



BASEL CONVENTION

**INSTRUCTION MANUAL ON THE
PROSECUTION OF ILLEGAL TRAFFIC
OF HAZARDOUS WASTES OR OTHER WASTES**



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FOREWORD

The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is unique in that it is the only Multilateral Environment Agreement where the illegal traffic in hazardous and other wastes is criminal. Associated with this condemnation of illegal traffic is the obligation undertaken by Parties to prevent and punish conduct in contravention to the Convention.

Prosecutors play a key role in ensuring that any criminal proceedings pertaining to alleged cases of illegal traffic are successfully brought forward and handled. Ultimately, proper prosecution will ensure that the rule of law is upheld, that justice is served and that communities and the environment are protected against the harmful consequences of improperly managed transboundary movement and disposal of hazardous and other wastes. This manual is a contribution to achieving these objectives.

The present manual was developed by a small group of experts under the Chairmanship of Ms. Christine Akello (Uganda), on the basis of a mandate from the Conference of the Parties to the Basel Convention. The following 20 countries nominated experts to the group: Argentina, Burkina Faso, China, Colombia, Costa Rica, Ethiopia, Gabon, Iraq, Jamaica, Kenya, Kuwait, Lebanon, Madagascar, Maldives, Mexico, Nigeria, Pakistan, Philippines, Uganda and Yemen. The European Commission also nominated an expert. The manual developed by the group of experts was approved by the tenth meeting of the Conference of the Parties that took place on 17-21 October 2011 in Cartagena de Indias, Colombia.

Secretariat of the Basel Convention

I. INTRODUCTION

A. PURPOSE OF THIS MANUAL

1. This manual has been produced in accordance with decisions VIII/24 and IX/23 of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, based on an outline prepared by the Secretariat of the Convention.¹ It is intended to provide guidance for those involved in the prosecution of cases of illegal traffic in hazardous or other wastes within the scope of the Basel Convention. Global in scope, it is intended to provide practical information that will be particularly relevant for judges and prosecutors in their role in combating illegal traffic in hazardous and other wastes. Inevitably, the manual will cover issues of interest for the defence counsel in cases of illegal traffic in waste, as well as for those outside the legal profession but involved in such cases, including officers of the competent authorities that ensure compliance, and enforcement entities that gather evidence for prosecutions.

2. The manual's objectives are to provide an improved understanding of the practice of prosecuting cases of illegal traffic in hazardous wastes within the context of the full range of measures available to combat what is widely known as "environmental crime". The ultimate objective when prosecuting cases of illegal traffic in hazardous and other wastes is to protect communities and the environment from the harmful consequences of improperly managed transboundary movement and disposal of hazardous and other wastes by punishing such crimes, and thus providing a deterrent.

3. The manual seeks to draw upon best practices and provides examples taken from the experience of parties to the Basel Convention in prosecuting illegal traffic cases, including information on how such actions are managed. Users of this manual are encouraged to confirm the provisions and rules that apply within their national jurisdiction and provide examples that supplement those already given.

4. The manual does not aim to duplicate other existing materials unnecessarily, but neither does it seek to avoid it where it allows the manual to be used as a free-standing document. Therefore, where appropriate, cross-reference will be made to publications of the Basel Convention Secretariat, the United Nations Environment Programme (UNEP) and intergovernmental and non-governmental organizations involved in the detection, prevention and prosecution of crimes, particularly environmental crimes.

B. ROLE OF THE JUDICIARY AND PROSECUTORS

5. Prosecutors and the judiciary play a vital role in upholding international environmental law. The value of the judiciary and judicial proceedings has been underpinned by the development of the Johannesburg Principles on the Role of Law and Sustainable Development, which were adopted at the Global Judges' Symposium held in Johannesburg, South Africa, from 18 to 20 August 2002. The Principles state, among other things, that: "We affirm that an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law".² It is estimated that there are 380 environmental courts and tribunals in operation worldwide today,³ although in many jurisdictions environmental cases are heard by ordinary courts and tribunals.

1 UNEP/CHW/OEWG/6/12, annex. Approved by the Open-ended Working Group in decision OEWG-VI/13. The outline is available at www.basel.int/meetings/oewg/oewg6/docs/12e.doc.

2 <http://www.unep.org/Documents.Multilingual/Default.asp?ArticleID=3115&DocumentID=259>.

3 International Judicial Institute for Environmental Adjudication, 2011 (www.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/press_releases/IJIEArelease.pdf).

6. A need to raise awareness of and train prosecutors and the judiciary in this area is widely recognized. Training institutions and other opportunities for obtaining further information are described in section 6 of this manual.

C. HARM AND THE ENVIRONMENTAL CRIME CONTEXT

7. Environmental crime has been defined as meaning “the violations or breaches of national environmental laws and regulations that a State determines to be subject to criminal penalties under its national laws and regulations”.⁴ It is wide-ranging, encompassing criminals who pollute the air, water and land and push commercially valuable wildlife species closer to extinction; it can also cover crimes that speed up climate change, destroy fish stocks, decimate forests and exhaust essential natural resources. It has economic, social and environmental consequences.

8. Taking into account other multilateral environmental agreements, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and those concerning chemicals such as the Montreal Protocol on Substances that Deplete the Ozone Layer (governing production of and trade in substances that deplete the ozone layer), the International Criminal Police Organization (INTERPOL) cites an estimate from the Government of the United States of America that environmental criminals worldwide earn between \$22 billion and \$31 billion per annum.⁵ This profit is, however, just one side of the coin. On the other side are the environmental costs in terms of destruction of habitats, pollution of the soil, air and water, and loss of biodiversity. When writing about enforcement and compliance with multilateral environmental agreements, notably the three significant international instruments: the Basel Convention, CITES and the Montreal Protocol, in 1999, it was noted that “in spite of the existence of a growing number of international arrangements illegal trade, violations of and environmental crimes under several environmental conventions continue to take place unabated”.⁶

9. Illegal traffic in wastes is perceived to be increasing, associated with the growing international trade in waste materials for recycling between waste-producing and manufacturing countries, where wastes are used as raw materials to produce goods. Evasion of controls lowers costs and opens up markets that might otherwise be unavailable (e.g., hazardous electronic waste from European Union member States to non-member countries of the Organization for Economic Cooperation and Development (OECD) in contravention of their implementation of the “Ban Amendment”).⁷

10. The prosecution of environmental crimes is as important as for other crimes. Prosecution not only promotes respect for the law, but also discourages violations of the rule of law. The impact of environmental crimes is not confined to human health and damage to the environment. Economic crime, and thus economic harm, are usually associated with environmental crimes. INTERPOL has concluded that initial evidence links pollution crimes with organized crime, and that in some cases links to terrorism were found to exist.⁸ INTERPOL has further emphasized the importance of prosecuting environmental crimes in its advocacy memorandum of 2007, which states that: “The far-reaching impacts of environmental crime

4 UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, 2001, available at: www.unep.org/DEC/docs/UNEP.Guidelines.on.Compliance.MEA.pdf.

5 Advocacy Memorandum, Arguments for Prosecutors of Environmental Crimes, Interpol Pollution Crimes Working Group, Penalties Project, 5 June 2007, available at www.interpol.int/public/EnvironmentalCrime/Pollution/issues/ArgumentsProsecutorsEC.pdf.

6 Enforcement of and Compliance with MEAs: The Experiences of CITES, Montreal Protocol and Basel Convention, vol. 1, p. 1, UNEP 1999, ISBN 92-807-1894-0.

7 By decision III/1, the Conference of the Parties adopted an amendment to the Basel Convention – usually referred to as the “Ban Amendment”, whereby each party member of the OECD, the European Union and Liechtenstein (known as “Annex VII parties”) prohibits all transboundary movements of hazardous wastes that are destined for disposal operations in States not listed in Annex VII. The amendment had not yet entered into force as at the time of elaboration of this manual, For the complete text of decision III/1 and further information on the Ban Amendment, please see: <http://www.basel.int/pub/baselban.html>.

8 Interpol Pollution Crimes Working Group, Assessing the Links between Organised Crime and Pollution Crimes, 2006 <http://www.interpol.int/Public/EnvironmentalCrime/Pollution/organizedCrime.pdf>. In the context of pollution crimes INTERPOL has used the definition of organized crime according to the 2000 United Nations Convention against Transnational Organized Crime: An “organized criminal group” is “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”. (www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext).

underscore the importance of adequate sentencing for such crimes. In order to deter environmental crime effectively, sentences, including incarceration and monetary penalties, must exceed the economic advantage gained by the defendant as a result of its non-compliance. Sentences must also be high enough to at least cover the costs of mitigating the damage inflicted”⁹

D. MULTIAGENCY COOPERATION

11. The successful prosecution of environmental crimes often depends on the careful preparation of multifaceted cases. This requires cooperation between multiple agencies, both nationally and internationally, bringing together different enforcement approaches and varying levels of available powers (such as for entering premises, seizing goods and taking samples, and detaining or arresting suspects). A case involving the illegal transboundary movement of hazardous wastes may involve the competent authorities of the countries of export and import, the Customs agencies in both jurisdictions and national and international police organizations, potentially multiplied by the number of countries that may have been used for transit. Cases may be linked to other crimes and even organized crime due to the substantial income generated by illegal trade (a prime driver for the crime), meaning that proceedings for asset recovery may also be instituted. As these complexities represent considerable communication and cooperation challenges crossing geographical and language boundaries, any case before a court will have most likely required considerable preparatory effort to reach the expected standard of evidence needed for the courts to deliver a robust and reliable verdict and conviction.

E. ORGANIZATION OF THE MANUAL

12. The first section of this manual deals with the steps taken to render international law in national legislation by outlining the monist and dualist legal traditions. Section two provides a brief overview of the basic obligations and procedures of the Basel Convention. The third section defines illegal traffic, in accordance with Article 9 of the Convention, and gives examples of how this definition has been translated into the domestic legislation of some parties. It identifies matters that should be addressed nationally to give full effect to the Convention but that are not addressed in detail in the Convention. Section four sets out the issues that a prosecutor should consider when preparing a case for prosecution and elaborates on the complexities of proving environmental crimes, particularly those involving transboundary movements of hazardous wastes. Section five discusses sentencing and possible penalties for the illegal traffic of wastes, including custodial sentences, fines and remediation. The sixth section examines how judges and prosecutors can be kept informed of new legal, technical and procedural issues at the national and international levels and where specialist training may be obtained. Section seven provides examples of cases of illegal traffic as reported by the press, competent authorities and prosecutors.

⁹ Advocacy Memorandum, Arguments for Prosecutors of Environmental Crimes, Interpol Pollution Crimes Working Group, Penalties Project, 5 June 2007, available at www.interpol.int/public/EnvironmentalCrime/Pollution/issues/ArgumentsProsecutorsEC.pdf.

II. IMPLEMENTATION AND ENFORCEMENT OF THE BASEL CONVENTION AT THE NATIONAL LEVEL

A. TERMINOLOGY

13. In this manual, the terms “implementation”, “compliance” and “enforcement” are defined as in the UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements (2001) where:

- (a) In the context of multilateral environmental agreements:
 - (i) “Compliance” means the fulfilment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement;
 - (ii) “Implementation” refers to, inter alia, all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/or take to meet their obligations under a multilateral environmental agreement and its amendments, if any.
- (b) In the context of national enforcement and international cooperation in combating violations of laws implementing multilateral environmental agreements:
 - (i) “Compliance” means the state of conformity with obligations, imposed by a State, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements in permits, licences and authorizations, in implementing multilateral environmental agreements;
 - (ii) “Enforcement” means the range of procedures and actions employed by a State, its competent authorities and agencies to ensure that organizations or persons, potentially failing to comply with environmental laws or regulations implementing multilateral environmental agreements, can be brought or returned into compliance and/or punished through civil, administrative or criminal action.

B. NATIONAL IMPLEMENTATION OF THE BASEL CONVENTION

14. The Basel Convention is expected to be given effect by binding rules at the national level. The actual approach taken by an individual State depends to a degree on the system that that State employs to translate international treaties into its national legal framework. In a monist system, treaties become part of the domestic legal framework once they have been ratified by the State concerned. Only those provisions of the Convention that require additional regulatory measures to be executed by domestic courts – i.e., that are not self-executing – need to be expressed in further domestic legislation. In a dualist system, the rights and obligations created by treaties have no weight in domestic law unless legislation is promulgated recognizing them. All the provisions of the Convention – whether self-executing or not – need to be incorporated into domestic law to be applied by domestic courts. Whichever system is used, the incorporation of the Convention’s obligations at the national level is required for action to be taken by regulatory authorities and agencies, including prosecuting illegal traffic.

15. A variety of guidance materials have been developed under the auspices of the Convention to explain the legal regime applicable to transboundary movements of hazardous wastes. The Manual for the Implementation of the Basel Convention¹⁰ aims to assist parties and non-parties, the private sector,

¹⁰ www.basel.int/pub/pub.html.

non-governmental organizations and individuals to understand the obligations set out in the Convention. It explains the provisions of the Convention in simple language and gives examples of situations that they cover. The descriptions of the obligations leave the State concerned with the task of adopting the language of the Convention or adapting it into a form that is fit for purpose according to the systems in place at the national level. The Guide to the Control System (Instruction Manual)¹¹ gives a comprehensive overview of the operation of the control system for transboundary movements of hazardous wastes and can help to determine what should constitute and be defined as lawful movements. This manual contains a short section on illegal traffic, although it does not go much beyond identifying the provisions of the Convention itself. Reference to additional materials under the Convention will be made in other parts of the manual as needed.

16. The previously mentioned UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements include a chapter on national enforcement and international cooperation in combating violations of laws implementing multilateral environmental agreements, which contains a checklist to assist States in developing relevant measures. It identifies the criteria for effective national laws and regulations, including a comprehensive range of penalties for violations, an appropriate institutional framework and other instruments and procedures that may be used to tackle environmental crimes. Further information on multilateral environmental agreement compliance and enforcement, including the guidelines, can be found on the website of the Division of Environmental Law and Conventions.¹²

11 Ibid.

12 www.unep.org/dec/MEA_Manual.html.

