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The Chemical Weapons Convention Implementation Act: United States Control over Exports

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ing key policies. Once set, EU negotiating positions are not easily changed. And, for EU delegations, vast amounts of time are consumed in coordinating positions.

Politicization

As noted previously, several resolutions passed on votes that split the Commission on North-South lines, including those on toxic wastes, the right to development and foreign debt. To these must be added some highly political resolutions introduced by Cuba aimed at U.S.-Cuban bilateral issues. One attacking the U.S. embargo (captioned "human rights and unilateral coercive measures") passed by twenty-four to seventeen (United States), with twelve abstentions.⁹³ A selectively phrased Cuban resolution extolling "universal freedom of travel and the importance of family reunification" passed by twenty-seven to nine (United States) (seventeen abstaining).⁹⁴ Cuba also was active in promoting a text by the Non-Aligned Movement demanding greater priority for developing countries in staffing the Human Rights Centre. This resolution passed by a vote of thirty-six to fifteen (United States) (two abstaining).⁹⁵ Yet another Cuban text sought a review of the Commission's rapporteurs and other human rights machinery; last-minute negotiations turned this into a consensus text.⁹⁶

XII. CONCLUSION

The Commission's 1995 session was in general quite positive. The Commission took steps that should strengthen the international protection of human rights and improve its own future work. By considering three permanent members of the Security Council, it showed that no country is beyond its consideration. It also dropped obsolete agenda items and made modest institutional improvements.

At the same time, there was little innovation or fresh thinking at this session. And enormous effort had to be expended to deflect efforts by some to use the Commission to score short-term political points or to weaken its already-modest mechanisms for protecting human rights.

JOHN R. CROOK*

THE CHEMICAL WEAPONS CONVENTION IMPLEMENTATION ACT: UNITED STATES CONTROL OVER EXPORTS

I. INTRODUCTION

During 1994, the total sales value of chemicals exported from the United States exceeded \$51 billion, up 15 percent over the previous year and resulting in the chemical sector outpacing all other sectors that finished the year with favorable trade balances.¹ Chemicals leaving the United States were shipped under the control provisions of both

⁹³ CHR Res. 1995/45 (Mar. 3).

⁹⁴ CHR Res. 1995/62 (Mar. 7).

⁹⁵ CHR Res. 1995/61 (Mar. 7).

⁹⁶ CHR Res. 1995/93 (Mar. 10).

* Of the Board of Editors. The views and opinions expressed are solely the author's and do not necessarily represent those of the U.S. Department of State.

¹ See William Storck, *Record Chemical Exports Boost Trade Surplus*, CHEMICAL & ENGINEERING NEWS, Mar. 6, 1995, at 7 (\$51.6 billion); BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 829, table No. 1332 (1994) (for 1993, chemicals had a positive trade balance of \$15.5 billion, with "agricultural products" following at a \$13.8 billion positive figure).

the Department of Commerce's Export Administration Regulations (EAR),² and the Department of State's International Traffic in Arms Regulations (ITAR).³ Though this is something of an oversimplification, the EAR basically concerns itself with products that have civilian application, and the ITAR with products of use to the military. Currently, the Commodity Control List of the EAR,⁴ overseen by Commerce's Office of Export Licensing within the Bureau of Export Administration, identifies fifty-four chemicals and ten toxins as intermediate agents and precursors to chemical weapons subject to export regulation.⁵ The Munitions List of the ITAR,⁶ administered by the Office of Defense Trade Controls of the State Department's Bureau of Politico-Military Affairs, identifies twenty-two chemicals as subject to regulation⁷ and cautions that this listing is merely illustrative, as any "chemical agent," defined as "a substance having military application," is subject to export control.⁸

The proposals to Congress⁹ put forward by the Clinton administration to implement obligations the United States may take on if it ratifies the Chemical Weapons Convention (CWC) of 1993¹⁰ could change the nature of the current controls on exports of chemicals. The CWC's Annex on Chemicals references by specific chemical abstracts service (CAS) registry number over fifty toxic substances that are subject to the Convention's controls, including those on exports.¹¹ Of the referenced substances carrying CAS registry numbers, twenty-eight are not specifically mentioned in either Commerce's Commodity Control List or State's Munitions List.¹² Conversely, Commerce's list identifies thirty-four chemicals and eight toxins,¹³ and State's list identifies eighteen chemicals¹⁴ that are not identified by name¹⁵ in the CWC Annex on Chemicals. Thus, current U.S. export controls regulate many chemical substances not required to be

² See 15 C.F.R. §§770-799 (1995).

³ See 22 C.F.R. §§120.1-128 (1994).

⁴ See 15 C.F.R. §799.1, Supp. No. 1.

⁵ *Id.*, items 1C60C, 1C61B.

⁶ See 22 C.F.R. §121.

⁷ See *id.* §121.7.

⁸ *Id.*

⁹ Chemical Weapons Convention Implementation Act of 1995, transmitted to Congress May 25, 1995, U.S. Arms Control & Disarmament Agency Doc. D/EX9502101-1. As of December 1995, neither House nor Senate bill numbers had been assigned.

¹⁰ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 21, 103d Cong., 1st Sess. (1993), reprinted in 32 ILM 800 (1993). See generally 88 AJIL 323 (1994). The Senate is not expected to take up the Convention until February or March 1996. For hearings on the earlier proposed Implementation Act of 1994, H.R. 4849 and S. 2221, 103d Cong., 2d Sess. (1994), see *Chemical Weapons Convention (Treaty Doc. 103-21): Hearings Before the Senate Comm. on Foreign Relations*, 103d Cong., 2d Sess. (1994); *Implementation of the Chemical Weapons Convention: Hearings Before the House Comm. on Foreign Affairs*, 103d Cong., 2d Sess. (1994); *Military Implications of the Chemical Weapons Convention (CWC): Hearings Before the Senate Comm. on Armed Services*, 103d Cong., 2d Sess. (1994).

