chemicals places Belgium in the position of having to assure no reexport. In the inconceivable event of Belgium failing to live up to its obligation regarding reexports, Great Britain would be hard pressed to cite language in art. VII of the CWC requiring it to prohibit the affiliate from engaging in reexporting. The only possible terminology available would be that concerning places under jurisdiction or control. See CWC, *supra* note 1, art. VII, para. 1(a)-(b). The number of occasions when such language will in fact support the contention that the Convention requires extraterritorial legislative reach over an affiliate are indeed extremely few. See *supra* notes 106-12 and accompanying text.

to ship such to nonparties becomes effective, the matter of extraterritorial reach may arise in connection with reexports that a business in a state party, or in a state not a party, to the CWC may be interested in making. After all, the Convention does not limit initial supplying states to transfers to importing entities in states parties. Thus, initial importing entities may be located in states that are parties to the CWC, or in countries that have not agreed to be bound by the Convention's terms.¹²⁸

The place to begin in understanding the Convention's approach to extraterritorial reach on reexports of Schedule 3 and unscheduled chemicals, as well as Schedule 2 (interim period) chemicals, is with the straightforward matter of unscheduled chemicals. Transfers of unscheduled chemicals carry no burden regarding reexport.¹²⁹ If unscheduled chemicals are initially supplied to an importer in another state party, the CWC does not restrict that importer's right to retransfer those chemicals to an entity in a third state. The absence of retransfer language regarding unscheduled chemicals weakens claims that the Convention recognizes extraterritoriality by the supplying state.¹³⁰ Any support in the CWC therefore must reside in the general prescriptions of article VII.¹³¹ If a nationality connection with a initial importer who is a natural person can be shown, then a basis for supplying state regulation exists.¹³² If it can be shown that the place from which the initial importer conducts its operations is under the jurisdiction

128. Therefore, once initial importing entities within either a state party or a state not a party to the Convention receive the Schedule 3 or unscheduled chemicals, or interim period Schedule 2 chemicals, they may wish to reexport to entities located in other states, including those not signing the CWC. This section of the article proceeds by first focusing on unscheduled chemicals; then taking up Schedule 2 (interim period) and Schedule 3 chemicals initially imported by entities within states parties to the Convention; and finally addressing Schedule 2 (interim period) and Schedule 3 chemicals initially imported by entities in nonparties.

129. See *supra* text accompanying note 119.

130. The language relating to retransfers of Schedule 3 chemicals and to Schedule 2 (interim period) chemicals is associated with that concerning retransfers of Schedule 1 chemicals. That is, it speaks of no retransfers, or requires some sort of certification stating that there will be no retransfers. This language far from indicates that a supplying state may assert extraterritorial reach over reexports by initial importers. See *supra* text accompanying note 124 (discussing Schedule 1 and post-interim period Schedule 2 chemicals). Nevertheless, some may argue that such language implies Convention permissibility of extraterritoriality on the basis that the state asserting such reach supplied the concerned chemical. With unscheduled chemicals, however, the fact that the CWC contains absolutely no language relating to restrictions on retransfers suggests that any assertion by a supplying state to extraterritorial reach on the basis of having supplied the chemical is largely without merit.

131. See *supra* part IV.

132. As indicated *supra* note 127, a case of this sort could arise if an individual citizen of, say, the United States were to ship an unscheduled chemical to Japan, listing himself or herself. Though the Convention would not speak to the matter of that person reexporting the chemical to, for example, North Korea—a nonparty—it does contain language providing the United States can assert jurisdiction over its nationals, wherever located. Consequently, in the extremely remote case of Japanese delinquency in stopping transfers to North Korea for prohibited, nonpeaceful purposes, support exists in the CWC for assertion of jurisdiction by the United States.

or control of the supplying state, then extraterritorial regulation can be asserted.¹³³ Cases of this sort are unlikely to arise with any degree of regularity.¹³⁴

Schedule 3 chemicals, and Schedule 2 (interim period) chemicals, do carry a retransfer burden.¹³⁵ A certification that the chemicals will not be reexported must be obtained in connection with an initial import by an entity within a state not a party to the Convention.¹³⁶ In the event that the initial import is made by an entity within a state that is a party, no such certification need be secured.¹³⁷ From this differentiation, initial imports by entities within states parties to the CWC may result in two adherents to the Convention being placed in positions of disagreement. The supplying state may want the state party where the initial importing entity is located to be more diligent in administering the Convention's restriction on retransfers. And, in the event the state where the initial importing entity is located is slow to act, the supplying state may seek to identify the CWC's legal bases said to justify extraterritorial action of its own. Again, however, the retransfer restrictions of the Convention no more appear to set forth a basis for contending that the supplying country of a Schedule 3 chemical, or a Schedule 2 chemical shipped during the interim period, may assert an extraterritorial reach over reexports, than those restrictions set forth a basis for such an assertion with regard to a Schedule 1 chemical.¹³⁸ Nonetheless, in a few highly unusual situations, supplying state extraterritorial reach to regulate reexports may be found to exist on the basis of article VII.¹³⁹

133. For example, a case involving a retransfer from a place under supplying state jurisdiction would be one in which an unscheduled chemical is shipped out of Italy aboard an Italian registered flag ship destined for Egypt, both states being signatories to the CWC. While in the Mediterranean, the chemicals are transferred to the possession of a representative of a business entity located in Libya, a nonsignatory, known to want the chemicals for prohibited purposes. Given the registry of the Italian vessel, Italy would be in a position of asserting extraterritorial reach. It would not matter that the business entity making the transfer to the Libyan entity was a legal, rather than natural, person, as Italy's authority would be based on the concept of a place under its jurisdiction, not upon nationality, as importer on the other end.