C. EXAMPLES OF NATIONAL IMPLEMENTATION

ARGENTINA

In Argentina the Secretariat of Environment and Sustainable Development of the Nation is the government agency that, nationally, has control over the transboundary movements of hazardous wastes through:

- By Law No. 23,922 of 1991 implementing the Basel Convention and
- National legislation Act N° 24,051 of Hazardous Waste, Regulatory Decree No. 831/1993.
- Article 41 of the Constitution provides the prohibition of entry into national territory, currently or potentially hazardous waste, and radioactive materials.
- Law No. 24,051 in Chapter IX provides for the application of a penal system: suppressing the use of hazardous waste to poison, adulterate or contaminate in a manner dangerous to health, soil, water, atmosphere or environment in general. It also represses the recklessness, negligence or incompetence in the practice of art or profession, or for breaching regulations or ordinances and

When these crimes are committed by a legal person, the penalty will also apply to directors, managers, trustees, and members of the supervisory board, managers, agents or representatives who had participated in the offense.

Ordinary criminal justice processes would apply for crimes committed within a province, federal courts intervene in cases which involve more than one province and the smuggling of hazardous waste entering or leaving the country as matters involving national security.

JAMAICA

Jamaica, which has a 'dualist' legal regime for the purposes of international law, incorporated the Basel Convention in 2002 in its domestic law: The Natural Resources (Hazardous Waste) (Control of Transboundary Movement) Regulations, 2002 (the "Regulations") and the Natural Resources (Hazardous Wastes) (Control of Transboundary Movements) (Change of Name and Amendment) Regulations, 2009. The Regulations are subsidiary to its principal Act, that is, the Natural Resources Conservation Authority Act. Section 2 of the Regulations define "hazardous wastes" as follows:

"hazardous waste" means –

- (a) waste that belongs to any category contained in the First Schedule, unless it does not possess any of the characteristics specified in the Third Schedule;*
- (b) waste which belongs to any category contained in the Second Schedule;*
- (c) wastes which belong to any category contained in the Sixth Schedule, unless they [does] not possess any of the characteristics specified in the Third Schedule;*
- (d) wastes which belong to any category contained in the Seventh Schedule that contain any of the wastes set out in the First Schedule to such extent that they display or possess any of the characteristics specified in the Third Schedule; and*
- (e) such wastes as the Minister may, by order, declare to be hazardous wastes; "...*

The First Schedule deals with categories of the waste to be controlled; the Second Schedule deals with categories of wastes requiring special considerations and the Third Schedule lists hazardous characteristics. The Minister has a statutory discretion to declare a waste as hazardous waste, by way of an 'order'. The Sixth Schedule deals with the Annex VIII List A of the Convention. Wastes contained in this Annex are characterized as hazardous under Article 1, paragraph 1(a), of the Convention and their designation on this Annex does not preclude the use of Annex III to demonstrate that a waste is not hazardous.

ETHIOPIA

Ethiopia has a dualist legal system for international laws. The Constitution of the Federal Democratic Republic of Ethiopia under Article 9 obligates international agreements shall be ratified in order be considered as integral part of the law of the land. Furthermore, international laws should be approved by the House of Peoples Representatives (Parliament) and be gazetted on the official Negarit Gezeta of the country.

Ethiopia has ratified the Basel Convention on the Transboundary Movement of Hazardous Waste by Proc. 192/2000. In order, to effectively implement the convention, the government of Ethiopia has enacted subsequent proclamations' like Environmental Pollution Control Proclamation (Proc. No. 300/2002) and the Solid Waste Management Proclamation (Proc. 513/2007). The pollution control proclamation has clearly defined hazardous material and hazardous waste as follows:

"Hazardous material" means any substance in solid, liquid or gaseous state, or any plant, animal or micro organism that is injurious to human health or the environment; and

"Hazardous Waste" means any unwanted material that is believed to be deleterious to human safety or health or the environment.

BURKINA FASO

Burkina Faso adopted its first national Environment Act in 1994.

In 1997, a new National Environment Act has been adopted.

Burkina Faso is a party to the Basel Convention and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.

In our system, international laws are directly implemented in national law system after the ratification or signature.

When someone commits a fault, we have to determine the kind of punishment.

The first can be a financial punishment.

The second can be a prison punishment.

In the legislation, Waste traffic is prohibited. Importation and exportation of waste is a crime which is punished by custody punishment (ten to Twenty year of prison).

In this kind of crime, there is no possibility to have an arrangement environmental administration to pay a financial contribution.

We have also a civil responsibility of the importer, transporter and receiver illegally waste in Burkina Faso.

For the punishment the environmental administration and the prosecutor are both entitled to initiate judicial proceedings.

COLOMBIA

In Colombia the Ministry of Environment is the competent government agency at the national level, on issues related to the hazardous wastes in general and to transboundary movements in particular. Relevant legal instruments include:

- National Constitution (1991), article 8: prohibits the introduction in the national territory of toxic wastes.
- Law No. 253 of 1996: ratifies the Basel Convention (Dualist approach)
- Law No. 1252 of 2008: establishes a prohibition for the introduction to the national territory of hazardous wastes for any purposes
- Criminal Code (Law 599 of 2000): Article 358 provides for 48 to 144 months imprisonment and a fine between US\$ 40 000 and US\$ 10 000 000 for a person found guilty of illegal traffic of wastes covered by international treaties ratified by Colombia.

UGANDA

Uganda applies the Ratification of Treaties Act (Cap 204 Laws of Uganda, 2000 Edition) a dualist approach. The Basel Convention was implemented through the National Environment Act (Cap 153) and specifically the National Environment (Waste Management) Regulations (Statutory Instrument 153-2). The National Environment Act prohibits importation of hazardous waste and requires that any person who imports such waste into Uganda shall be responsible for its removal from Uganda and for its disposal.

The National Environment (Waste Management) Regulations apply to all categories of hazardous and nonhazardous waste; to storage and disposal of hazardous waste and its movement into and out of Uganda; and to all waste disposal facilities, landfills, sanitary fills and incinerators. The Regulations regulate import and export of waste into and out of Uganda; require prior informed consent for such transboundary movement of waste; and provide for proper disposal of waste, including the prevention of pollution from treatment plants and disposal sites.

The National Environment Act also creates offences relating to hazardous waste, materials and chemicals; offences relating to pollution; and offences relating to restoration orders and easements. Most of these offences are strict liability offences.

Uganda has designated environmental inspectors under the National Environment Act. For purposes of enforcement of environmental law, officers in the Uganda Police Service have been designated by rank from Regional Police Commanders to Community Liaison Officers and others. This augments the role of the Police Force under the Police Act (Cap 303), which includes prevention of the commission of offences and detection of offenders.

To address concerns about continuing degradation of the environment and the need to step up enforcement, the Cabinet of Ministers in December 2009 approved the establishment of an Environmental Protection Force under section 107 of the National Environment Act. Modalities of operationalisation of that Force are still under discussion but the force is likely to be part of the Uganda Police Force.

In Uganda, due to the pecuniary limitation in the amount of fines that can be imposed, prosecution of most environmental offences is undertaken in the Magistrates courts rather than the High Court. The High Court, however, has residual jurisdiction for both criminal and civil cases.

III. WHAT JUDGES AND PROSECUTORS NEED TO KNOW ABOUT THE BASEL CONVENTION

A. BASIC INFORMATION

17. The Basel Convention was adopted on 22 March 1989 and entered into force on 5 May 1992. As at July 2011 there are 175 parties to the Convention.

18. The main objectives of the Convention are:

- (a) To minimize the generation of hazardous wastes and other wastes (in terms both of quantity and potential hazard);
- (b) To treat and dispose of hazardous wastes and other wastes as close as possible to their source of generation in an environmentally sound manner;
- (c) To reduce transboundary movements of hazardous wastes and other wastes to a minimum consistent with their environmentally sound management.

19. The most relevant provisions of the Convention for the purpose of this manual are set out in annex III to this manual, while the full text can be found on the website of the Convention.¹³

20. The Convention provides for the regulation of transboundary movements of hazardous and other wastes. To protect human health and the environment against the adverse effects that may result from such wastes, the Convention's system for controlling transboundary movements of hazardous and other wastes is based on, among other things, the following principles and actions:

- (a) The requirement of prior informed consent of a State of import and States of transit and of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question before the waste can be exported and, for this purpose, the establishment of a notification procedure;
- (b) The requirement referred to in the Convention as "environmentally sound management" that all practicable steps are taken to ensure that such wastes are managed in a manner that protects human health and the environment from the adverse effects that could result from those wastes;
- (c) A restriction on exports to a country that is not a party to the Convention;
- (d) An obligation on the exporting state to take back the wastes in the case of a transboundary movement of hazardous or other wastes deemed to be illegal traffic as the result of conduct on the part of the exporter or generator.

B. GENERAL OBLIGATIONS

21. Paragraph 4 of Article 4 of the Convention provides that Parties to the Convention are to have an appropriate national regulatory framework to implement and enforce the requirements of the Convention: "Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention". Any person within the national jurisdiction of a party to the Convention who is involved in transboundary movement of hazardous or other wastes is therefore legally bound to comply with the relevant national laws and regulations governing the transboundary movements of wastes and

13 www.basel.int/text/documents.html.

their disposal. A checklist for the legislator, indicating the key provisions to be included in the national legal framework, is available on the Convention website.¹⁴ The checklist does not cover all aspects of the Convention but seeks to identify the most fundamental matters that should be addressed in national implementing legislation. Model national legislation is also available for the benefit of parties.¹⁵

22. General rights and obligations are to be found in Article 4 of the Convention, including the right of parties to prohibit the import of hazardous or other wastes for disposal (note that disposal is defined as final disposal or recovery, as described below). Consequently, the extent of regulation of the transboundary movement of hazardous wastes may differ by country. A list of the restrictions imposed under national law in individual parties is available on the Convention website.¹⁶ There is a corresponding obligation that parties respect such import prohibitions when duly notified, through the Secretariat of the Convention, of their existence. The relevant entity at the national level should ensure that information about import prohibitions is circulated to all involved in enforcement and implementation in its country. This would include the competent authority, which is the governmental authority designated by a party to be responsible, within such geographical areas as the party may think fit, for receiving the notification of a transboundary movement of hazardous wastes or other wastes, and any information related to it, and for responding to such a notification.¹⁷ The competent authority should know about every shipment of hazardous wastes that leaves from, transits through or enters its country (including those shipments scheduled to do so), in addition to what is regulated by the Convention and what by national legislation. A list of competent authorities is available on the Convention website.¹⁸

23. An amendment to the Convention, usually known as the “Ban Amendment”, inserts a new article 4 (a) that prohibits all transboundary movements of hazardous wastes from Annex VII (in effect OECD member countries) to non-Annex VII Countries (non-OECD member countries).¹⁹

24. Of particular relevance to this manual is paragraph 3 of Article 4 of the Convention, which asserts that the parties consider that the illegal traffic in hazardous wastes is criminal, and the associated paragraph 5 of Article 9, which requires each party to introduce appropriate national/domestic legislation to prevent and punish illegal traffic.

25. Parties to the Convention have, among other things, thus agreed:

- (a) To commit themselves to introducing appropriate legal, administrative and other measures to regulate the transboundary movements of hazardous and other wastes;
- (b) To consider that illegal traffic in hazardous or other wastes is criminal;
- (c) To introduce legislation to prevent and punish illegal traffic.

26. The reader may, therefore, find it useful to have copies of the relevant national legislation to hand when reading this manual.

C. WASTES COVERED AND THE CONTROL SYSTEM FOR TRANSBOUNDARY MOVEMENTS

27. The foundation of the control system outlined in the Convention for transboundary movements of hazardous and other wastes is based upon detailed procedures for information exchange and a requirement of prior written consent.

14 www.basel.int/legalmatters/natleg/index.html.

15 www.basel.int/pub/modlegis.pdf.

16 www.basel.int/natdef/frsetmain.php.

17 Paragraph 6 of Article 2 of the Convention.

18 www.basel.int/contact-info/frsetmain.html.

19 www.basel.int/pub/baselban.html.

1. Wastes covered by the Convention

28. The Convention defines “wastes” as substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law (Article 2, paragraph 1). The provisions apply to what are known as “hazardous” and “other” wastes. What is understood by the Convention as being hazardous wastes, in accordance with the above definition, is stated in paragraph 1 of Article 1 of the Convention, which provides that they are:

- (a) Wastes that belong to any category contained in Annex I of the Convention unless they do not possess any of the characteristics contained in Annex III; and
- (b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the party of export, import or transit.

29. Annex I lists the categories of waste to be controlled. For example, hazard characteristic Y10 pertains to waste substances and articles containing or contaminated with polychlorinated biphenyls and/or polychlorinated terphenyls and/or polybrominated biphenyls. Annex III contains the list of hazardous characteristics, such as explosive, corrosive, poisonous or flammable.

30. Paragraph 1 (b) of Article 1 of the Convention is another example of the latitude expressly given to a party to expand the scope of application of the Convention to wastes defined as “hazardous” under its national legislation. Just as in the case of import restrictions, such domestic specificities need to be communicated to all parties, through the Secretariat, in accordance with Article 3 of the Convention, and should also be communicated to all relevant authorities at the national level, in particular competent authorities and enforcement entities, as they clearly affect the scope of application of the Convention’s obligations.

31. The list of national definitions of hazardous wastes notified through the Secretariat is available online.²⁰

32. The second category of waste covered by the Convention, “other wastes”, is defined in Annex II to the Convention and includes household wastes.

NATIONAL DEFINITIONS (ARTICLE 3)

UGANDA

Hazardous waste means any waste specified in Fifth Schedule to the National Environment (Waste Management) Regulations (waste considered hazardous) or any waste having the characteristics defined in the Second Schedule to these Regulations (list of hazardous characteristics) and determined in accordance with the guidelines set out in the Third Schedule to the Regulations (guidelines for determination of some hazardous characteristics).