¹¹ See CWC, *supra* note 10, Annex on Chemicals, 32 ILM at 821-24.

¹² Examples include O-ethyl N,N-dimethyl phosphoramidocyanidate (tabun), 77-81-6; and O-ethyl S-2-diisopropylaminoethyl methyl phosphonothiolate (VX), 50782-69-9. Five substances identified in the Convention, but without CAS registry numbers, are also subject to control. Of these, only N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides appears on the CWC and not the Commerce and State lists. As an illustration of the other four, dialkyl (Me, Et, n-Pr or i-Pr) aminoethyl-2-chlorides and corresponding salts, which appear on the CWC, appear on the Commerce list as diethyl-N,N-dimethylphosphoroamidate, 2404-03-7. Some substances identified by CAS registry number in the CWC are *exempt* from the terms of the Convention. An example is O-ethyl S-phenyl ethylphosphonothiolothionate (fonofos), carrying number 944-22-9.

¹³ For chemicals, see item 1C60C, *supra* note 5. An illustration is the chemical carrying CAS number 1341-49-7. For toxins, see item 1C61B, *supra* note 5. Botulinum toxins are an example.

¹⁴ See 22 C.F.R. §121.7.

¹⁵ This is a deliberate use of the notion of "identification by name." That a chemical substance on the Commodity Control List or the Munitions List is not identified by name in the CWC schedules is not an indication that it is not covered by those schedules. See note 16 *infra*.

regulated by the Convention.¹⁶ N,N-diethylethanolamine, for example, is regulated under the Commodity Control List but not under the CWC.¹⁷ At the same time, however, the CWC calls for export controls on other chemical substances not currently required by name or CAS registry number to be under regulation by the United States. O-isopropyl methylphosphonochloridate (chlorosarin) and carbonyl dichloride (phosgene) fall under the export controls of the Convention¹⁸ but are not explicitly named¹⁹ as regulated chemicals under either the Commodity Control List²⁰ or the Munitions List.²¹

In regard to the CWC's expansion beyond chemicals now covered by U.S. export controls, it must be observed that, even if account is taken of the broad authority of the Department of State to subject to control any "chemical agent" it deems "a substance having military application,"²² nowhere in the ITAR, or in Commerce's EAR, are there specific limitations on the export of chemicals of the sort found in Schedules 1 and 2 of the CWC's Annex on Chemicals. The CWC provides that Schedule 1 chemicals, those with a high potential for military application and little or no peaceful use,²³ may be

¹⁶ The CWC's Annex on Chemicals, *supra* note 11, under B, "Schedule of Chemicals," second introductory paragraph, 32 ILM at 822, indicates that the listed chemicals are considered to include others made of a different combination of chemicals. As a consequence, fewer than 34 chemicals listed in the Commodity Control List are not covered by the CWC. For instance, the former lists ethylphosphonyl difluoride, 753-98-0, which does not appear by name in the CWC. Nonetheless, given the language of the second introductory paragraph, *supra*, the substance may be covered under Schedule 1, B(9), alkyl (Me, Et, n-Pr or i-Pr) phosphonyl-difluorides. Twelve other chemicals seem to qualify for the same analysis. Thus, only 21 substances on the Commerce list are not in the CWC schedules.

¹⁷ See item 1C60C, *supra* note 5, No. 9; CWC Annex on Chemicals, *supra* note 11, Schedule 2, B(11), 32 ILM at 823.

¹⁸ See CWC Annex on Chemicals, *supra* note 11, Schedules 1, B(11) and 3, A(1), 32 ILM at 823, 824.

¹⁹ This is a deliberate use of the notion of "explicitly named." However, the fact that a chemical substance appears on the CWC schedules but is not named in the Commerce and State lists does not mean that it has escaped U.S. export control. Nonetheless, what can be said about chlorosarin and phosgene would seem to be of general applicability. Although the Office of Defense Trade Controls has broad control authority, it is more likely to invoke it to restrict exports of chlorosarin than of phosgene. The former is a Schedule 1 (most highly restricted) precursor, the latter only a Schedule 3 precursor.

²⁰ Twenty chemicals mentioned in the CWC schedules are also listed in the Commodity Control List. An illustration is thiodiglycol, 111-48-8. In addition, 13 other chemicals fall within the schedules, not by explicit reference, but by virtue of the two sets of broad language appearing in the CWC Annex on Chemicals, *supra* note 11, under B, second introductory paragraph, and Schedule 2, B(4), 32 ILM at 822, 823, in combination with the scheduled items carrying no CAS registry number and listed in Schedule 2, B(5-6) and (10-12), 32 ILM at 823. Examples of these 13 include diethyl ethylphosphonate, 78-38-6; and diethyl methylphosphonite, 15715-41-0.

Toxins listed in the schedules and the Commodity Control List, with CAS registry numbers, are as follows: saxitoxin, 35523-89-8; and ricin, 9009-86-3. Twenty-nine other chemicals listed in the CWC schedules are not on the Commerce list. See *supra* note 12. Twenty-seven of the chemicals carry a CAS registry number. Five other chemicals without CAS numbers appear in the CWC schedules, but only N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides, Schedule 2, B(5), is mentioned in the CWC and not under current U.S. export law. Since the focus is on CWC chemicals not mentioned in the Commodity Control List, one must add to this list of 28 the chemical trichloronitromethane (chloropicrin), 76-06-2, Schedule 3, A(4), which appears on the Munitions List and not on the Commodity Control List.

