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## **THE HELLENIC REPUBLIC ON BEHALF OF THE EUROPEAN UNION**

### **CHALLENGE INSPECTIONS: VIEWS OF THE EUROPEAN UNION**

#### **Introduction**

1. Throughout the negotiations of the Chemical Weapons Convention (hereinafter “the Convention”), during the Preparatory Commission and even now, more than five years after entry into force of the Convention, many have viewed challenge inspection as a sensitive issue. It is evident that views of States Parties differ. This paper is intended to examine these differences.

#### **A. The need for an effective challenge inspection mechanism**

2. The dual use of chemical technology, comparative ease of chemical weapons (CW) production, storage, concealment and movement means that, to be effective and credible, the Convention must possess the means for investigating expeditiously possible cases of non-compliance. Time and technology and legitimate security concerns dictate that this option must be available if the Convention is to remain an enduring and viable legal instrument. Whilst it is undoubtedly true that many compliance concerns can be resolved through consultations, others manifestly cannot – periodic CW production at an undeclared facility or open air trials of chemical warfare agents, for example.
3. Challenge inspection should be seen primarily as a deterrent. It also serves to restore confidence in compliance and can act as an enforcement measure to ensure that violators are exposed. For a deterrent to be credible, it must be effective; and for it to be effective in a CW context, there must be the possibility that inspections can be requested and conducted at any time. Moreover, there must be a possibility that inspectors might uncover evidence indicative of illegal CW activities, and for that speed is essential. The Convention’s Article IX, paragraph 8, makes this clear:

*“Each State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this Convention, and to have this inspection conducted anywhere without delay by an inspection team designated by the Director-General and in accordance with the Verification Annex”.*



4. Challenge inspection is a mechanism which serves the interests of all States Parties. It maintains the Convention's integrity by deterring non-compliance with its core prohibitions and providing an opportunity for all States Parties to clarify and resolve any questions concerning possible non-compliance. Furthermore, every State Party has the right, and indeed should welcome the right, to demonstrate its compliance. All States Parties therefore have a vested interest in ensuring that challenge inspection is effective and not regarded in unduly pejorative terms. In this respect it is important to note that in the five years since entry into force of the Convention no challenge inspections have been requested. This shows that States Parties have observed faithfully the Convention's obligations to refrain from abusive or frivolous requests. Concerns over such misuse would appear to be misplaced, and certainly much less of a problem than some had feared in 1992.

## **B. The role of prior consultations**

5. There has been some suggestion that the Convention mandates prior consultations *before* any request for a challenge inspection may be submitted. Such an interpretation is at odds both with the objective technical requirement for effective CW verification and, more importantly, with the ordinary meaning and construction of the text in Article IX, paragraph 1.<sup>1</sup> Three points can be made in support of this thesis.
6. First, Article IX is in two self-contained parts detailing procedures that are self-evidently *independent*; the first entitled "*Procedure for requesting clarification*", the second "*Procedures for challenge inspections*". If it were intended that these sections were hierarchical or sequential, then the negotiators would surely have inserted text to the effect that, if the clarification procedures failed to resolve an issue, then (and only then) could challenge be used. Moreover, Article IX, paragraph 3, would have read "*A State Party shall first*" instead of the actual text which reads "*shall have the right to*", which in this context means that a State Party has discretion as to *whether* it wishes to avail itself of this right.
7. Second, the opening lines of Article IX, paragraph 2, read "*Without prejudice to the right of any State Party to request a challenge inspection, State Parties should, whenever possible, first make every effort to clarify and resolve ...considered ambiguous.*" The phrase "*Without prejudice*" means in legal terms without diminishing, affecting or detracting from an existing right. In this case, that must mean the unqualified right of each State Party to request a challenge inspection as specified in Article IX, paragraph 8. Article IX, paragraph 8, does not make the right of each State Party to request a challenge inspection subject to prior fulfilment of any conditions or procedures before it can be invoked.

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<sup>1</sup> See Walter Krutzsch and Ralf Trapp, *A Commentary on the Chemical Weapons Convention*, Martin Nijhoff Publishers, Dordrecht 1994, page 175 "*the same paragraph makes it clear that the right to request a challenge inspection is not dependent on such previous attempts to solve the matter by exchange of information.*"

8. Third, in common treaty usage the word “shall” confers an absolute obligation i.e., a State Party must do or refrain from doing a specified act. However, in Article IX, paragraph 2, the word “*should*” is used instead. In treaty terms this confers a lesser conditional obligation which is certainly the intention when we see that the phrase “*whenever possible*” immediately follows. Such a phrase admits amongst other things that there may be occasions, possibly infrequent, when it is **not** possible even to consider using exchanges of information and consultation to resolve a matter of concern. It is in the nature of things that such occasions cannot be known in advance. All will depend on the unique circumstances that may apply in any particular future case of possible non-compliance.

**C. Conclusion**

9. Challenge inspection remains at the heart of the Convention’s verification regime. Indeed, it is now even more important given the increasing sophistication and flexibility in chemical production allowed by the technological changes in chemistry and chemical engineering. These changes, such as high throughput screening and micro-reactors, make identification of new highly toxic compounds and clandestine production easier. The Convention must therefore be resilient to technological change and an enduring instrument for constraining the misuse of chemistry. Attempts to re-interpret the challenge inspection regime do more than weaken an individual Convention component; they also strike at its continued effectiveness and relevance by attacking its resilience to technological change. We therefore believe that the Review Conference should reiterate the commitment of States Parties to effective implementation of and compliance with the provisions of Article IX, and their willingness to treat any challenge inspection constructively in that light.