NATIONAL DEFINITIONS (ARTICLE 3)

MEXICO

Hazardous wastes are those with some of the characteristics of corrosivity, reactivity, explosive, toxic, flammable, or contain infectious agents which give them their danger, as well as packaging, containers and soils which have been contaminated when transferred to other sites. (General Law for Prevention and Integral Waste Management and Regulations, Article 5 fraction XXXII, 2003)

2. Lists of wastes/annexes

33. The annexes to the Convention that contain the lists of wastes were developed in two stages. When the Convention was adopted, annexes I–III were included, listing those wastes that were to be controlled and their characteristics. In 1998, the Conference of the Parties adopted two more annexes (VIII and IX), which provide more details as to what is and what is not covered by the Convention. Annex VIII (list A) clarifies which specific wastes are covered by Annex I and are characterized as hazardous. As with Annex I, if Annex VIII wastes do not possess any of the characteristics described in Annex III (e.g., explosiveness, corrosivity and toxicity) they are not hazardous and will therefore not be subject to the Convention controls. Annex IX (list B) contains wastes that are not hazardous unless they contain Annex I material to an extent that makes them exhibit an Annex III characteristic. In such cases, the wastes are covered by the Convention.

3. Wastes not covered by the Convention

34. Article 1 also provides that the following wastes are not covered by the Convention:

- (a) Wastes which, as a result of being radioactive, are subject to other control systems, including international instruments, applying specifically to radioactive materials;
- (b) Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument.

4. Meaning of “disposal”

35. The Convention does not simply regulate transboundary movements of hazardous wastes; it also deals with the disposal of such wastes. In this context the meaning of disposal is twofold, as set out in Annex IV to the Convention:

- (a) Section A lists 15 types of operations (coded D1–D15) that do not lead to the possibility of resource recovery, recycling, reclamation and direct re-use, among other things. Examples of these are landfill, incineration and permanent storage;
- (b) Section B lists 13 types of operations (coded R1–R13) that may lead to resource recovery, recycling, reclamation and direct re-use, among other things. Examples of these are recycling or reclamation of metals and metal compounds, and used oil re-refining.

36. The method of disposal is not just the concern of the country of import; it also has legal implications for the country of export (where the generator is located). The Convention seeks to ensure that the disposal of hazardous and other wastes is carried out in an environmentally sound manner.

5. Control system for the transboundary movements of hazardous and other wastes

37. In accordance with paragraph 3 of Article 2 of the Convention, a transboundary movement means “any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement”.

38. The control system for the transboundary movement of hazardous and other wastes is based on prior written consent. The forms to be used – notification document and movement document – and the associated instructions on how to do so, can be found on the Convention website.²¹

21 www.basel.int/techmatters/forms-notif-mov/vCOP8.doc.

39. Article 6 states that the State of export is to notify, or is to require the generator or exporter to notify, in writing, through the channel of the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes. The information to be provided through the notification procedure is listed in Annex V to the Convention and includes the reason for the export, the exporter, the generator, the site of generation and the process by which the wastes were generated, the nature of the wastes and their packaging, in addition to the intended itinerary, the site of disposal, the disposer and the method of disposal. States of import then make a written response, consenting to the movement with or without conditions, denying permission for the movement or requesting additional information.

40. The State of export is not to allow the generator or exporter to commence the transboundary movement until it has received written confirmation that:

- (a) The notifier has received the written consent of the State of import; and
- (b) The notifier has received from the State of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question.

41. Competent authorities are designated to administer these tasks.

42. The movement document is intended to accompany the consignment at all times, from the moment of departure from the waste generator to its arrival at the disposer in the importing country. It provides relevant information about a particular consignment, for example, the carriers, passage through Customs offices, and the receipt and disposal of waste by the disposer.

43. The information provided in the notification and movement documents – or lack thereof – may be central to the prosecution of a case of illegal traffic.

6. Transit countries not parties to the Convention

44. While this procedure is applicable to countries of export and import it is also commonplace for wastes to be shipped through third or transit countries. In the event that a transit country is not a party to the Convention, Article 7 of the Convention provides that the requirement of notification of the competent authorities of the states concerned, which is set out in paragraph 1 of Article 6 of the Convention, applies *mutatis mutandis*. Thus, the transit country must be informed, through the notification procedure, of the proposed transboundary movement. Written consent from the non-party transit State is not, however, a prerequisite for the movement to commence. Article 7 ensures that the non-party transit State may be made aware of the shipment and may take such appropriate action as it sees fit. Care is needed to ensure compliance with the Convention where such situations arise.

7. Bilateral, multilateral and regional agreements

45. Article 11 of the Convention allows for other agreements regarding transboundary movements of wastes to be made between parties and non-parties, provided that they do not derogate from the environmentally sound management of hazardous and other wastes. A number of these exist, such as the Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region, and the Bamako Convention.²² One such example is the OECD Decision C(2001)107/Final concerning the control of transboundary movements of wastes destined for recovery operations. A noteworthy provision of the Decision is the variation on the prior informed consent procedure, referred to as “tacit” consent, whereby in specific circumstances the administrative process giving consent to a written notification for transboundary movement is effected by a competent authority by simply not raising objections to the submitted notification within a defined time period.

22 For the full list of such agreements or arrangements notified through the Secretariat, see www.basel.int/article11/multi.html.

IV. ILLEGAL TRAFFIC OF HAZARDOUS AND OTHER WASTES

46. This section sets out the definition of illegal traffic as contained in Article 9 of the Convention. Some elements of Article 9 may be considered to be self-executing, for example the definition of the crime considered, although parties may decide to broaden this definition in their national legal framework. Other elements of Article 9 will need to be specified in the national legislation, such as the penalties for illegal traffic.

A. DEFINITION OF ILLEGAL TRAFFIC

47. The Convention defines illegal traffic in Article 9 as follows:

ILLEGAL TRAFFIC

1. For the purpose of this Convention, any transboundary movement of hazardous wastes or other wastes:
 - (a) without notification pursuant to the provisions of this Convention to all States concerned; or
 - (b) without the consent pursuant to the provisions of this Convention of a State concerned; or
 - (c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or
 - (d) that does not conform in a material way with the documents; or
 - (e) that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law, shall be deemed to be illegal traffic.
48. Subparagraphs (a)–(d) cover the conditions that constitute violations of the notification procedure, while subparagraph (e) covers the conditions that constitute a violation of the expected standards of waste disposal and the requirement of environmentally sound management.
49. The following paragraphs in Article 9 set out the measures that should be taken in the event of illegal traffic being discovered, including taking back the waste and its proper treatment in an environmentally sound manner.
2. In case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part of the exporter or generator, the State of export shall ensure that the wastes in question are:
 - (a) taken back by the exporter or the generator or, if necessary, by itself into the State of export, or, if impracticable,
 - (b) are otherwise disposed of in accordance with the provisions of this Convention, within 30 days from the time the State of export has been informed about the illegal traffic or such other period of time as States concerned may agree. To this end the Parties concerned shall not oppose, hinder or prevent the return of those wastes to the State of export.

3. In the case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part of the importer or disposer, the State of import shall ensure that the wastes in question are disposed of in an environmentally sound manner by the importer or disposer or, if necessary, by itself within 30 days from the time the illegal traffic has come to the attention of the State of import or such other period of time as the States concerned may agree. To this end, the Parties concerned shall cooperate, as necessary, in the disposal of the wastes in an environmentally sound manner.
 4. In cases where the responsibility for the illegal traffic cannot be assigned either to the exporter or generator or to the importer or disposer, the Parties concerned or other Parties, as appropriate, shall ensure, through cooperation, that the wastes in question are disposed of as soon as possible in an environmentally sound manner either in the State of export or the State of import or elsewhere as appropriate.
50. Paragraph 5 requires that the provisions are translated into domestic law, stating: "Each Party shall introduce appropriate national/domestic legislation to prevent and punish illegal traffic. The Parties shall cooperate with a view to achieving the objects of this Article".

B. RESOURCES FOR DEFINING AND DETECTING ILLEGAL TRAFFIC

51. Parties will refer to their specific national law definitions and offences to comply with paragraph 5 of Article 9 of the Convention. An example is given in the model national legislation on the Convention website.²³ Matters to be addressed in domestic legislation may include the definition of the offence, the burden of proof and the establishment of penalties.

52. The Convention Secretariat also provides further information on illegal traffic on its website.²⁴ It describes the reference documents available concerning illegal traffic and national practices in combating illegal traffic (the latter section is empty at present). There is a section with links to other institutions concerned with the enforcement of other international agreements on hazardous waste. It also provides links to the guidance elements for the detection, prevention and control of illegal traffic in hazardous wastes, intended to provide a practical guide to assist in the enforcement of national laws implementing the Convention, and the training manual for the enforcement of laws implementing the Convention: guidance for safe and effective detection, investigation and prosecution of illegal traffic in hazardous wastes, which provides a basis for training law enforcement and Customs agencies with regard to all aspects of the illegal traffic of hazardous wastes.

23 www.basel.int/pub/modlegis.pdf.

24 www.basel.int/legalmatters/illegtraffic/index.html.

JAMAICA

In Jamaica the Natural Resources (Hazardous Waste) Control of Transboundary Movement) Regulations, 2002 (the "Regulations") create relevant offences.

Offence of Illegal Traffic

Regulation 22 makes it a criminal offence, punishable by fine or imprisonment in the case of illegal traffic in hazardous waste, that is, where a person imports hazardous waste into, transits hazardous wastes through, or exports waste from, an area under the jurisdiction of Jamaica –

- (a) Without notification pursuant to the provisions of these Regulations to every State concerned;
- (b) Without a permit and the consent of every State concerned;
- (c) With consent obtained from a State concerned through falsification, misrepresentation or fraud;
- (d) That does not conform in a material way with the documents; or
- (e) That results in the unlawful disposal of hazardous wastes in contravention of the Convention, the Natural Resources Conservation Authority Act, the Regulations and general principles of international law.

Offence of Failure to Return Waste

Regulation 20 deals with cases where a transit permit or export permit has been granted and, as the case may be, the wastes are in an area under the jurisdiction of Jamaica or the jurisdiction of a Convention State; the movement cannot be completed in accordance with the terms of the permit; and alternative arrangements cannot be made for their disposal in an environmentally sound manner.

In such cases, the permit holder has an obligation to ensure that the wastes in question are, in the case of a transit permit, taken back into the exporting State; in the case of an export permit, taken back into the area under the jurisdiction of Jamaica, within 90 days of the date on which the public authority and the Basel Convention Secretariat are so informed or within such other period as may be agreed between the parties. Subject to the foregoing, if in the circumstances the permit holder is unable to cause the wastes to be taken back into the exporting State or into an area under the jurisdiction of Jamaica, the hazardous waste shall be disposed of in an environmentally sound manner consistent with the Convention.

In both cases, the generator of any such waste shall ensure that during any period in which the waste is in an area under the jurisdiction of Jamaica, the waste is stored in accordance with the terms and conditions of the permit, the provisions of the Natural Resources Conservation Authority Act and any regulations thereunder and any other existing enactment for the management of waste.

Sentencing Options for Failing to Return Waste

Regulation 23 creates a separate criminal offence for failure to return hazardous waste which is punishable by a fine, imprisonment or both.

Dumping of Hazardous Waste

It is a criminal offence to dump or otherwise dispose of any hazardous waste in any area under the jurisdiction of Jamaica punishable by fine or imprisonment or by both.

AUSTRALIA

Hazardous Waste (Regulation of Exports and Imports) Act 1989 Act No. 6 of 1990 as amended (compilation prepared on 18 October 2001 taking into account amendments up to Act No. 118 of 2001)

"8 Reference to offence against Act etc. includes reference to offence against certain provisions of Crimes Act

In this Act: (a) a reference to an offence against this Act includes a reference to an offence against section 6 of the *Crimes Act 1914*, or section 11.1, 11.4 or 11.5 of the *Criminal Code*, that relates to an offence against this Act; and (b) a reference to an offence against a provision of Part 4 includes a reference to an offence against section 6 of the *Crimes Act 1914*, or section 11.1, 11.4 or 11.5 of the *Criminal Code*, that relates to an offence against that provision."

"10A Application of the Criminal Code

Chapter 2 (other than Part 2.5) of the *Criminal Code* applies to all offences against this Act."

Section 35 of the same Act deals with the requirements of article 9, paragraph 2(a), of the Convention

AUSTRALIA (*continued*)

“38 Orders authorising import of exported hazardous waste where it cannot be dealt with as intended

(1) If:

- (a) a person has exported hazardous waste in accordance with the requirements of this Act; and
- (b) the waste cannot be dealt with in accordance with:
 - (i) if the export was authorised by an export permit—the permit (including the permit conditions); or
 - (ii) if the export was ordered by the Minister under section 34—the order;
the person may apply to the Minister, in writing, for an order authorising the person to import the waste.

(2) If the Minister receives an application under subsection (1), the Minister may make the order.

(3) The Minister may, in the order, require that the waste be imported and dealt with in a specified way.

(4) Without limiting subsection (3), the Minister may, under that subsection, specify the day on or before which anything required to be done in relation to the waste is to be done.

(5) An order under this section may also require the person to give the Minister (by a specified time and in a specified manner) specified information relating to the dealing with the waste.”

Offences and penalties are provided for within the Act.

“40 Regulation of export of hazardous waste

Prohibition of exports

(1) A person must not export hazardous waste unless:

- (a) the person is the holder of an export permit authorising the person to export the waste; or
- (b) the person is the holder of a transit permit authorising the person to export the waste; or
- (c) the export has been ordered under section 34 or 35A.

Compliance with export permits

(2) The holder of an export permit must not:

- (a) export the hazardous waste to which the permit relates except in accordance with the permit; or
- (b) whether before or after exporting the hazardous waste to which the permit relates, breach any of the permit conditions.

Offence—intention, recklessness or negligence

(3) A person who intentionally, recklessly or negligently contravenes subsection (1) or (2) is guilty of an offence punishable on conviction by:

- (a) in the case of a body corporate—a fine not exceeding 2,500 penalty units; or
- (b) in the case of an individual—imprisonment for a term not exceeding 2 years.

Note: This penalty does not, by implication, affect the operation of subsection 4B(2) of the *Crimes Act 1914*.

Meaning of negligence

(4) A person is taken to contravene subsection (1) or (2) negligently if, and only if, the person’s conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- (b) such a high risk that the person’s conduct would contravene the subsection;
that the conduct merits criminal punishment.

Offence—intention or recklessness

(5) If:

- (a) a person intentionally or recklessly contravenes subsection (1) or (2); and
- (b) the contravention injures or damages, or is likely to injure or damage, human beings or the environment;
the person is guilty of an offence punishable on conviction by:
 - (c) in the case of a body corporate—a fine not exceeding 10,000 penalty units; or
 - (d) in the case of an individual—imprisonment for a term not exceeding 5 years.