²¹ Only three chemicals listed in the CWC schedules are identified on the Munitions List. However, the Department of State, under the ITAR, has extensive authority to regulate the export of chemicals other than those listed. The regulations provide, in 22 C.F.R. §121.7, that a controlled "'chemical agent' includes, but is not limited to," the chemicals appearing on the Munitions List. As indicated *supra* note 19, however, such authority is more likely to be exercised in regard to chemicals on Schedule 1 than those on Schedule 3. Of the 28 chemicals listed on the CWC schedules and not currently subject to U.S. export control, all but the five Schedule 3 chemicals (phosgene, cyanogen chloride, hydrogen cyanide, ethyldiethanolamine, and methyldiethanolamine) could therefore be subjected to export regulation. But see text *infra* at notes 22-30. If the State Department does not regulate the export of Schedule 2 chemicals, the five listed in Schedule 3 could be supplemented by four additional chemical substances (amiton, PFIB, BZ, and N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides).

²² See text at and note 8 *supra*.

²³ See CWC Annex on Chemicals, *supra* note 11, under A, Guidelines for Schedule 1, para. 1, 32 ILM at 822.

transferred to states parties only, and then for none other than pharmaceutical, medical, research or protective purposes.²⁴ Schedule 2 chemicals, as of three years after the Convention enters into force, may be transferred for any peaceful purpose, but only to other states parties.²⁵ While the Office of Export Licensing and the Office of Defense Trade Controls probably refuse to license exports of Schedule 1 chemicals destined for countries like those that have not signed the CWC, authorization to ship to signatory countries is not conditioned in the regulatory provisions on use for pharmaceutical, medical, research or protective purposes.²⁶ Indeed, shipments may be made to Canada without a licensed authorization, let alone agreement to some condition on end use.²⁷ Similarly, while the CWC's prohibition on shipments of Schedule 2 chemicals to nonparties three years after entry into force is clear,²⁸ a request to Commerce or State to export Schedule 2 chemicals appearing on their respective lists to countries not party to the CWC is not automatically to be rejected under the terms of either the EAR²⁹ or the ITAR.³⁰

This essay examines the export control provisions of the proposed domestic legislation to implement the CWC. Undoubtedly, the prohibition on the development, production and use of chemical weaponry;³¹ the declarations regarding production, processing and consumption of chemical substances;³² the matter of on-site inspections of chemical industry facilities;³³ and the destruction of chemical weapons stockpiles³⁴ may all prove more riveting to some. Nonetheless, in view of the position the U.S. chemical industry occupies in international trade and the industry's contribution to the economic vitality of the nation, it would be a substantial oversight to ignore the way the proposed Chemical

²⁴ See CWC, *supra* note 10, Annex on Implementation, pt. VI, A, paras. 1 and 2(a), 32 ILM at 824, 853–54.

²⁵ See *id.*, pt. VII, C, paras. 31 and 32, 32 ILM at 859–60.

²⁶ The EAR requires, 15 C.F.R. §778.8(a)(1) & (3), with a few country exceptions, a validated license to export any of the chemicals listed under item 1C60C or 1C61B of the Commodity Control List. The specific nature of the end use of the chemical or toxin affects decisions to grant or deny requests for validated licenses. *Id.* §778.8(d)(2)(i); see also *id.* §§778.8(c) and 773.9. The EAR, however, says nothing about restrictions on end uses of chemicals listed in Schedule 1. See *id.* §§778.8, 772.6(a)(2), and 773.9. As for export under a general license, i.e., export to a country other than one for which a validated license is required, see *id.* §770.3 (requiring, in most cases, a general license), the EAR takes the same approach as with validated licenses. However, in most cases, a Shipper's Export Declaration identifying end use must be submitted to Customs Service officials. See ANDREAS F. LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS* 21 (1983).

The ITAR provides, 22 C.F.R. §123.1 (1994), that exports from the United States of defense articles, like chemicals, are to be made with prior licensed approval of the Office of Defense Trade Controls. The Customs Service is permitted, however, to allow exports of unclassified articles without a license whenever they are for end use in Canada. See *id.* §126.5. In every case, a Shipper's Export Declaration identifying end use must be filed with Customs, see *id.* §123.16(a), but there are no restrictions on end use in the ITAR. See *id.* §126.7.

²⁷ See note 26 *supra*.

²⁸ See CWC Annex on Implementation, *supra* note 24, pt. VII, C, para. 31, 32 ILM at 859.

²⁹ The EAR clearly allows chemicals of this sort to be exported to most nations only under a validated license. See item 1C60C, *supra* note 5. Exports to a few identified countries may be made under a general license, see *supra* note 26. Yet even if export is destined for a country for which a validated license is required, the most the regulation dictates is denial of a request if, "on a case-by-case basis," it is determined the commodities involved would make a "material contribution" to development or production of chemical weapons. See 15 C.F.R. §778.8(d)(1). The nonproliferation credentials of the country of destination are considered, *id.*, subpara. (2)(iii), but nothing indicates that mere nonparty status under the CWC precludes granting a validated license.

³⁰ See 22 C.F.R. §126.7. As with the Commodity Control List, while a license request may be denied if the country of destination is not a party to the CWC, that result is not automatically required.

³¹ See CWC, *supra* note 10, Art. I(1)(a), 32 ILM at 804; Implementation Act, *supra* note 9, secs. 201 (§§227(a), 227B(a)(3)), and 203(a).

³² See CWC, *supra* note 10, Art. III, 32 ILM at 806–07, and Annex on Implementation, *supra* note 24, e.g., pt. IV(A), A, 32 ILM at 836; Implementation Act, *supra* note 9, secs. 301–302.

³³ See CWC Annex on Implementation, *supra* note 24, e.g., pt. II, 32 ILM at 829–34; Implementation Act, *supra* note 9, secs. 401–407.

³⁴ See CWC, *supra* note 10, Art. I(2–5), 32 ILM at 804; and Annex on Implementation, *supra* note 24, e.g., pt. IV(A), C, 32 ILM at 837–40.