134. See *supra* notes 124-27 and accompanying text (discussing extraterritorial reach in the context of Schedule 1 and 2 (post-interim period) chemicals).

135. See *supra* note 118 and accompanying text.

136. See A COMMENTARY, *supra* note 26, at 445 (indicating that, with nonparties, bilateral agreements may have to be negotiated).

137. See CWC, *supra* note 1, Verification Annex, pt. VII(C), paras. 31-32, & pt. VIII(C), para. 26.

138. See *supra* notes 124-25 and accompanying text (making this same point with regard to Schedules 1 and 2 (post-interim period) chemicals); see also *supra* note 130 (retransfer language of the Convention does not support claims to extraterritoriality by supplying state in context of scheduled or unscheduled chemicals).

139. See *supra* notes 124-27, 132-33 and accompanying text. The situations cited and discussed in notes 124-27 involve insufficient enforcement by a state party of the retransfer obligations relative to Schedules 1 and 2 (post-interim period) chemicals, with the supplying state wishing to assert extraterritorial reach over the entity involved in the retransfer. Those situations cited and discussed in notes 132-33 involve unscheduled chemicals, which have no comparable retransfer obligation, and delinquency by a state party in assuring that transfers from its territory are for nonprohibited

Entities within states not party to the CWC who import Schedule 3 or unscheduled chemicals, as well as Schedule 2 (interim period) chemicals, operate free of the Convention's restrictions on reexport.¹⁴⁰ The states in which such business entities are located have not committed themselves to the terms of the CWC. Even in the case of imports of Schedule 2 and 3 chemicals, all that such states have given is a certification that retransfers will not occur. When it comes to unscheduled chemicals, such states have not given even the barest form of commitment about retransfers. Since in these situations a supplying state is involved with a state not a party to the Convention, the terms of article VII would seem inapplicable in resolving matters of extraterritorial reach. That article fixes explicit obligations on states parties to adopt implementing internal legislation designed to assure observance of the prohibitions of the CWC. In a sense, though, it also establishes the parameters of what the Convention considers acceptable regulatory reach. As any consensual commitment, however, it only provides a basis for a party to argue that another party must respect the limits established. Claims by a nonparty that a supplying state that is party to the Convention has exceeded what the CWC considers acceptable would not fall on receptive ears. The principles of international law establish the limits of each state's legislative jurisdiction,¹⁴¹ but the limits articulated in article VII of the Convention would

purposes (e.g., for industrial, agricultural, research, medical, pharmaceutical, or other peaceful purposes), with the supplying state then asserting extraterritorial reach over the retransfer. In all these cases, the idea of basing such reach on having supplied the chemical that is, or is about to be, retransferred is rejected. From the perspective of the CWC, such reach shall be based on nationality over natural persons, or on a prohibited act occurring in a place under the asserting state's jurisdiction or control. In connection with Schedule 3 chemicals, or interim period Schedule 2 chemicals, another illustration might be added. Specifically, assume that a French company ships such chemicals to a wholly independent and unaffiliated importer in New York City. The appropriate certifications on retransfer are given, but the importer, a Pakistani employed by the French Government to work in its Office of U.N. Affairs in New York, subsequently prepares to reexport the chemicals to a purchaser in Canada. The Pakistani has operated the chemical sales business out of France's U.N. Office. In the remote case of the United States not fulfilling its obligation to prevent the reexport, the French would be hard pressed to find authority in the Convention to support an assertion of extraterritorial reach, outside the idea that the location of its Office of U.N. Affairs is a place under its control or jurisdiction.

140. As we have already seen, the CWC contains no language restricting retransfers of unscheduled chemicals. See *supra* text accompanying note 128. Therefore, one could never argue that imports into one country, whether or not a party to the Convention, could not be reexported to another. As for Schedule 3 chemicals and Schedule 2 (interim period) chemicals, a retransfer obligation exists, but, as noted below, that obligation has no effect on nonparties.

141. On the general matter of international law's limits on legislative jurisdiction, see A. V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981); Andreas F. Lowenfeld, *Sovereignty, Jurisdiction, and Reasonableness: A Reply to A. V. Lowe*, 75 AM. J. INT'L L. 629 (1981); Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-403 (1986) & comments and reporters' notes.

not be available for arguing that the regulatory action of a supplying state is restricted.¹⁴²

VI. Conclusion

Whether the Chemical Weapons Convention will receive ratification from the necessary sixty-five states needed to bring it into force remains to be seen.¹⁴³ The growing number of states capable of developing toxic chemicals for weapons use, and the collapse of the former Soviet empire certainly suggest that the chances of this happening are much better today than they were a decade ago. Without intimating any opinion about the propriety of the terms of the Convention from the business standpoint, it establishes significant obligations concerning various matters, including both declarations regarding chemical production facilities and access rights to industries for purposes of conducting verification inspections. Those knowledgeable about the Convention have centered most of their attention on these obligations. The controls that the CWC envisions over exports of toxic chemicals and their precursors have not received comparable scrutiny. While this article attempts to provide brief insight into that matter, how those controls are finally configured in each state party will depend as much on what the relevant implementing domestic legislation and regulations say as on the controls envisioned by the Convention itself.

142. To claim the rights incident to art. VII's limitations on extraterritorial reach, one must have undertaken the obligations of the Convention invoked. As a state not party to the CWC has not taken on such obligations, it would be unable to invoke its rights.

143. At the time that this article was completed, Nancy Crowe, Office of Exporter Services, Bureau of Export Administration, U.S. Department of Commerce, Washington, D.C., had informed the author that 25-30 states had ratified the Convention. However, the necessary 65 ratifications probably would not be secured until both the United States and Russia had acted.