Note: This penalty does not, by implication, affect the operation of subsection 4B(2) of the *Crimes Act 1914*.”

ETHIOPIA

Ethiopia has a dualist legal system for international law. Article 9 of the Constitution states that international agreements ratified by Ethiopia are to be considered as an integral part of the law of the land. Furthermore, international laws should be approved by the Council of Peoples' Representatives (Parliament) and be gazetted in the official Negarit Gazeta of the country.

Ethiopia ratified the Basel Convention by Proclamation No. 192/2000. In order effectively to implement the Convention, the Government has enacted subsequent proclamations, including the Environmental Pollution Control Proclamation (No. 300/2002) and the Solid Waste Management Proclamation (No. 513/2007). The former proclamation clearly defines hazardous material and hazardous waste as follows:

"Hazardous material" means any substance in solid, liquid or gaseous state, or any plant, animal or micro-organism that is injurious to human health or the environment; and

"Hazardous waste" means any unwanted material that is believed to be deleterious to human safety or health or the environment.

ETHIOPIA

PROSECUTION OF CRIMINAL ACTIVITIES RELATED TO HAZARDOUS WASTES

The Ministry of Justice of the Federal Democratic Republic of Ethiopia is part of the executive branch of the Federal Government of Ethiopia and has the authority to prosecute cases falling under the jurisdiction of federal courts. Article 23 of the Proclamation No. 471/2005 to provide for the definition of powers and duties of the executive organs of the Federal Democratic Republic of Ethiopia lists the powers and duties of the Ministry of Justice as to:

- Be Chief advisor to the Federal Government on matters of law;
- Represent the Federal Government in criminal cases falling under the jurisdiction of the federal courts;
- Order the conduct of investigation where it believes that a crime the adjudication of which falls under the jurisdiction of the federal courts has been committed; order the discontinuance of an investigation or instruct for further investigation on good cause; withdraw criminal charges in accordance with the law;
- Study the causes of and the methods of preventing crime; devise ways and means of crime prevention; coordinate the relevant government organs in crime prevention;
- Ensure that witnesses in a criminal case are accorded protection, as necessary;
- Assist victims of crimes or violations of human rights in civil proceedings to claim damages where such victims are unable to institute such claims in federal courts and to follow up the proceeding on their own;
- Institute or cause the institution of suits or intervene at any stage of the proceedings of such suits before federal and regional state courts, any judicial body or arbitration tribunal where the rights and interests of the public and of the Federal Government so require;
- Register religious organizations, non-profit making foreign organizations and, unless specific power is given to other government organs, non-governmental organizations and associations operating in the cities of Addis Ababa and Dire Dawa or in more than one regional State;
- Follow up, as necessary, the handling of civil suits and claims to which the federal government organs are parties; cause reports to be submitted to it on same, and ensure that competent staff is assigned for the purpose;
- Assist in the preparation of draft laws when so requested by federal and regional state organs;
- Issue, supervise and revoke licenses to advocates for practicing before federal courts;
- Provide legal education through the use of various methods with a view to raising public legal consciousness in relation to the protection of human rights; cooperate with the appropriate bodies regarding legal education and training;
- Undertake legal reform studies and carry out the codification and consolidation of federal laws; collect regional State laws and consolidate them as necessary.

ETHIOPIA

PROSECUTION OF CRIMINAL ACTIVITIES RELATED TO HAZARDOUS WASTES *(continued)*

Article 10 of the Council of Ministers Regulation No. 44/1998 for the administration of federal prosecutors stipulates that prosecutors shall be accountable to the Minister of Justice and their immediate superior. As the ultimate superior of all prosecutors, the Minister of Justice may thus initiate a specific criminal investigation or stop another. The Minister also has the authority to reverse a decision of a prosecutor or to dismiss a pending case.

The revised Criminal Code of Ethiopia clearly envisages pertinent provisions on crimes committed by polluting the environment under Title VIII - Crimes against public health. Art 520 of the Criminal Code states:

Article 520 - Mismanagement of Hazardous Wastes and other Materials.

Whoever:

- (a) fails to manage hazardous wastes or materials in accordance with the relevant laws; or
- (b) fails to label hazardous wastes or materials; or
- (c) unlawfully transfers hazardous wastes or materials, is punishable with a fine not exceeding five thousand Birr, or rigorous imprisonment not exceeding three years, or with both.

C. PENALTIES AND OTHER AVAILABLE REMEDIES

53. Penalties for violations of environmental law include fines, suspension of a licence, community service, seizure of profits or forfeiture of proceeds, reimbursement of costs for the seizure, storage or detention of wastes, payment of the costs associated with the environmentally sound disposal of the wastes, home detention and prison. Penalties of a financial nature are usually expected to take the profit out of the criminal activity, while the possibility of depriving someone of his or her liberty can be seen as the greatest deterrent.

THE NETHERLANDS

In the Netherlands violations for waste shipments offences are considered to be economic offences and are prosecuted under the Economic Offences Act, which has incorporated environmental protection within its scope since the 1970s with reference to the Environmental Management Act. The effect of this is that, at present, a natural person may face a custodial sentence of up to six years' imprisonment and a fine of €76,000 and legal persons face a maximum fine of €760,000 per offence. Other measures also exist, such as confiscation of illegal profits. Sanctions for illegal waste shipments involving failure to comply with the European Union regulations on waste shipments, which implement the Basel Convention, are calculated according to a formula based on the quantity of the waste. This is described in more detail in the case study outlined in section 7 of this manual.

MEXICO

In Mexico, article 414 of the Federal Criminal Code in relation to crimes against the environment and environmental management lays down a penalty of one to nine years in prison for a person who unlawfully, or without applying the necessary preventive or safety measures, engages in the production, storage, traffic, import or export, transport, abandonment, disposal, discharge of, or any other activity with hazardous substances due to their corrosive, reactive, explosive, toxic, flammable, radioactive or similar characteristics, ordered or authorized, to cause damage to natural resources, flora, fauna, ecosystems, water quality, soil, groundwater or the environment.

In addition to criminal penalties, other administrative and commercial penalties also apply in cases of transboundary movements of hazardous wastes that do not comply with the national and international regulatory framework.

ETHIOPIA

The Environmental Pollution Control Proclamation No. 300/2002 states that any person involved in offences related to illegal movement of hazardous waste and material will be liable to civil and criminal sanctions. Accordingly, article 12 of the Proclamation provides that:

- (1) A person who, under this Proclamation or under any other relevant law, commits an offence, for which no penalty is provided for either in the Penal Code or under this Proclamation, is liable on conviction:
 - (a) In the case of a natural person, to a fine of not less than 5,000 Birr and not more than 10,000 Birr or an imprisonment of not more than one year or both.
 - (b) In the case of a juridical person, to a fine of not less than 10,000 Birr and not more than 20,000 Birr.
- (2) Where a juridical person is convicted pursuant to subparagraph 1 of this article, the officer in charge, who should have known of the commission of the offence and who failed to fulfil his duty appropriately, shall be liable to a fine of not less than 5,000 Birr and not more than 10,000 Birr or imprisonment of not more than two years or both.
- (3) Unless the provisions of the Penal Code provide more severe penalties, the penalties laid down under this Proclamation shall be applicable.

The Solid Waste Management Proclamation, which was issued in 2007 as a general framework of the solid waste administration, provides for penalty clauses. It lists prohibited activities within an urban environment. One such prohibition concerns the importation of used tyres for final disposal in Ethiopia.

V. PREPARING TO PROSECUTE A SUSPECTED CASE OF ILLEGAL TRAFFIC

A. POTENTIAL RESPONSES TO AN ALLEGED CASE OF ILLEGAL TRAFFIC

54. The provisions of the Convention can be enforced in various ways, such as through administrative, civil or criminal proceedings. In addition, an out-of-court settlement can, in some instances, be considered the most suitable way forward. A regulatory or enforcement agency may have various options open to it, depending on the nature and severity of the transgression. Moreover, different jurisdictions will operate according to their own rules, practices and processes. In some countries, prosecutors lead the investigation and in others it is carried out by an independent, specialized entity. In Argentina, for example, in addition to judges and prosecutors a specialized agency, the Public Prosecutor's Office for Environmental Crimes Investigations (UFIMA), conducts preliminary investigations and leads the investigations into violations of Act No. 24,051 of 1991 on hazardous wastes and all cases of environmental crimes.

55. Whichever entity is responsible for preparing the case, similar activities to collect, collate and present evidence of sufficient quality and substance to prosecute a case will be required. It will often be necessary to pursue investigations in cooperation with competent authorities and enforcement and policing and Customs agencies from different countries, between different time zones and languages, which can add to the time, cost and complexity of preparing cases. It will be necessary to obtain evidence, such as witness statements, and then decide on the appropriate course of action, for instance whether to proceed with a prosecution.

B. CRIMINAL PROSECUTION, ADMINISTRATIVE OR CIVIL PROCEEDINGS²⁵

1. Criminal prosecution

56. A decision may be taken on whether cases may be addressed by civil or administrative means under national laws or whether a case should be the subject of a criminal prosecution. If there is scope for discretion, the authorities may weigh the extent of the damage against that of the culpable conduct and the reasonable chances of success of a prosecution. The jurisdiction of which country under which a suspected case of illegal traffic has the best chances of leading to a conviction is also a factor that may be taken into account before bringing a case to court.

57. In England and Wales, the Environment Agency would always require a decision to prosecute to be made. This decision would need to be taken in compliance with the Crown Prosecution Service Code for Crown Prosecutors and the Agency's own enforcement and sanctions statement.²⁶ It would be necessary to show that the Agency has met the evidence test of "a realistic prospect of conviction" together with the public interest test. Further guidance on enforcement and sanctions is provided by the Agency to demonstrate its approach,²⁷ which is used when considering whether an enforcement response is necessary to achieve the desired outcome (i.e., compliance). A full explanation of the Agency's approach to enforcement and sanctioning is given in its operational instructions, known as the "Offence Response Options",²⁸ which describe the options available to counter every offence that is subject to regulation by the Agency. An example of the approach that the competent authority takes in preparing cases that may come before the courts is given below.

58. Set out below is an extract from the Offence Response Options. It refers to operational instruction 1430_10, which was issued on 1 April 2011. In the extract, "Regulation" refers to the Transfrontier Shipment of Waste Regulations 2007 and "Article" refers to the Regulation (EC) No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

5.6.1 GENERAL REQUIREMENTS FOR SHIPMENT OF WASTE					
Regulation 17		Failure to comply with Article 49(1), manage shipments of waste in an environmentally sound manner and without endangering health.			
Standard criminal and offence specific responses					
Warning	Formal Caution	Prosecution	Fixed Penalty Notice		
✓	✓	✓	X		
Civil Sanctions which can be imposed					Offered
Compliance Notice	Restoration Notice	Fixed Monetary Penalty	Variable Monetary Penalty	Stop Notice	Enforcement Undertaking
X	X	X	✓	X	✓
Other considerations and notices specific to this offence					
Suggested notice(s): n/a					
Position Statements (link or position): n/a					
Further information: n/a					
Relevant commencement dates: Civil sanctions are only available for offences which occurred after 6 April 2010 in England and 15 July 2010 in Wales					

25. References: Steven Molino "Practical Difficulties in Prosecuting Environmental Offenders". 12 April 2011. Available from www.aic.gov.au/publications/previous%20series/proceedings/1-27/~/_media/publications/proceedings/26/molino.ashx Central Virginia Environmental Crimes Task Force "Resource Guide for the Investigation of Environmental Crimes", January 2005. 12 April 2011. Available from http://www.vaemergency.gov/sites/default/files/ECTF_resourceguide0105.pdf

26. A published document that can be found at <http://publications.environment-agency.gov.uk/pdf/GEHO0910BSZJ-e-e.pdf>.

27. <http://publications.environment-agency.gov.uk/pdf/GEHO0910BSZL-E-E.pdf>.

28. www.environment-agency.gov.uk/static/documents/Business/ORO_External.pdf.

59. It may be noted in this example that the prosecutor's decision-making process allows some discretion regarding the most appropriate route to be taken in the prevailing circumstances, which may or may not result in a decision to prosecute in the courts. A warning, a caution (admission of guilt but without a trial) or prosecution are all available remedies.

2. Administrative sanctions

60. Commonly and widely employed by competent authorities, administrative sanctions can be applied to cases in which operators, companies or persons involved in transboundary movements are deficient in their application of the specific movement and notification process. A range of responses may be used, including notices to require actions to be taken (or ceased) and penalties, without recourse to the courts and in proportion to the scale of the misdemeanour (the quantity of waste, hazardousness and lack of a proper description, among other things).

3. Civil measures

61. These may be applied for breaches for which criminal trials are deemed not appropriate, and their flexibility may help to promote improved compliance, without involving the legal requirements of preparing a case for prosecution. Undertakings or penalties may be lower than those imposed by administrative or criminal procedures but may be more proportionate, cost-effective and dispensed more rapidly. In essence, the means will depend on whether they are expected to achieve the desired objective and act as a suitable deterrent. There may also be the possibility of applying compensation measures, as envisaged in Article 12 of the Convention (the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal is not yet in force), through domestic legislation.

4. Constitutive elements of the crime

62. In establishing the constitutive elements of the crime of "illegal traffic", possible points of contention may include: assessing whether a substance or good is a "waste"; whether the waste is a "hazardous" or "other" waste according to the Convention (or is designated so in the State concerned); whether a "transboundary movement" occurred; and whether any of the elements (a)–(e) given in paragraph 1 of Article 9 to the Convention are deemed to have taken place. Obviously, the task of the prosecutor and the judge is made easier if the national implementing legislation is clear, complete, in line with the Convention and provides clear rules and consequences in case of violation of these rules.

63. In addition, the prosecutor may seek to put the severity of the alleged offence in a broader context by demonstrating criminal activity associated with the illegal traffic offence. This will depend on the provisions of the relevant legislation, but may include the violation of other domestic environmental legislation or more traditional criminal offences (such as forgery, fraud, false statement, money laundering, bodily harm and property damage). The prosecutor may also invoke general environmental principles, applicable at the national level, to support the case (e.g., the polluter pays principle, the precautionary principle, sustainable development, the principle of common but differentiated responsibilities, the principle of equal access to justice, and intergenerational equity). Moreover, the prosecutor may consider whether it is a case of organized crime and base the prosecution on the national legislation implementing the United Nations Convention against Transnational Organized Crime.