Weapons Convention Implementation Act envisions regulating the export of certain chemical substances.

II. BASIC STRUCTURE OF THE PROPOSED IMPLEMENTATION ACT

There are three basic parts to the CWC Implementation Act. The first part applies the CWC's prohibitions to natural and legal persons by setting forth the prohibited activities, stating the jurisdictional reach of those prohibitions, and providing for penalties in the event of violations.³⁵ The second establishes the reporting or declaration duties of persons to whom the Act's jurisdiction is extended. It is designed to assure that the United States develops the information needed to allow it to comply with the reporting obligations imposed on states parties by the Convention itself, and to create disincentives to inappropriate disclosures by public officials of any sensitive information obtained as a result of information gathering.³⁶ The final part of the Implementation Act deals with on-site inspections. The provisions on this controversial issue lay down the rules under which routine and challenge inspections envisioned by the CWC are to be conducted, and authorize the acquisition of warrants for securing access to facilities to be inspected.³⁷

The way the Implementation Act addresses the export controls contemplated by the CWC for toxic chemicals and their precursors is clearly of interest to the chemical industry since some chemicals not currently under EAR or ITAR control may be subjected to regulation by the Act. The basic prohibitions on export contained in the Act appear in two provisions. The first, section 201, provides that it is unlawful "knowingly" to transfer, either directly or indirectly, any chemical weapon,³⁸ which includes scheduled or unscheduled chemicals.³⁹ The penalty for violating section 201 consists of criminal fines and/or imprisonment for life or any number of years.⁴⁰ The second provision, section 203, provides that it is unlawful to transfer Schedule 1 chemicals, unless in limited quantities and for specific limited purposes,⁴¹ and that it is unlawful to transfer them to entities outside the United States, unless the recipient entities are located in states parties to the Convention.⁴² Transfers of Schedule 2 chemicals, beginning three years after the CWC enters into force, may not be made to entities located in nonparties.⁴³ Violations of the prohibitions under section 203 are punishable by civil penalties of up to \$50,000 for each infraction, and in the case of one "knowingly" violating the prohibitions, criminal fines and/or imprisonment for not more than two years, in addition to or in lieu of civil penalties.⁴⁴

While sections 201 and 203 may appear at best duplicative, there is reason to view the two provisions as complementary.⁴⁵ However, the interest of this commentary in

³⁵ See Implementation Act, *supra* note 9, secs. 201–203.

³⁶ See *id.* secs. 301–303 for the reporting regime.

³⁷ See *id.* secs. 401–407.

³⁸ See Implementation Act, *supra* note 9, sec. 201 (amending ch. 11 of 18 U.S.C. to add, *inter alia*, §227(a) to ch. 11A).

³⁹ *Id.* (§227D(2) defines "chemical weapons" as including toxic chemicals and precursors when for purposes other than industrial, agricultural, research, medical, pharmaceutical, protective or other peaceful use, or when inconsistent with such uses in type or quantity).

⁴⁰ See *supra* note 38.

⁴¹ See Implementation Act, *supra* note 9, sec. 203(a).

⁴² *Id.* sec. 203(b)(1).

⁴³ *Id.* sec. 203(b)(2).

⁴⁴ *Id.* sec. 404.

⁴⁵ Since the section 201 prohibitions are on "chemical weapons," and extend to development, stockpiling, ownership and possession, while the section 203 prohibitions are on "chemicals," and do not reach beyond production, acquisition, retention, transfer and use, this conclusion has merit. Additionally "whoever" engages in proscribed conduct is subject to the section 201 prohibitions, while those in 203 are defined in a way that could leave aside members of the U.S. armed forces. See text preceding note 48 *infra*. "[W]hoever" seems

the prohibitions embodied in these provisions lies exclusively in the distinctions accorded the various export transactions available to the chemical industry, that is, the differences in treatment given chemical exports depending upon the point of exportation and the connection with the United States of either the exporting entity or the chemical exported.⁴⁶ Specifically, does it matter if chemical exports from the United States are undertaken by foreign persons operating here as opposed to domestic persons in the same position? Are chemical exports from abroad, when conducted by overseas affiliates of U.S. controlling enterprises as opposed to foreign enterprises with affiliates operating in the United States, accorded distinct treatment? Would an export from abroad, either by a foreign enterprise or by an overseas affiliate of a U.S. enterprise, be treated differently if it were to involve a chemical of U.S. origin rather than one of foreign origin?

III. EXPORTS FROM THE UNITED STATES

Estimates suggest that somewhere between twelve thousand and twenty thousand entities located in the United States are involved in the production of toxic chemicals and their precursors.⁴⁷ Obviously, entities located in the United States that engage in the exportation of such chemicals may be foreign nationals; or agents, branches or subsidiaries affiliated with foreign business enterprises; or simply U.S. nationals, or domestic business establishments that make sales to foreign purchasers. In any case, the territorial tilt of the Implementation Act renders such distinctions irrelevant. If an exporter in the United States ships regulated chemicals to an overseas purchaser, the requirements of the CWC incorporated in the Act govern the transaction.

In prohibiting transfers of Schedule 1 chemicals to "any person located outside the territory of the United States," unless the recipient is in a state party, section 203(b)(1) of the Act explicitly requires that the prohibition be observed by any "person." That term is defined in section 5(b)(4) as including any individual, business, association, or foreign state or municipal government or instrumentality of such, "located in the United States." Thus, whether operating as an independent entrepreneur, a wholly domestic business enterprise, or a U.S.-based affiliate of a foreign business venture, one found here must conform to the limitations of section 203(b)(1) when exporting Schedule 1 chemicals from the United States.

intended to bring armed forces personnel within the ambit of 201's prohibitions. *See also* Section-by-Section Analysis of the Proposed Chemical Weapons Convention Implementation Act of 1994, 140 CONG. REC. S7253, S7255 (daily ed. June 21, 1994).