64. One of the biggest challenges facing enforcement entities, including prosecutors, is to prove the existence of a "waste" that is "hazardous". Under the Basel Convention, a substance or an object is waste if it is disposed of, intended to be disposed of or if it is required to be disposed of by the provisions of national law. This definition relies in part on subjective elements that may prove difficult to establish with certainty unless an objective element is added. Some attempts have been made to provide definitive answers by using pictorial manuals and descriptions, akin to those used for chemical safety manuals, or

guidance with photographic comparisons. This is, however, often complicated by the fact that wastes are often mixtures of various substances, whose contaminating or hazardous components may only be revealed by further laboratory testing. The Netherlands produced a reference book of waste substances, detailing the characteristics of some 160 substances in alphabetical order, from activated carbon to zinc skimmings. The book includes photographs and provides available reference numbers from relevant lists: the List of Wastes (formerly the European Waste Catalogue), the United Nations numbers²⁹ and the World Customs Organization Harmonized Commodity Description and Coding System.³⁰

65. Often the facts of the case will speak for themselves, but the complexities of the case will depend on the type of waste involved. For example, in the case of tyres, the first task is to prove whether the items are wastes and such prosecutions will generally stand or fall on this definitional issue. For household waste (classified under category Y46 in the Convention), issues regarding which sampling protocols were used and whether they have been complied with can be key to a successful prosecution.

66. Where items are alleged to be hazardous, it is also necessary to prove the hazardous nature. For example, waste electrical and electronic equipment may be classified as either a hazardous or a non-hazardous waste.

67. In some cases it may be necessary to prove whether the items are destined for disposal or recovery due to the way in which the regulations are drafted (for example, the Transfrontier Shipment of Waste Regulations in the United Kingdom of Great Britain and Northern Ireland). This can give rise to practical issues when the shipment is destined for a distant country and the competent authority or other investigation body requires resources to send officers abroad to collect necessary evidence.

C. WHOM TO PROSECUTE

68. In theory, anybody involved in illegal transboundary movements can, potentially, be prosecuted: the generator, the exporter, the importer, the individuals completing the paperwork (freight forwarder, broker, shipping facilitator or coordinator) and the disposer. The application of national offences and penalties to the various actors involved in a transboundary movement will be set out in the national legal framework. Similarly, how far the powers of a prosecutor and the jurisdiction of a court can extend to such actors who are physically or legally established in a foreign country is a matter for national legislation to clarify. Aiding or abetting, attempting or conspiring to commit a crime may also open the door to criminal liability. Whether criminal intent (*mens rea*) is a material element or not (strict liability) and to what extent (knowledge or wilfulness) is also a matter to be clarified in the national legal framework.

69. A decision will also need to have been taken on whether charges should be brought against a legal entity (a business or corporate organization), an individual or both. The particular circumstances and facts of the case, including the nature of any harm caused, should have been examined to determine how to proceed. The national legal framework may also limit or proscribe what entity may be prosecuted. Also for consideration would be whether other, related charges regarding other offences are to be taken into consideration: for example, theft, assault, criminal damage, falsification of records or conspiracy or even corporate manslaughter may all have a bearing on the case.

29 Four-digit numbers that identify hazardous substances and articles (such as explosives, flammable liquids and toxic substances) in the framework of international transport.

30 Reference Book of Waste Substances, 2001 (Elsevier bedrijfsinformatie BV, The Hague, The Netherlands).

D. OBTAINING EVIDENTIAL MATERIAL, COMMUNICATION AND COOPERATION

70. The system of prior informed consent established under the Basel Convention relies upon cooperation between the actors (generator, exporter, importer, disposer and competent authorities in the States concerned) for its successful and smooth operation. In much the same way, the investigation and prosecution of cases may rely on cooperation between investigating authorities and enforcement agencies and prosecutors within and between different jurisdictions. The complexity of preparing such cases rapidly multiplies with number of agencies involved and requires careful case management to optimize the prospects of conviction. This process is envisaged in paragraph 5 of Article 9 of the Convention, which requires parties to “cooperate with a view to achieving the objects of this Article”.

71. Interview techniques and other procedures, such as searches, sampling and forensic investigations, are more relevant to investigators than prosecutors. The procedural issues surrounding them might, however, be useful to prosecutors. For example, it will be important to determine whether the interview was properly carried out according to the relevant regulations, guidelines and codes of practice pursuant to evidence gathering for criminal cases; whether a legal representative was present at the interview; who was interviewed; and in what capacity. All these may determine whether the interview is legally admissible. Similarly, procedural points could be raised over searches: whether they were legal and whether any evidence seized from the searches would be admissible. Surveillance may have been used as an investigative tool and its authorization may be examined to determine its lawfulness and whether the evidence gathered is admissible. Chapters 6 and 7 of the Convention training manual on illegal traffic for Customs and enforcement agencies provides useful guidance on the collection of evidence.³¹

E. COMPATIBILITY BETWEEN COMPETENT AUTHORITIES AND NATIONAL JURISDICTIONS IN INVESTIGATIONS

72. Different approaches exist, even for closely grouped countries such as the European Union, which has an overarching regulation that implements the Basel Convention but each member State has its own, necessarily different, means of investigation, compliance and enforcement and of effecting legislation to define penalties according to its own established framework. For example, in England and Wales, the competent authority for transboundary shipments of waste, the Environment Agency, has established its own prosecution service. The Agency has specialist environmental prosecutors who work closely with specialist investigation teams. A number of the latter are former police officers with an investigative background, while others are technical specialists with environmental training. Perhaps in contrast to other public prosecutors, the Environment Agency’s prosecutors deal only with environmental crime. This is considered to be beneficial when preparing cases and also allows close relations to be established and maintained between the investigating officers and prosecutors, enabling the thorough preparation of the case before it goes to court. The courts themselves are not specialized. This specialization is not universal: for example, in the Crown Prosecution Service, which deals with other criminal matters, often a prosecutor will only meet a police officer for the first time on the morning of the trial.

73. The Netherlands operates on a slightly different basis, treating environmental crimes as economic crimes (see case study in section 7). Investigations are carried out by the police, in cooperation with the Inspectorate of the Ministry of Infrastructure and Environment and its separate Investigation Department, and the Customs authorities. Law enforcement in the Netherlands is provided by 25 regional police forces and a national police force. Each of the 25 regional forces has a regional environmental team, which is a separate unit for investigating environmental crimes.

74. In Norway, the National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM) is the central unit in charge of investigating and prosecuting economic and environmental crimes, and is the main source of specialist skills for the police and the prosecuting

31 www.basel.int/legalmatters/illegtraffic/trman-e.pdf.

authorities in their combat against crimes of this kind. ØKOKRIM was established in 1989 and is both a specialist police agency and part of the public prosecutor's office with national jurisdiction. The ØKOKRIM formal rules can be found in chapter 35 of the Prosecution Instructions.³²

75. While these examples reflect the differing systems, the fundamental process of evidence collection and prosecution case preparation will be broadly similar.

F. COOPERATION AND ASSISTANCE IN OBTAINING EVIDENCE

76. In cases of transboundary illegal traffic in wastes, cooperation may be sought through inter-agency communication to produce corroborative evidence and witness statements. A prosecutor may call upon resources of the policing organizations for this purpose or contact them directly according to arrangements that may be in place. There are two principal routes for obtaining evidence from abroad: through mutual legal assistance (a judicial route) and by informal cooperation between law enforcement agencies (also referred to as mutual administrative assistance).

1. Mutual legal assistance

77. Mutual legal assistance is a request for assistance from a judge or prosecutor in one jurisdiction to a judge or prosecutor in another (i.e., from one judicial authority to another), usually citing mutual obligations arising from bilateral or multilateral agreements. Some jurisdictions can provide assistance without any underlying agreement, purely on the basis of reciprocity. The availability of mutual legal assistance will depend on the country in question and whether there is an agreement covering mutual assistance or a reciprocal arrangement. This assistance can be a resource-intensive tool that places the onus on the person making the request and considerable burdens on the recipient. It would normally be used only where it would add genuine value to a case and the assistance sought could not be obtained by another, less formal route.

2. Informal cooperation (mutual administrative assistance)

78. Informal cooperation between law enforcement agencies may also take place. This may be underpinned by a memorandum of understanding or multiagency memorandum of understanding. Examples of such assistance are the provision of information taken from public access databases in the country concerned and confirmation of the location of a company's premises or the existence of a particular address.

79. In general terms mutual administrative assistance can be used for:

- (a) Exchanging intelligence;
- (b) Exchanging information that is already in the public domain to be used as evidence;
- (c) Exchanging some evidence obtained through non-coercive measures (it should be noted that countries' rules vary as to what can be obtained in this way: some matters that might be classified as non-coercive in one jurisdiction may be classified as coercive in another).

80. It may also be possible for evidence gathered from third parties, such as non-governmental organizations, to be used, but such evidence often gives rise to issues surrounding admissibility, particularly as a result of compliance with evidence-gathering laws in the country concerned.

81. Practical considerations of such issues in another context can be found on the website of the Environmental Investigation Agency, which contains useful and interesting information on evidence gathering in timber-producing countries.³³

32 www.okokrim.no/artikler/in-english.

33 www.eia-international.org/

VI. SENTENCING FOR ILLEGAL TRAFFIC

82. Sentences are a matter for the relevant court or tribunal and may be delimited by a number of factors, depending on the latitude allowed, up to the maximum penalty provided for by the legislation and the practice of the country concerned. The maximum penalties available are typically found in the relevant legislation. Mitigating and aggravating circumstances may be taken into account when sentencing. Some jurisdictions have extensive guidelines that list these circumstances, in accordance with established principles, to provide consistency and the desired or necessary level of punishment. This is of particular value in giving effect to the obligation set forth in paragraph 4 of Article 4 of the Basel Convention: “[to] take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention”. Approaches that use sentencing guidelines may be especially valuable for cases heard in non-specialist courts, which may see relatively few environmental prosecutions. Examples of how this can be achieved are given below.

ENGLAND AND WALES

83. In England and Wales sentencing guidelines are provided for environmental offences. The Sentencing Council for England and Wales, established by the Coroners and Justices Act 2009, is now responsible for the production of guidelines on sentencing. This is an authoritative body of the Ministry of Justice that has replaced previous organizations, the Sentencing Guidelines Council and the Sentencing Advisory Panel. A number of guidelines are available, including interactive video scenarios, based on actual cases (“You be the Judge”).³⁴ With regard to environmental offences, a revised version of the guidance for sentencers (“Costing the Earth”) is currently available on the Magistrates’ Association website.³⁵ The guidance refers to and explains various environmental and sentencing questions, using 47 detailed case studies covering environmental issues from air pollution to wildlife. The guidance was first published in 2002 by the Magistrates’ Association in recognition of the increasing number and importance of these cases and the lack of any available guidance.

84. Various useful principles to take into consideration when determining a sentence, based on frequently asked questions, are set out in the guidance and may be applied to any sentencing considerations in relation to illegal traffic in wastes. They are:

“For any given case the following questions, principally of the prosecution, could be asked:

- What is the cost of any damage arising from the illegality – both financial and qualitative (damage to the environment etc)?
- What is the cost of any clear-up of the damage; and who will bear/has borne it? Can a compensation order be made to cover some or all of that cost?
- Are the company’s accounts available? What do they show about the impact of the illegality on the firm’s finances?
- What is the cost of conducting the business legally – obtaining licences, permits, remedial/preparatory/compliance works to enable a licence to be granted etc?
- What are the court’s powers – fine, custody etc? Compensation? Prosecution costs? Confiscation order or any other ancillary orders?
- What sentences have been imposed in other similar cases?”

34 <http://sentencingcouncil.judiciary.gov.uk/>.

35 www.magistrates-association.org.uk/Earth.

85. Although these sentencing guidelines do not specifically refer to transboundary waste offences, in practice the principles may be applied by analogy. In addition, in this context the prosecution may make use of more general and, most likely, more familiar advice on sentencing from the Attorney-General together with section 143 of the Criminal Justice Act (2003) as the starting point, together with the document on the prosecutor's role in the sentencing exercise. This sets out matters that the prosecutor must refer to when making submissions on behalf of the Crown for sentencing, such as aggravating and mitigating factors and victim impact statements. Table 1 in section VII of this manual provides examples of actual sentences handed down for convictions for transboundary waste shipment offences in England and Wales from 2004 to 2009.

86. It may also be possible to issue ancillary orders where available. This may include the ability to strike off directors of a company, to demand compensation, or, where legislation permits, to seize the proceeds of crime (illegal profits).

VII. REMAINING INFORMED ABOUT ILLEGAL TRAFFIC AND TRAINING

87. Environmental law is continually evolving and changes will occur regularly at both the international and national levels. A variety of sources may be consulted that will assist those wishing to remain up to date with matters pertaining to illegal traffic in hazardous wastes and general issues related to environmental crime. Much is available online, where it can be searched readily. Confirmed cases of illegal traffic, which should include all court cases resulting in guilty pleas and verdicts, should be reported to the Basel Convention Secretariat. A special form is available to do this.³⁶ That said, however, few cases involving wastes and illegal traffic are posted on the sites found, including that of the Convention. This is an area that can be developed further. These and other potentially useful sources of information are indicated below, including activities and programmes that support capacity-building for judges and prosecutors in this area.

A. BASEL CONVENTION WEBSITE

88. Amendments to the Convention are rare and, in any event, subject to the conditions for their entry into force. Other decisions will be taken at meetings of the Conference of the Parties to the Convention approximately every two years. New guidelines on topics from the work programme of the Convention will be approved by parties and then published by the Secretariat on the website. New material is flagged and there is a special section on illegal traffic. The website is available at <http://www.basel.int/index.html> and the section on illegal traffic at <http://www.basel.int/legalmatters/illegtraff/index.html>.

B. ECOLEX

89. ECOLEX is a database containing the most comprehensive, global information on environmental law, operated jointly by the Food and Agriculture Organization of the United Nations, the International Union for Conservation of Nature and UNEP. It is found at <http://www.ecolex.org/ecolex/ledge/view/SimpleSearch;DIDPFDSIjsessionid=4F5E3E8769B53EAB6E2185621F8F0DF1>.

36 www.basel.int/legalmatters/illegtraff/illegtrafform.pdf.

C. INSTITUTIONS INVOLVED IN ENFORCEMENT

90. Provided below are links to other institutions involved in the enforcement of international agreements on hazardous wastes:

- European Union Network for the Implementation and Enforcement of Environmental Law (<http://impel.eu/>)
- Green Customs Initiative (<http://www.greencustoms.org>)
- International Maritime Organization (<http://www.imo.org>)
- International Network for Environmental Compliance and Enforcement (<http://www.inece.org>)
- Interpol Environmental Crime Unit (<http://www.interpol.int/Public/EnvironmentalCrime/Default.asp>)
- United Nations Environment Programme, Division of Environmental Law and Conventions, (<http://www.unep.org/DEC/index.asp>)
- United Nations Office on Drugs and Crime (<http://www.unodc.org>)
- World Customs Organization (<http://www.wcoomd.org>)

D. NATIONAL ASSOCIATIONS OF LAWYERS

91. A number of countries have specialist law groups for environmental issues, such as the United Kingdom Environmental Law Association,³⁷ which is the foremost membership organization in the United Kingdom working to improve understanding and awareness of environmental law, and to make the law work for a better environment. Its members include lawyers and non-lawyers from across the private, public and voluntary sectors. It publishes a bimonthly electronic journal, entitled “e-law”, which is available to members and contains news, events and papers.

E. SPECIALIZED TRAINING

92. Specialized training is available from governmental and non-governmental organizations. The Basel Convention Secretariat has developed a training manual on illegal traffic for Customs and enforcement agencies as a basis for training law enforcement and Customs officers with regard to all aspects of the illegal traffic of hazardous wastes. A directory of training institutions offering activities aimed at improving capacity for detection, prevention and prosecution of cases of illegal traffic is also available from its website.

93. Some training tools are also developed specifically for other entities involved in the hazardous wastes enforcement chain, such as Customs and police officers. Although not specifically tailored to prosecutors and the judiciary, these tools have substantial value. For Customs officers, an e-learning tool on the Basel Convention, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Convention on Persistent Organic Pollutants is being developed in cooperation with the World Customs Organization and will be available online in 2012. Training for Customs is also dispensed in the framework of the Green Customs Initiative. For police officers, a similar tool is being developed with INTERPOL, also to be made available in 2012. In addition, a training manual for police officers, focusing on implementing the European Union regulation on shipments of waste, has been developed as part of the framework of the pan-European Augias project.³⁸

37 www.ukela.org/.

38 For more information, contact the Augias team on: +32 2 644 82 29 or at: Augias@police.belgium.eu.

94. Some other multilateral environmental agreements have also identified the need for targeted information and training in this area. CITES provides an interactive training course for enforcement officers and information module for prosecutors and the judiciary on CD-ROM.³⁹

F. JUDGES PROGRAMME

95. The United Nations Environment Programme (UNEP) has initiated a judges programme, targeted at the more specific needs of judicial stakeholders, based on the idea that the role of the judiciary is fundamental to promoting compliance with and enforcement of international and national environmental law. It aims to promote networking, sharing of legal information and the harmonization of implementation approaches of global and regional instruments. Further information is available in the UNEP compendium of summaries of judgements in environment-related cases.⁴⁰

96. The programme is implemented by the Division of Environmental Law and Conventions in collaboration with relevant divisions and regional offices of UNEP, in addition to several partner agencies.

97. National programmes of work are implemented by the chief justices and the respective national judicial training institutions, with the support of UNEP, in conjunction with a global alliance of partners, including the World Bank Institute, the United Nations University, the United Nations Institute for Training and Research, the International Union for Conservation of Nature, academic institutions and regional and national institutions with relevant capabilities in the area of environmental law, training and education.

98. The programme also includes the development of a series of environmental law training materials, which are translated into the official languages of the United Nations. These materials include:

- (a) UNEP training manual on international environmental law;
- (b) Judicial handbook on environmental law;
- (c) Handbooks for drafting laws on specific topics such as water, energy, land and soil management and economic instruments, such as the guidebook for policy and legislative development on conservation and sustainable use of freshwater resources;⁴¹
- (d) Two UNEP collections of selected texts of legal instruments in international environmental law and the register of international treaties and other agreements in the field of the environment;⁴²
- (e) Compendium of summaries of judgments in environment-related cases from around the world.

G. PROSECUTOR AND JUDGE NETWORKS

99. Several networks have been established to facilitate the exchange of information between judges and prosecutors, some under the banner of the International Network for Environmental Compliance and Enforcement.⁴³ **Other networks or forums include** the European Police Office, the European Union's Judicial Cooperation Unit, and the European Union Forum of Judges for the Environment. Additional relevant networks or forums currently under discussion include a working group on envicrime.net, a European prosecutors' network for the regulation on the shipments of waste, and a European network of prosecutors for the environment.

39 www.cites.org/eng/resources/publications.shtml.

40 www.unep.org/dec/PDF/UNEPCompendiumSummariesJudgementsEnvironment-relatedCases.pdf.

41 <http://opentraining.unesco-ci.org/tools/pdf/otpitem.php?id=640>.

42 UNEP/Env.Law/2005/3.

43 <http://www.inece.org>.

VIII. EXAMPLES OF CASES OF ILLEGAL TRAFFIC

100. Successful prosecutions have a deterrent effect and help to improve standards of compliance generally. They also serve to fulfil the obligations of Article 9 of the Basel Convention that illegal traffic should be punished. This chapter contains examples of cases of illegal traffic as reported by the press, competent authorities or prosecutors.

A. ARGENTINA: TWO PRELIMINARY INVESTIGATIONS BY THE PUBLIC PROSECUTOR'S OFFICE FOR ENVIRONMENTAL CRIMES INVESTIGATIONS (UFIMA)

101. The first case concerned black liquor produced during the kraft process, containing residual bleach cellulose sulfate, which is a hazardous waste, due to the hazardous properties it displays, given in Annex II of the Act 24.051, and its importation is prohibited under Annex I of the same law which lists the categories subject to controls (Y35).

102. An administrative process was initiated by the Regional Customs Office in Rosario (Dirección Regional de Aduana de Rosario). It was then sent to the Customs Office in La Plata (Dirección Aduanera de La Plata) as it concerned an operator and unusual merchandise. Subsequently, the National Department for the Environment and Sustainable Development (SAyDS) intervened, confirming that the substance that had entered the country constituted a hazardous waste (Y35).

103. Customs conducted a preliminary investigation into the importer, customs broker and freight forwarder for infringement of arts. 47, 51, 64, 68, 100 and 103 of the Customs Code.

104. Therefore, UFIMA lodged a case for violation of article 863 of the Customs Code and took into account article 3 of Act 24.051 and Regulatory Decree 831/93, and determining that it was a case of smuggling of hazardous waste according to article 9 of the Basel Convention. The process is pending before the Federal Court of Concepción del Uruguay (Entre Ríos, Argentina) and is in the investigation stage.

105. Another case was a shipment containing 52 tons of hazardous waste (scrap iron and steel; filters used for oil, fuel and free liquids; leftover paint cans; insecticide containers; cans of leftover adhesive; batteries in disused appliances; containers with traces of drugs for veterinary use; disused printed circuit boards, etc.) from the Republic of Paraguay and destined for the province of Santa Fe, in Argentina. The importation of such waste infringed article 41 of the Constitution, which prohibits entry to the country of wastes that are or are potentially hazardous. It also constitutes illegal traffic of hazardous waste according to article 9 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and is thus a violation of article 3 of Law 24.051 and its Regulatory Decree No. 831/93 and article 1 of Decree 181/92.

B. VIRIDOR RESOURCE MANAGEMENT: VIRIDOR RESOURCE MANAGEMENT ORDERED TO PAY £110,000 FOR ILLEGAL WASTE EXPORTS

106. Viridor Resource Management Limited has been fined a total of £75,000 and ordered to pay costs of £35,000 at Maidstone Crown Court for illegally shipping mixed plastic waste to Dubai.

Protecting environment is shared responsibility says Judge

Businesses that fail to take their environmental responsibilities seriously and illegally export recyclable waste were last week (Friday 15 May 2009) criticized by a Crown Court judge and warned that they face prosecution by the Environment Agency.

The warning comes after Viridor Resource Management Limited, previously known as Grosvenor Waste Management Limited, was fined a total of £75,000 and ordered to pay costs of £35,000 at Maidstone Crown Court for illegally shipping mixed plastic waste to Dubai in the United Arab Emirates.

In sentencing the company His Honour Judge Statman:

“It is incumbent on us all to protect the environment not just for ourselves but for our children and future generations. I am grateful to the Environment Agency for the presentation of its case and the role it performs in society.”

The company, now a Viridor subsidiary, pleaded guilty at Dartford Magistrates Court in November 2008 to five charges relating to the illegal export of 25 40-foot containers, holding almost 430 tonnes of plastics from various sites in England and Wales, via Felixstowe and Southampton to Dubai between November 2006 and April 2007.

The case was then referred for sentencing to Maidstone Crown Court who today heard that neither the Environment Agency, which is responsible for enforcing waste shipments into and out of England and Wales under the Transfrontier Shipment of Waste (TFS) Regulations, nor its counterpart, the UAE Federal Environment Agency (UAE FEA), were notified of the exports - in breach of TFS rules.

UK waste exports to the UAE are also subjected to the strictest controls of notification and written consent, so it was unlikely that the shipments of plastic would have been allowed to go ahead if the Agency had been notified, the court was told.

During their inquiries Environment Agency officers who were asked to investigate the origin of the shipments in the UK by the UAE FEA in April 2007, unearthed a contract between the defendant and the Ajman authorities to build and operate a recycling plant in the Emirate.

The court heard the company had told some of its suppliers that the materials would be sent to Dubai where the defendant had opened a recycling facility. This was contrary to the contract which stipulated that waste from the UAE would be treated at the facility.

Despite a formal request to return the waste to the UK, which was served in May 2007, it is thought to have ended up in India and Malaysia.

Grosvenor was fined £55,000 in April 2007 for shipping 75 container loads of mixed household waste from London and the Home Counties to the Far East, including India, China and Indonesia, between November 2004 and February 2005.

Angus Innes, Prosecutions Team Leader for the Environment Agency, said:

“Grosvenor knew full well what its legal responsibilities were. In 2003 and 2004 we rejected their applications to ship waste to non-OECD countries. The company has also repeatedly been told both verbally and in writing of the need, in many cases, to notify the Environment Agency of proposed TFS shipments to non-OECD countries. In fact it was successfully prosecuted by us 16 months ago for failing to do just that.

“The purpose of the laws governing waste shipments is to ensure the authorities in the country receiving the waste can properly treat and recycle it - flouting these laws puts both the environment and human health at risk.”

Judge Statman added that he did not regard the offences as less serious than the previous offences faced by Grosvenor because the waste was shipped to a country that had not responded to the European Union's request for waste controls. As such the EU could not impose its own requirements for green-list materials on countries such as the UAE.

Grosvenor Waste Management has since been taken over by Viridor Limited. It now operates under the name Viridor Resource Management Limited, registered at Peninsula House, Exeter."

Source Environment Agency: <http://www.environment-agency.gov.uk/news/107603.aspx?page=6&month=5&year=2009>

C. E-WASTE TO AFGHANISTAN: RECYCLER FINED FOR ILLEGAL WASTE SHIPMENT ABROAD

107. The boss of an electrical recycling company has been convicted of illegally shipping old computers and other waste to Afghanistan. Naveed Sohail was today (24 February) convicted at Bradford Magistrates' Court of four counts of illegally storing and shipping hazardous waste after a two-day trial. Mr. Sohail, 44, of Catergear Mill, Thornbury Road, Bradford, West Yorkshire, who had represented himself in court, was fined £1,000 for each of the four offences and was ordered to pay full prosecution costs of £8,200.

108. Louise Azmi, prosecuting counsel for the Environment Agency, told the court that Mr. Sohail was a director of Quest International Trading Limited ("Quest"), based at Catergear Mill, which collected electronic and electrical equipment for export abroad, specializing in second-hand computer monitors, stands and hard drives. The company carried out some minor repairs on site. She said anyone exporting waste electrical goods from the UK has to comply with the Waste Electrical and Electronic Equipment Directive 2007, and be able to show whether what they are shipping is classed as waste (electrical goods which do not work are viewed as waste). Waste shipments abroad also are subject to the Transfrontier Shipment of Waste Regulations 2007, which ban the movement of some types of waste to specific countries because of the risk to human health and the environment through unsafe disposal and recovery methods, such as burning electrical components.

109. On 9 July 2009 Environment Agency officers attended Catergear Mill and provided Mr. Sohail with advice on rules about exporting electrical items and the permits he might need. They raised concerns about the ways items were being packaged inside a container. Mr. Sohail told the officers that his company did not purchase electrical waste and he would reject anything damaged in transit. On 1 September 2009, a container was returned to Quest after checks identified the contents as electrical waste. It had been on its way to Afghanistan. Environment officers examined items from inside the container and found computer monitors, wrapped in cling film and stored on pallets, as well as a large number of computers piled up haphazardly behind them. Some items were labelled as faulty while others were damaged.

110. Miss Azmi said the Environment Agency tested 42 items from the container and found 29 to be broken. Some of the equipment appeared to have been stored outside and was damp or mouldy inside. Many had damage which needed repairing so would have been classified as waste. In interview, Mr. Sohail claimed some damage had happened while the container was in transit. When challenged as to why items had not been properly packed, he said some had been loaded by mistake. Mr. Sohail denied dealing in waste and said the company randomly checked items which came in from customers.

111. The court heard that there was a testing area in a warehouse at Catergear Mill but it was not easily accessible because of storage around it. Quest had no records of carrying out testing. Miss Azmi said cling film was the main form of packaging, with no real protection to keep items safe against damage during transit. She said electrical and electronic waste, such as broken computer monitors, was classed as hazardous waste and once a load was contaminated with hazardous waste it could not be shipped for disposal or recovery to a non OECD country such as Afghanistan. In addition, Quest did not have the necessary permission from the Environment Agency to store and test electronic equipment at its Catergear Mill site. The court heard Mr. Sohail had since obtained this permission.