⁴⁶ The operative term in sections 201 and 203 of the Act is "transfer." It connotes not only exports, but also domestic shipments. *Cf.* WALTER KRUTZSCH & RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION 13 (1994) (Art. I(1) of CWC). Section 203(b), in referring to Schedule 1 and 2 chemicals, mentions limitations on transfers to persons outside the United States. Nonetheless, paragraph (a) of that same section indicates a more general prohibition on transfers of Schedule 1 chemicals, unless for peaceful purposes and under other limitations. As paragraph (a) is styled "Schedule 1 Activities," and the follow-on paragraph "Extraterritorial Acts," arguably even domestic shipments of Schedule 1 chemicals are subject to the Act's controls. Similarly, the section 201 addition of 18 U.S.C. §227(a) prohibits anyone from "knowingly" making a transfer of chemical weapons, including toxic chemicals, and does so without reference to transfer outside the United States. Thus, if knowledge could be shown, the United States would seem entitled to control domestic transfers of any toxic chemical, including Schedule 2 chemicals, notwithstanding section 203(b)(2). It will be interesting to see how regulatory provisions to implement the Act approach "transfer," in regard to domestic transfers and other matters like intracompany transfers. *See also infra* part V.

⁴⁷ *See* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, THE CHEMICAL WEAPONS CONVENTION: EFFECTS ON THE U.S. CHEMICAL INDUSTRY 8 (OTA-BP-ISC-106, 1993) (20,000); *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) (12,000).

The prohibition on transfers of Schedule 2 chemicals to nonparties, beginning three years after the CWC enters into force, is also made applicable to any "person" by virtue of section 203(b)(2). Again, the implication is clear that U.S. affiliates of foreign enterprises are as subject to the prohibition as indigenous U.S. entities, when engaged in exporting from the United States.⁴⁸ Schedule 3 chemicals,⁴⁹ and so-called unscheduled chemicals,⁵⁰ are not dealt with as explicitly by the Act. According to the terms of the CWC, Schedule 3 and unscheduled chemicals may be transferred to anyone, but only when for research, industrial, agricultural, medical, pharmaceutical or other peaceful purposes.⁵¹ Section 201 of the Act, and in particular that section's addition of section 227 of chapter 11A to title 18 of the United States Code, contains the relevant parallel language. The prohibition on transfers in section 227(a) applies without regard to whether the exported chemical is scheduled or unscheduled. The prohibition affects only transfers of any "chemical weapon," defined in section 227D(2) to exclude toxic chemicals and their precursors when transferred for peaceful purposes. Thus, Schedule 3 and unscheduled toxic chemicals would seem available for free and open exportation from the United States, but only when exported for peaceful purposes.⁵²

Continuing with the language of section 227(a) of chapter 11A of title 18, there is no reason to believe it establishes any different regime over domestic than over foreign entities operating in the United States, when it comes to the export of Schedule 3 or unscheduled chemicals shipped to recipients in other countries for purposes that happen not to be peaceful. As the prohibition on shipments for such purposes is made explicitly applicable to "whoever" knowingly undertakes them, the fact that it governs in the same way the conduct of U.S. nationals or enterprises, and foreign nationals or enterprises located in the United States, is amply demonstrated. While "whoever" is undefined by the Act, its breadth leaves no doubt that it is intended to encompass at least the same entities as fall within the ambit of "person" subject to regulation in connection with the export of Schedule 1 and 2 chemicals.⁵³

Support for reading the reference to the term "whoever" in the added section 227(a), as well as the reference in section 203 to the term "person," so as to cover domestic or foreign entities making exports from the United States can also be found in the apposite

⁴⁸ As with section 203(b)(1), "person" is defined with reference to being "located in" the United States. It will be interesting to see whether the implementing regulations define "located in" and, if so, whether the definition will include those who merely employ a U.S. agent to take possession and arrange the export from the United States of regulated chemicals. See Section-by-Section Analysis, *supra* note 45, at 7254 (defining person broadly to "ensure that all possible entities within the United States" are covered).

⁴⁹ See "Schedules of Chemicals," *supra* note 16, 32 ILM at 824.

⁵⁰ The CWC, *supra* note 10, Art. I(1)(a), 32 ILM at 804, establishes obligations with regard to "chemical weapons." Weapons are defined in Article II(1)(a), 32 ILM at 804-05, as including "toxic chemicals and their precursors," not just those listed in the schedules. See also Annex on Implementation, *supra* note 24, pt. IX, 32 ILM at 862 (obligations with regard to "discrete organic compounds" containing phosphorus, sulfur, or fluorine).

⁵¹ See CWC Annex on Implementation, *supra* note 24, pt. VIII, C, paras. 26-27, 32 ILM at 862, on Schedule 3 chemicals. Transfer rights regarding unscheduled chemicals are much less direct. CWC Article I(1)(a), 32 ILM at 804, prohibits transfers to anyone of "chemical weapons," defined in Article II(1)(a), *id.*, as toxic chemicals and precursors, except for peaceful purposes. Article VI(1), *id.* at 809-10, states the right to transfer toxic chemicals for peaceful purposes, "subject to the provisions of this Convention." Nowhere in the CWC is the transfer of unscheduled chemicals regulated.

⁵² See also CWC Annex on Implementation, *supra* note 24, pt. VIII, C, para. 26, 32 ILM at 862, requiring exporter to obtain from recipient state certification that the chemical transferred will be used only for peaceful purposes and will not be retransferred, and identification of the end use and end user. No such obligations are found in the Implementation Act.