112. Speaking after the case, Roy Howitt of the Environment Agency said: "Mr. Sohail pleaded not guilty but was found guilty of four offences, including exporting hazardous waste to Afghanistan. "Any business involved in the export of electrical goods must be aware of the waste regulations and the potential penalties they face if they break the law." OECD is the Organisation for Economic Co-operation and Development. It is always illegal to export electrical waste from the UK to developing countries and waste companies, local authorities and businesses all have a duty of care and moral responsibility to ensure hazardous electrical waste is properly recycled here in the UK.

113. The Environment Agency has a dedicated waste exports intelligence unit and currently has around 30 investigations into the illegal export of waste. Electrical waste such as TV's, computers and refrigerators can contain both valuable and hazardous materials such as mercury, copper, arsenic and lead. Electrical waste is one of the fastest growing types of waste in the western world because we are a throwaway society, continually upgrading to the latest technology. Naveed Sohail was charged with four offences, that:

1. On or before 6 July 2009 and by virtue of article 36(1) of the European Waste Shipment Regulation EC 1013/2006, Quest International Trading Limited transported waste specified in article 36(1), namely hazardous waste electronic equipment to Afghanistan, a country to which the OECD decision does not apply. Contrary to Regulations 23 and 58 of the Transfrontier Shipment of Waste Regulations 2007. And you were a director of the said Company and the offence was committed with your consent. Contrary to Regulation 55(1) (a) of the Transfrontier Shipment of Waste Regulations 2007.
2. On or before 6 July 2009, and by virtue of article 35 and 37(5) of the European Waste Shipment Regulation EC 1013/2006, Quest International Trading Limited transported waste namely waste electronic equipment to Afghanistan, a country to which the OECD decision does not apply without the procedure of written notification and consent as described in article 35 of the said European Regulation. Contrary to Regulations 23B and 58 of the Transfrontier Shipment of Waste Regulations 2007. And you were a director of the said Company and the offence was committed with your consent. Contrary to Regulation 55(1) (a) of the Transfrontier Shipment of Waste Regulations 2007.
3. On or before 6 July 2009, Quest International Trading Limited transported waste to a third country destined for disposal in breach of article 34 of the European Waste Shipment Regulation EC 1013/2006, namely hazardous waste electronic equipment to Afghanistan. Contrary to Regulations 21 and 58 of the Transfrontier Shipment of Waste Regulations 2007. And you were a director of the said Company and the offence was committed with your consent. Contrary to Regulation 55(1) (a) of the Transfrontier Shipment of Waste Regulations 2007.
4. On and before 1 September 2009, at Bradford, Quest International Trading Limited operated a regulated facility, namely the secure storage of waste electronic and electrical equipment, other than under or to the extent authorized by an environmental permit. Contrary to Regulations 12 and 38 of the Environmental Permitting (England and Wales) Regulations 2007. And you were a director of the said Company and the offence was committed with your consent. Contrary to Regulation 41(1) (a) of the Environmental Permitting (England and Wales) Regulations 2007.

Source: <http://www.environment-agency.gov.uk/news/127722.aspx>

D. HAZARDOUS ILLEGAL WASTE EXPORT TO GHANA

114. A man from Rochdale who illegally exported fridge and freezers to Ghana has been brought to justice by the Environment Agency.

115. Mr. Phillip Jesson who operated a waste site in Rochdale has been ordered to serve 280 hours of unpaid work and given a six months curfew order for not having the correct environmental permission in place for the site and for exporting the waste to Ghana. Mr. Jesson operated a site at Britannia Works, Smallbridge, Rochdale where he was storing waste fridges, freezers, televisions and computers of which

some parts are classed as hazardous. By operating this site without a permit in place there is the potential for significant harm to the environment and/or human health. Sites which operate with environmental permits have strict controls in place and also benefit from regular visits from the Environment Agency to ensure that their activities will not cause harm.

116. Following a routine stop check by authorities in Belgium, a shipping container was found to contain waste fridges and freezers. The container had been exported from the UK and was destined for Ghana. It was found that Mr. Jesson was exporting waste illegally from his site in Rochdale. Under current legislation, the export of waste fridges and freezers to Ghana is prohibited.

117. The export of hazardous waste to developing countries is illegal due to concerns that the waste cannot be handled in an environmental friendly manner. If the container had not been checked in Belgium there is a considerable risk that the hazardous contents would have been dumped in Ghana causing significant environmental harm.

118. Jennie Frieze, prosecuting for the Environment Agency said, "The law is clear, it is always illegal to export waste from the UK for disposal. It is legal to export fully functioning products for re-use, but the export of hazardous waste, including waste fridges and freezers, to developing countries is illegal and causes harm to people and the environment.

119. Exporting waste illegally is a serious criminal offence which can result in harm to the environment and people in its destination country. Illegal waste operations in the UK affect the quality of people's lives and undermine legitimate businesses all over the world and we are determined to stamp them out."

Source: <http://www.environment-agency.gov.uk/news/127462.aspx?page=4&month=2&year=2011>

E. WASTE SHIPMENT REGULATION PROSECUTION IN THE NETHERLANDS: AN OVERVIEW⁴⁴

1. Penalties for violations of the Waste Shipment Regulation

120. One of the objectives of Regulation (EC) No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (WSR) is to implement the Basel Convention in the European Community.

121. In Netherlands legislation, WSR violations are prohibited by section 10.60 of the Environmental Management Act. These violations are considered to be economic offences and are punishable under the Economic Offences Act.

122. This method of punishment differs from that of traditional crimes such as theft or forgery. The Economic Offences Act was initially conceived to protect economic order during the reconstruction after the Second World War. This is why this Act originally only covered offences in the economic field, but since the 1970s protection of the environment also falls within its scope.

123. The Act itself does not lay down any prohibitions. The key part of the Act is that one and the same maximum sentence is imposed for violating other, substantive acts. These acts appear in two lists under the Economic Offences Act. One list contains economic legislation and the other environmental laws. The Environmental Management Act is one of these many substantial acts.

124. It follows that punishment of WSR violations in the Netherlands takes place by the reference to the Regulation in the Environmental Management Act and by the reference to this Act in the Economic Offences Act.

⁴⁴ Prepared by Mr. Rob de Rijck, Public Prosecutor, Head of the Rotterdam office, and Ms. Kitty van den Brand, Public Prosecutor, Amsterdam office, who work for the Financial, Environmental and Food Safety Offences Office of the Netherlands. Current as at May 2011.

125. When applying the Economic Offences Act it is essential to differentiate between intentional violations of the law (which are crimes) and non-intentional violations (which are misdemeanours). The interpretation of the term "intent" is a broad one, since it only requires that a perpetrator's actions are carried out intentionally. It does not require that the perpetrator knows that his or her actions are an infringement of a law. Therefore, a violation of economic or environmental legislation is quite likely to be considered a crime.

126. This has two important consequences.

- (a) First, the maximum legal penalty for crimes pursuant to the Economic Offences Act is considerable. For a natural person, it is six years' imprisonment and a fine of €76,000. For legal persons the maximum fine is €760,000 per offence. Another possible penalty is an order to stop the company's activities for the duration of one year. Netherlands legislation also has ample provision to confiscate illegal profits.
- (b) Second, that environmental crimes carry a maximum penalty of six years' imprisonment means that the public prosecutor or the investigating judge is permitted to apply specific coercive measures during the investigation, such as telephone taps, search of premises and pre-trial detention.

127. As indicated above, within the Netherlands system a legal person, both Netherlands and foreign nationals can be prosecuted and sentenced. In addition, it must be mentioned that even government legal persons, such as municipalities, can be prosecuted insofar as their actions do not fall within the scope of a specific governmental task. In the latter case, they are immune from prosecution. The State of the Netherlands is fully immune to criminal prosecution.

128. Lastly, WSR violations can, of course, accompany traditional offences, such as forgery or corruption.

2. Investigation

129. Investigating violations of WSR is considered a priority in the Netherlands and it is therefore, at least comparatively, active in pursuing such crimes. As a result of the number of entities that are concerned with the enforcement of the WSR, however, it also suffers from fragmentation.

130. Law enforcement in the Netherlands is provided 25 regional police forces and a national police force. Each of the 25 regional police forces has a separate unit for investigating environmental crimes, the regional environmental team. The Rotterdam-Rijnmond Seaport Police is a special case, as it is a police team for the port with its own division in charge of investigating environmental crimes. Moreover, there are six separate, supra-regional teams in the country, which are in charge of investigating the more serious supra-regional environmental crimes.

131. It must be noted that the Netherlands police force is on the eve of a national reorganization that will lead to the creation of one national police force, divided into 10 regions. The precise position of the investigation of environmental crime in this new organization is not yet clear.

132. At the national level, both the Inspectorate of the Ministry of Infrastructure and Environment and its separate Investigation Department, in addition to the Customs authorities, are active in the investigation of WSR cases.

133. By and large, WSR violators that are caught in the act will be investigated by the Inspectorate, the Customs authorities or a police environmental team. Large investigations will be carried out either by an environmental team or a supra-regional team of the police or by the Investigation Department of the Ministry of Infrastructure and Environment.

134. Of course, the Inspectorate also has its own administrative powers to enforce the WSR. This administrative law enforcement is not characterized by punishment, but by preventing an offence from continuing or being repeated. In practice, the administrative enforcement procedures instigated by the

Inspectorate mainly apply to Netherlands parties. The exception is for cases in which foreign shipments of waste have to be returned to the sender.

135. To adjust administrative and criminal law enforcement, formal agreements have been made between the Inspectorate and the Financial, Environmental and Food Safety Offences Office. In short, a criminal investigation is instituted in any case if the violation touches on the essence of the WSR as the controlling system. This would, for instance, be the case with a shipment sent without notification, but not if a shipment was reported one day too late in contravention of subparagraph b of article 16 or if a minor mistake was made in a notification form.

136. This fragmentation of enforcing offices sometimes leads to difficulties in harmonizing activities. More importantly, it is difficult to obtain a clear picture of WSR violations. This is the case for all criminal investigations in the area of environmental crimes in the Netherlands, although authorities are continuously working to improve their reporting procedures.

3. Prosecution

137. All criminal investigations undertaken by any authority in the Netherlands are overseen by the Prosecution Service. This is a national organization, working in regional offices, each managed by a Chief Public Prosecutor. There are two exceptions to this regional system, one of which is the Financial, Environmental and Food Safety Offences Office, which is responsible for investigating and prosecuting cases of fraud, especially tax fraud and environmental crime. This is a national office, established in 2003, with operative offices in Amsterdam, Rotterdam, Zwolle and Den Bosch and a staff unit in The Hague. The Financial, Environmental and Food Safety Offences Office has some 250 employees working under one Chief Public Prosecutor. About 100 of those employees are involved in prosecuting environmental crimes.

138. The Financial, Environmental and Food Safety Offences Office brings its cases before 19 district courts, but in the near future the judiciary may appoint four district courts exclusively to hear all environmental crime cases. If that does come to pass, the judiciary will take the same step towards specialization in this field as has the Prosecution Services.

139. Not all cases dealt with by the Public Prosecution Service are brought to trial, as the Service has ample scope to settle cases out of court.

4. Sanctioning of WSR violations

140. There are not yet official, public directives regarding the level of the sanctions that must be applied for WSR violations. The Financial, Environmental and Food Safety Offences Office follows an internal instruction that has not been officially published.

141. This instruction lays down the following: for a standard case, that is, an intentional WSR violation without involving fraud and not being in violation of an export prohibition (the standard case thus consisting mostly in the failure to notify or to supply the relevant information), the starting point for a fine is €450 for each transported tonne of waste. This amount is based on the financial guarantee that was previously required in the Netherlands when consent for export of waste was given.

142. In cases in which an export prohibition has been violated and involving fraud heavier penalties, including, for natural persons, community service or even prison sentences, are considered. In practice, this part of the sanctioning policy is less well developed than penalties in standard cases.

143. In the Rotterdam office of the Financial, Environmental and Food Safety Offences Office the fine is calculated as follows: if the full fine that is to be called for is lower than €50,000, a settlement is offered. If the intended fine is between €50,000 and €100,000, the case is submitted to a single-judge court. If the sum of the fine exceeds €100,000, the case will be submitted to a three-judge division of the court.

144. The Rotterdam district court tends to follow the policy of €450 per tonne for standard cases in its sentences. The court of appeal in The Hague is less clear in its policy.

5. Facts and figures

145. Day-to-day activities show four types of waste passing through Rotterdam by ship:

- (a) Waste originating from the Netherlands that is usually shipped by sea to Africa or Asia. This often concerns metal waste, cables or electronic waste;
- (b) Similar waste originating from Germany that is transported to Rotterdam to be shipped by sea to Asia;
- (c) Waste originating, for instance, from Italy or Ireland that is transferred for import by inland shipping to Germany. Often this is construction or demolition waste containing asbestos;
- (d) Waste from other western European countries transported via Rotterdam as a transit port for sea vessels.

146. The volume of each shipment varies. It may involve just one or two containers, or tens of containers. In other parts of the country, there is also transport by road, both to or from Germany or to or from Belgium.

147. The exact size of “WSR criminality” is not known. It could be estimated from the following calculation: Rotterdam is the largest port in Europe; in 2009 almost 10 million TEU containers passed through this port.⁴⁵ The Inspectorate of the Netherlands Ministry of Infrastructure and the Environment estimates that 15 per cent of all international container shipments concerns waste. If that is true, then in 2009 just under 1.5 million TEU, or 750,000 40-foot containers, containing waste were shipped via Rotterdam. If there was something wrong with 10 per cent of those containers, which is a percentage that some Netherlands criminological literature gives for suspicion of fraud in other areas, then we would be looking at an annual figure of over 70,000 such containers passing through Rotterdam.

148. It must be noted that there are clear indications that strict law enforcement in Rotterdam leads to an increase in the illegal traffic of waste via Antwerp in Belgium.

149. The number of prosecutions for WSR violations varies. From 2005 to 2008, it was about 200 cases a year. Over the following two years, it decreased, reaching 90 cases in 2010. The reason for this is not known. About two thirds of the cases prosecuted concern legal persons. In 2010, 38 cases were brought to court. In two of those, sentences included community service or suspended prison sentences. In all the other cases, defendants were only fined. In 2008, the highest imposed penalty amounted to €190,000, whereas in 2009 it was €60,000. In 2010 the highest fine imposed was €1 million but this fine was not representative since it concerned the Probo Koala case.