⁵³ On prohibiting exports by foreign entities located in the United States, as well as by domestic entities, see *Implementation of the Chemical Weapons Convention: Hearing Before the House Comm. on Foreign Affairs*, 103d Cong., 2d Sess. 38 (1994) (Statement of Donald A. Mahley, Acting Assistant Director, Bureau of Multilateral Affairs, U.S. Arms Control and Disarmament Agency) [hereinafter Mahley].

jurisdictional provisions of the Act. Paragraph (c)(1) of both the added section 227 and section 203 declares the United States to have jurisdiction if a prohibited activity "takes place in the United States," which is defined by the Act as including all places under U.S. "jurisdiction or control."⁵⁴ This jurisdictional assertion tracks subparagraphs (a) and (b) of Article VII(1) of the CWC, which requires that each state party prohibit activities violative of the Convention "on its territory" or in places either "under its jurisdiction as recognized by international law" or "under its control."⁵⁵ As the requirement in subparagraph (a) regarding activities on a state's territory or places under its jurisdiction deals with conduct engaged in by "natural and legal persons," it contemplates that a state party will exercise its authority to prohibit transgressions by its own nationals or business ventures, or by foreign nationals or business ventures, anywhere within the concerned area. The requirement in subparagraph (b) regarding the exercise of authority over places under one's control, which by definition includes areas over which one is the territorial sovereign or has jurisdiction, does not contain a similar reference. Nonetheless, as it contemplates the exercise of authority over such places, it must envision the authority's extending to everyone, regardless of status as natural or legal person, and regardless of one's national origin or sovereign loyalty.⁵⁶ Given this understanding, the fact that the jurisdictional provisions of the Implementation Act track Article VII(1) implies that the United States intends to assert jurisdiction over anyone, indigenous or foreign, who is within its territory and is involved in export activities regulated by the Act.

IV. EXPORTS FROM OVERSEAS BY U.S. CITIZENS OR FOREIGN-BASED AFFILIATES OF U.S. ENTERPRISES

The jurisdictional provisions of paragraph (c)(1) of both the added section 227 and section 203 of the Act are important for an entirely distinct reason as well. They do not just support the view that anyone who is located in the United States is required to comply with the export controls established by the Act; they also indicate that, in certain situations, the United States will apply the terms of the Act to areas outside its sovereign land territory. This is the thrust of the language quoted above, which speaks of the extension of authority to places over which the United States has "jurisdiction or control,"⁵⁷ an extension envisioned by the CWC.⁵⁸ Though the Implementation Act does not declare which places, apart from U.S. aircraft and oceangoing vessels,⁵⁹ are to be included, the references seem sufficiently broad to pull in, for instance, locations on the U.S. continental shelf or platforms attached thereto, overseas military bases, and perhaps even areas occupied by U.S. military forces yet within the sovereign territory of another nation.⁶⁰ International law recognizes the right of a coastal state to assert jurisdic-

⁵⁴ Implementation Act, *supra* note 9, §§5(b)(3) and 227D(8) (as added by sec. 201 of the Implementation Act).

⁵⁵ 32 ILM at 810.

⁵⁶ This conclusion is strengthened by the fact that subparagraph (a) of Article VII(1), *see* CWC, *supra* note 10, 32 ILM at 810, as well as subparagraph (c), uses language indicating to whom jurisdictional reach applies. No such indication is present in subparagraph (b), suggesting it has a scope encompassing the entities herein referenced.

⁵⁷ *See supra* text at and note 54.

⁵⁸ *See supra* text at and note 55. *See also* THOMAS BERNAUER, THE PROJECTED CHEMICAL WEAPONS CONVENTION: A GUIDE TO THE NEGOTIATIONS IN THE CONFERENCE ON DISARMAMENT 67-69 (1990).

⁵⁹ *See* Implementation Act, *supra* note 9, §227D(8)(A)-(C) (as added by sec. 201 of the Act) and §5(b)(3)(A)-(C).

⁶⁰ *See* Section-by-Section Analysis, *supra* note 45, at S7254. *See also* KRUTZSCH & TRAPP, *supra* note 46, at 115-16; and Article-by-Article Analysis, *in* S. TREATY DOC. NO. 21, 103d Cong., 2d Sess. 40 (1993) (transmittal of CWC to Senate).

tion over some activities on its continental shelf.⁶¹ Status-of-forces agreements connected with the stationing of U.S. military personnel abroad often incorporate the notion of extraterritorial U.S. regulatory jurisdiction.⁶² And the concept of control is surely capable of accommodating combat situations in which U.S. armed forces exercise domination over land territory technically under the sovereignty of the local government.

The notion of jurisdiction and control equates certain places beyond the borders of the United States with U.S. land territory proper. As a consequence, entities, domestic or foreign, located within such places will be subject to the same controls on exports as entities within the borders of the United States itself. But much remains beyond the land territory of the United States, or places over which the United States has jurisdiction or control. Thus, it may be asked whether the Implementation Act envisions regulation of exports by U.S. entities from locations in foreign countries where the United States maintains neither military bases nor occupying forces; that is, where the United States possesses no indicia of governmental power.

Considering the language of paragraph (c)(2) of both the added section 227 and section 203, there seems no room for doubt. Prohibited activities occurring "outside of the United States" are explicitly said to fall within U.S. jurisdiction.⁶³ The reference in paragraph (c)(2), however, is linked to prohibited activities being "committed by a national of the United States." This excludes the possibility that regulatory authority will be asserted over foreign nationals located in foreign countries.⁶⁴ In this respect the Implementation Act gives effect to the jurisdictional limitations of Article VII(1)(c) of the Convention.⁶⁵ With regard to exports by U.S. entities from overseas locations, the reference to activities of a U.S. "national" occurring outside the United States raises an important question. Specifically, does it matter if exports are made by legal persons or business entities, rather than by natural persons or individuals? If extraterritorial jurisdiction is asserted with regard to U.S. but not foreign nationals, in the context of legal persons or businesses, how are overseas affiliates of U.S. enterprises seen?⁶⁶

The concept of "national" is defined by the Act as meaning what it means in immigration and naturalization law: a natural person.⁶⁷ Consequently, exports from places outside the United States are subject to regulation when undertaken by natural U.S. persons located overseas, but not when undertaken by U.S. businesses located overseas. As if to make this point unequivocally, paragraphs (a) and (b) of section 203, in addressing activities prohibited in connection with Schedule 1 and 2 chemicals, speak of the unlawfulness of transfers made by "any person" or by "any national of the United States located outside the United States." Since the definition of "person," as mentioned above, includes natural persons and also a variety of entities understood as legal persons, the definition of "national" as including only the former makes it plain that the Act

⁶¹ See [1956] 2 Y.B. Int'l L. Comm'n 297, UN Doc. A/CN.4/SER.A/1956/Add.1 (indicating in Commentary, para. 2, to Article 68 of the 1956 draft provisions on the law of the sea that the authority of the coastal state in regard to its continental shelf includes "jurisdiction in connexion with the prevention and punishment of violations of the law").

⁶² See generally SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW (1971).

⁶³ See Implementation Act, *supra* note 9, §227(c)(2) (as added by sec. 201) and sec. 203(c)(2); see also sec. 203(a) & (b).

⁶⁴ Assuming this is beyond U.S. "jurisdiction or control."

⁶⁵ See 32 ILM at 810. This provision requires extensions of authority beyond areas over which one has jurisdiction or control, but only as to "natural persons."

⁶⁶ See BERNAUER, *supra* note 58, at 68 (U.S. position in CWC negotiations that it would assert jurisdiction as to enterprises incorporated in the United States and operating in states not party to the Convention).

⁶⁷ Implementation Act, *supra* note 9, §§5(b)(2) and 227D(7) refer to §101(a)(22) of the Immigration and Nationality Act, which speaks of a national as being a "citizen" of, or a "person" owing allegiance to, the United States, therefore implying a natural person.

reaches the conduct of individual U.S. citizens outside the United States but not that of overseas affiliates of U.S.-based business entities.⁶⁸ Nor would it make any difference if the business entity of concern happened to be a foreign branch of a U.S.-based enterprise. As only natural U.S. persons overseas are subject to the Act, the fact that the foreign affiliate has not been incorporated as a subsidiary under the laws of the country in which it operates has no effect on its placement beyond U.S. jurisdiction.⁶⁹

V. EXPORTS ARRANGED IN THE UNITED STATES AND MADE FROM OVERSEAS BY FOREIGN PRODUCERS

As seen, overseas affiliates of U.S. business enterprises are left beyond the reach of the Act's control provisions with regard to exports from the countries in which they are located,⁷⁰ but what about entities within the United States that arrange for foreign producers to make exports from overseas locations?⁷¹ In the envisioned situation a U.S. entity would serve as a chemical broker or trader, one who holds legal title but may not be involved either in producing the chemical traded or in taking physical possession of it. At least two possible variations might occur. In one, the U.S. entity might have nothing to do with the production of chemicals anywhere, and might have no facilities for taking possession of or storing them. Its only role would be to serve as an intermediary between producers and purchasers. The entity might be involved simply in purchasing legal rights to another's chemical output; these rights would then be sold to a buyer in a third country and the chemicals themselves would be exported by someone other than the chemical broker or trader. In the second variation, the U.S. entity might be involved in chemical production through an overseas affiliate. Then the U.S. entity, just like the broker or trader, would

⁶⁸ See Mahley, *supra* note 53, at 38 (Act extends to U.S. citizens abroad "but not its businesses"). On the CWC, see KRUTZSCH & TRAPP, *supra* note 46, at 113-14 (CWC allows state party in which a parent business is located to reach beyond its territory if affiliate does not maintain a separate identity).

⁶⁹ On branches, as opposed to subsidiaries, and the CWC, see KRUTZSCH & TRAPP, *supra* note 46, at 114-15 (branches may have no separate identity and could be subject to jurisdiction). While the Implementation Act does not affect exports by foreign nationals located overseas or U.S. business enterprises located overseas, the EAR, *supra* note 2, asserts jurisdiction over export activities of foreign affiliates of U.S. enterprises when the affiliates are "owned or controlled" by the U.S. entity, and over independent foreign business enterprises located overseas when involved in the production and export of items produced under an agreement with a U.S. entity licensing the use of industrial or intellectual property or know-how. See *Dresser (France) S.A.*, 47 Fed. Reg. 38,170 (1982); *Creusot-Loire, S.A.*, *id.* at 38,169 (trans-Siberian pipeline controls).

⁷⁰ To the extent affiliates are in the territory of, or a place subject to the jurisdiction and control of, another signatory of the CWC, that state may exercise authority. The Implementation Act does not clearly address the situation of affiliates located within the territory of a state not party to the Convention. However, the basic prohibition of the added §227(a), when read in conjunction with the jurisdictional provision of paragraph (c) of that same section, could be argued to reach activities of such affiliates in instances in which "knowledge" of an export could be shown. The reasoning would be that the 227(a) prohibition applies not to "nationals of the United States located outside the United States," but to "who[m]ever." (*Cf. Implementation of the Chemical Weapons Convention*, *supra* note 10, at 49 (Statement of Will Carpenter, Chemical Manufacturers Association) (suggesting that "whoever" be changed to "any person who")). And while paragraph (c) of that section references activities outside the United States and committed by a "national of the United States," it does so in the context of simply recognizing U.S. jurisdiction. A recognition of this sort is distinct from a statement of limitation. Because the language does not provide that "jurisdiction by the United States may be exercised only when" an activity occurs within the United States, or outside the United States if undertaken by a U.S. national, it should be read as merely approving jurisdiction in those cases. Whether jurisdiction is to be exercised in other cases turns on the phraseology of the prohibitory language of §227(a). See KRUTZSCH & TRAPP, *supra* note 46, at 114 (no jurisdiction to reach overseas subsidiary located in and cooperating with a state not party to the Convention).

⁷¹ Exports from the United States, or places under U.S. jurisdiction or control, arranged by entities in foreign countries are subject to the Act's regulatory regime through authority over the person or business in the United States that seeks to carry out the exports.

arrange for a wholly unrelated third party to make exports to some other country and would have the affiliate in return transfer a portion of its own chemical production.⁷²

This discussion raises the issue of whether instigating an export of a chemical with regard to which one has nothing but bare legal title provides a basis for an assertion of authority under the Act. The language of section 227(a), as added by section 201, and of section 203(a) and (b), speaks of the unlawfulness of certain "transfers" of chemicals, suggesting there is such a basis. While in perhaps the classic export transaction one who has possession of certain items turns them over to an independent freight forwarder for shipment to a purchaser, "transfer" is broad enough to snare a multitude of less-classic transactions.⁷³ "Transfer" indicates that regulatory authority can be asserted when shipments destined for one nation leave the United States or a third country. The term connotes the movement or passage of something from one person or place to another, brought about by someone's conduct. It does not appear to require either that physical possession be changed or that the export be made from a point within the United States or under U.S. jurisdiction or control. Movement from one state to another brought on as a consequence of a U.S. entity's exercise of rights of legal ownership seems to suffice.⁷⁴

VI. RETRANSFERS OF EXPORTED CHEMICALS

Historically, an item exported from the United States has remained subject to U.S. export control laws even when in the hands of a foreign entity located in a foreign country.⁷⁵ Retransfers or reexports have had to be in accordance with what prevailing export rules authorize. In the context of the proposed Implementation Act, the factual situations likely to raise the matter of authority over retransfers or reexports of toxic chemicals will most likely involve shipments by a foreign importer located in a foreign nation who initially receives chemicals from the United States or another country. Obviously, if the retransfer is of chemicals imported into a foreign nation from a country other than the United States, no basis for extending the Act's export controls exists. Maybe jurisdiction could be asserted over a U.S. entity having a hand in arranging or instigating such a transaction, but as long as the entity making the retransfer and the chemicals involved have no connection with the United States, there is no basis for regulatory authority.

If the chemicals that are being retransferred or reexported were initially imported from the United States, a definite link is present that may be thought to supply a basis for jurisdiction. To assure that chemicals subject to the controls of the Implementation Act do not fall into the possession of rogue nations, continuing jurisdiction is to be exercised by the initial supplying nation. The weakness of this position, however, is that little in the provisions of the Act gives it support.⁷⁶ As concerns the extraterritorial reach of the export controls, the jurisdictional provisions of the added section 227(a) and of section 203 refer to nothing more than, essentially, control over the activities of U.S. citizens located abroad. In fact, the whole thrust of the Act is toward deriving U.S. authority from the place where prohibited conduct occurs or the person engaged in

⁷² Obviously, the foreign country from which chemical exports are made is in a position to exercise jurisdiction. Our concern, though, is with whether the Implementation Act envisions that the United States will exercise jurisdiction over the U.S. entity that has taken legal title to and arranged for the exports.

⁷³ On the many facets of the term "transfer," see *supra* note 46.

⁷⁴ On the broad construction in the CWC, see KRUTZSCH & TRAPP, *supra* note 46, at 13.

⁷⁵ See 15 C.F.R. pt. 774 (1994).

⁷⁶ The only conceivable argument is based on the added §227(a)'s application of a prohibition on "knowing" transfers to "who[m]ever." See *supra* note 70.

such conduct. Nowhere is there any indication that authority can be connected with the origin of the regulated substances.

VII. CONCLUSION

It is difficult to know the exact configuration of a final U.S. control regime under the Chemical Weapons Convention until Congress enacts implementing legislation and the Department of Commerce's Bureau of Export Administration adopts a regulatory scheme. In the event an effort is made to track precisely the Clinton administration's proposals before the House of Representatives and the Senate, the ultimate configuration is sure to address several important dimensions of export trade in toxic chemicals and their precursors.

Exports from facilities in the United States by any individual U.S. citizen or business, or any foreign citizen located in the United States or U.S. affiliate of a foreign business, will have to be in conformance with applicable limitations, especially that regarding the country of destination. Shipments from overseas facilities by any entity located there will be subject to the same limitations if that place is under the jurisdiction or control of the United States. If the export is from an overseas location situated beyond the jurisdiction or control of the United States, individual U.S. citizens located overseas and engaged in the undertaking will also be obligated to meet those requirements, as will any entity, foreign or domestic, arranging from within the United States an export of a controlled chemical from an overseas location. Foreign entities, whether overseas affiliates of U.S. enterprises or foreign nationals or business ventures, will escape those requirements, even if the transaction involves a retransfer or reexport of toxic chemicals or precursors initially imported from the United States, or a shipment from production within the exporting country.

To date, the conventional wisdom has suggested that U.S. implementation of the obligations in the CWC could result in liberalization of the current export control regime on chemicals. Some commentators have speculated that adoption of domestic legislation similar to the administration's proposals may result in removing from control some chemicals currently subject to strict export regulation.⁷⁷ While certainly true, this view reflects only part of the picture. As noted at the outset, given the language of the EAR and the ITAR, it is also possible that some chemicals not under control now will be placed under control, and that the controls already placed on some chemicals will take on a more restrictive character. In light of the importance of the chemical industry to the overall health of U.S. export trade, one can hardly doubt the genuine significance of the export control dimension of the proposed Chemical Weapons Convention Implementation Act.

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⁷⁷ See OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 47, at 41.

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