6. Two cases

(a) **Omni Metal Service: in flagrante delictu**

150. The Rotterdam Omni Metal case, in which the Court of Justice of the European Communities passed a preliminary judgement on 21 June 2007 (case C-259/05), was a simple one to investigate.

151. In 2004, the French company, Omni Metal Service, from Nantes, transported 17 containers with scrap electricity cables from Spain, via Rotterdam, to China without notifying the Netherlands authorities beforehand. That this transport took place became apparent during a Customs inspection of the freight documents and a container scan.

⁴⁵ A TEU is a 20 foot equivalent unit. One 20 foot container equals one TEU, a 40 foot container equals two TEU.

152. The file did not consist of anything more than the findings of the Customs authorities, photographs of the scan, copies of the freight documents, a statement by the Netherlands Ministry of Infrastructure and the Environment that no notification had been made, and a statement from the company concerned. This file consisted of some dozens of pages and Omni Metal Service was the only defendant in the case.

153. The prosecution did not need to prove more than that the transport actually took place and that it was not performed according to the rules. Of course, the court did have to consider various legal defences presented by the defence attorney, which led it to request a preliminary judgement from the European Court of Justice.

(b) Deliverance: an extensive investigation

154. In contrast, the trial in what is known as the “Deliverance” case was preceded by an extensive investigation. In the following brief summary it is only possible to give an overview of the most interesting aspects of this very complex case.

155. In March 2006 the Inspectorate of the Netherlands Ministry of Infrastructure and the Environment carried out a supervisory inspection, on the basis of the WSR as it was then in force, of a company X BV based in Mijdrecht, near Utrecht. Nineteen files were found related to the export of waste plastics, mainly in 2005. Upon examination of those files, the Inspectorate suspected that those shipments had been sent to India and other countries without consent.

156. The files were seized and in November 2006 the Investigation Department of the Ministry (VROM IOD) instituted a criminal investigation under the supervision of the Financial, Environmental and Food Safety Offences Office.

157. In March 2007 both the business premises and the homes of the managing directors of the company were searched. Some 100 boxes of administrative files were seized. These documents included the administration of X Recycling UK Ltd., which was a legal person, separate from the Dutch company X BV. That led to the suspicion that municipal waste plastics had been illegally shipped from Ireland and the United Kingdom to China. It turned out that those plastics had been acquired either free of charge or for a small remuneration from a well-known waste collector in Kent. A letter of request was sent to the United Kingdom and, in September 2007, the VROM IOD and representatives of the Environment Agency visited that company.

158. During 2007 and 2008, in the course of the investigation, the Netherlands company X BV was caught several times in the act in the port of Rotterdam trying to ship waste plastics to Hong Kong, China, without the required accompanying documents. Unlike the shipments of which documentary evidence had only been found in the company’s offices, these containers were opened and checked on the basis of the confiscated files.

159. In November 2008, the examination of the confiscated documents was concluded, corresponding to a court file of over 6,000 pages. This file was used to prosecute the Netherlands company and one of its managing directors for transporting waste plastics from Rotterdam to India and China, in this case Hong Kong, during the period 2005–2007, in contravention of the WSR. They were also prosecuted for committing forgery and defrauding the China Certification and Inspection Group (CCIC). This forgery related to the false buyer name given in the documents accompanying the shipment. CCIC had been led to believe that the waste plastics that were transported were other plastics that the CCIC had inspected.

160. Jurisdiction issues meant that the Public Prosecution Service decided not to prosecute the defendants for the shipments of municipal waste plastics originating from the United Kingdom waste collector.

161. In January 2011 the District Court of Utrecht handed down comprehensive sentences. The complexity of the case was demonstrated by the fact that the trial lasted six sessions, which in the Netherlands system is considerable. The court found X BV and its managing director guilty of exporting waste plastics to China, in this case Hong Kong, and India during the period 2005–2007 in violation of the WSR, of forgery and of defrauding CCIC.

162. The company was sentenced to pay a fine of €100,000 and its managing director was sentenced to 80 hours community service and a suspended custodial sentence of one month with a probation period of two years. Both defendants lodged an appeal.

163. It is expected that, in September 2011, sentence will be passed in the case against X BV in which the Prosecution Service has called for the company to be fined over €2 million, the equivalent of what it is estimated was made as unlawfully obtained profits.

F. United Kingdom

164. The table below shows transfrontier waste shipment prosecutions for the period 2004–2009, according to the National Enforcement Database of the Environment Agency of the United Kingdom. It was accessed on 22 July 2009.

<i>Date</i>	<i>Court</i>	<i>Defendant</i>	<i>Offence</i>	<i>Penalty</i>
1. 27/01/2004 Event Ref: 2050110	Weymouth (Magistrates)	Company	Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1): <i>Breach of Transfrontier Shipment Regulations</i>	Fine- £500.00
2. 27/01/2004 Event Ref: 2050109	Weymouth (Magistrates)	Individual	Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1): <i>Breach of Transfrontier Shipment Regulations</i>	Conditional Discharge 12 months
3. 12/07/2004	Goole (Magistrates)	Company		Total Fine- £3 250
Event Ref: 2020232			Transfrontier Shipment of Waste Regulations 1994, Regulation 7 (1): <i>No consent for waste shipment / No financial guarantee prior to shipment</i>	Fine £100
Event Ref: 2020233			Transfrontier Shipment of Waste Regulations 1994, Regulation 7 (1): <i>No consent for waste shipment / No financial guarantee prior to shipment</i>	Fine: £100
Event Ref: 2020233			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1): <i>No consent for waste shipment / No financial guarantee prior to shipment</i>	Fine: £550
Event Ref: 2020234			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1): <i>No consent for waste shipment / No financial guarantee prior to shipment</i>	Fine: £550
Event Ref: 2020231			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1): <i>No consent for waste shipment / No financial guarantee prior to shipment</i>	Fine: £550
Event Ref: 2020231			Transfrontier Shipment of Waste Regulations 1994, Regulation 7 (1): <i>No consent for waste shipment / No financial guarantee prior to shipment</i>	Fine: £100

<i>Date</i>	<i>Court</i>	<i>Defendant</i>	<i>Offence</i>	<i>Penalty</i>
Event Ref: 2020230			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1): <i>No consent for shipment of waste / No financial guarantee prior to shipment</i>	Fine: £550
Event Ref: 2020230			Transfrontier Shipment of Waste Regulations 1994, Regulation 7 (1): <i>No consent for shipment of waste / No financial guarantee prior to shipment</i>	Fine: £100
Event Ref: 2020234			Transfrontier Shipment of Waste Regulations 1994, Regulation 7 (1): <i>No consent for waste shipment / No financial guarantee prior to shipment</i>	Fine: £100
Event Ref: 2020232			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1): <i>No consent for waste shipment / No financial guarantee prior to shipment</i>	Fine: £550
4. 01/12/2004	Bedfordshire Magistrate's Court (Magistrates)	Company		Total Fine: £1 700
Event Ref: 2000026			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Breach of Transfrontier Shipment of Waste Regulations</i>	Fine: £850
Event Ref: 2000026			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (4) <i>Breach of Transfrontier Shipment of Waste Regulations</i>	Fine: £850
5. 01/12/2004	Bedfordshire Magistrate's Court (Magistrates)	Company		Total Fine: £1 700
Event Ref: 2000026			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Breach of Transfrontier Shipment of Waste Regulations</i>	Fine: £850
Event Ref: 2000026			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (4) <i>Breach of Transfrontier Shipment of Waste Regulations</i>	Fine: £850
6. 12/05/2005	Taunton (Magistrates)	Company		Total Fine: £20 000
Event Ref: 2050267			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (4) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.67
Event Ref: 2050267			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.67
Event Ref: 2050275			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.66

<i>Date</i>	<i>Court</i>	<i>Defendant</i>	<i>Offence</i>	<i>Penalty</i>
Event Ref: 2050274			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.66
Event Ref: 2050271			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.67
Event Ref: 2050268			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.67
Event Ref: 2050267			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (7) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.67
Event Ref: 2050273			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.66
Event Ref: 2050276			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.66
Event Ref: 2050272			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.67
Event Ref: 2050270			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.67
Event Ref: 2050269			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Caused waste to be shipped illegally</i>	Fine: £1 666.67
7. 01/03/2006	Stevenage (Magistrates)	Company		Total Fine: £3 000
Event Ref: 2000130			Transfrontier Shipment of Waste Regulations Regulation 12 (1) <i>Breach of Transfrontier Shipment of Waste Regulations</i>	Fine: £1 500
Event Ref: 2000130			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (4) <i>Breach of Transfrontier Shipment of Waste Regulations</i>	Fine: £1 500
8. 01/03/2006	Stevenage (Magistrates)	Individual		Total Fine: £3 000
Event Ref: 2000130			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Breach of Transfrontier Shipment of Waste Regulations</i>	Fine: £1 500

<i>Date</i>	<i>Court</i>	<i>Defendant</i>	<i>Offence</i>	<i>Penalty</i>
Event Ref: 2000130			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (4) <i>Breach of Transfrontier Shipment of Waste Regulations</i>	Fine: £1 500
9. 19/02/2007	Swansea (Magistrates)	Company		Total Fine: £3 000
Event Ref: 2071246			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Waste television to Dubai</i>	Fine: £1 000
Event Ref: 2071246			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (4) <i>Waste television to Dubai</i>	Fine: £1 000
Event Ref: 2071246			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (7) <i>Waste television to Dubai</i>	Fine: £1 000
10. 21/06/2007 Event Ref: 2060847	Maidstone (Crown)	Company	Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Illegally exporting maggot infested waste</i>	Total Fine: £3 0000
11. 23/10/2007	Cardiff (Magistrates)	Company		Total Fine: £9 000
Event Ref: 411204			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (7) <i>Transfrontier shipment of waste</i>	Fine: £3 000
Event Ref: 411204			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (4) <i>Transfrontier shipment of waste</i>	Fine: £3 000
Event Ref: 411204			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Transfrontier shipment of waste</i>	Fine: £3 000
12. 30/04/2007 Event Ref: 042249	Maidstone (Crown)	Company	Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipment of waste in a manner deemed Illegal Traffic under WSR</i>	Total Fine: £9 000
13. 05/04/2007	Maidstone (Crown)	Company		Total Fine £55 000.00
Event Ref: 2060789			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste in circumstances deemed Illegal Traffic</i>	Fine: £1 0000
Event Ref: 2060788			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (9) <i>Failed to repatriate waste</i>	Fine: £5 000
Event Ref: 2060784			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste in circumstances deemed Illegal Traffic</i>	Fine: £10 000

<i>Date</i>	<i>Court</i>	<i>Defendant</i>	<i>Offence</i>	<i>Penalty</i>
Event Ref: 2060786			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste in circumstances deemed Illegal Traffic</i>	Fine: £10 000
Event Ref: 2060787			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste in circumstances deemed Illegal Traffic</i>	Fine: £10 000
Event Ref: 2060785			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste in circumstances deemed Illegal Traffic</i>	Fine: £10 000
14. 25/10/2007 Event Ref: 2061042	Medway (Magistrates)	Company	Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste destined for China - deemed to be Illegal Traffic</i>	Total Fine £3 000
15. 16/02/2007	Preston (Magistrates)	Company		Total Fine: £4 000
Event Ref: 2031088			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (4) <i>Shipped waste without relevant certificate & in illegal circumstances</i>	Fine: £2 000
Event Ref: 2031088			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste without relevant certificate & in illegal circumstances</i>	Fine: £2 000
16. 19/02/2007	Swansea (Magistrates)	Individual		Total Fine: £3 000
Event Ref: 385760			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (7) <i>Waste televisions to Dubai</i>	Fine: £1 000
Event Ref: 385760			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (4) <i>Waste televisions to Dubai</i>	Fine: £1 000
Event Ref: 385760			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Waste televisions to Dubai</i>	Fine: £1 000
17. 03/07/2008 Event Ref: 2050771	Bristol (Magistrates)	Company	Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Exporting waste to non-OECD country in such a way to constitute Illegal Traffic</i>	Total Fine: £500
18. 15/05/2009	Maidstone (Crown)	Company		Total Fine £75 000
Event Ref: 2061372			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste plastics in circumstances deemed Illegal Traffic</i>	Fine: £15 000

<i>Date</i>	<i>Court</i>	<i>Defendant</i>	<i>Offence</i>	<i>Penalty</i>
Event Ref: 2061371			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste plastics in circumstances deemed Illegal Traffic</i>	Fine: £15 000
Event Ref: 2061369			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste plastics in circumstances deemed Illegal Traffic</i>	Fine: £15 000
Event Ref: 2061370			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste plastics in circumstances deemed Illegal Traffic</i>	Fine: £15 000
Event Ref: 2061370			Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1) <i>Shipped waste plastics in circumstances deemed Illegal Traffic</i>	Fine: £15 000
19. 16/07/2009	Bury St Edmunds (Magistrates)	Company	Transfrontier Shipment of Waste Regulations 1994, Regulation 12 (1)	Total Fine: £5 000

Notes:

- Does not include costs where awarded
- Dates are date of conviction not of when offences were committed
- Transfrontier Shipment of Waste Regulations is a UK Statutory Instrument
- "WSR" is the European Union Waste Shipments Regulation 1013/2006

165. In the cases highlighted by the United Kingdom, note the consistency of sentencing within cases as opposed to between cases. While the prosecuting lawyers are specialists in environmental crime the courts are not. The courts (Magistrates and Crown) hear a whole range of criminal cases.

ANNEX I

DEFINITIONS OF RELEVANT TERMS WITH REGARD TO PROSECUTIONS OF CASES OF ILLEGAL TRAFFIC IN HAZARDOUS WASTE

1. **“Wastes”** are substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law;
2. **“Management”** means the collection, transport and disposal of hazardous wastes or other wastes, including after-care of disposal sites;
3. **“Transboundary movement”** means any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement;
4. **“Disposal”** means any operation specified in Annex IV to the Convention;
5. **“Approved site or facility”** means a site or facility for the disposal of hazardous wastes or other wastes which is authorized or permitted to operate for this purpose by a relevant authority of the State where the site or facility is located;
6. **“Competent authority”** means one governmental authority designated by a Party to be responsible, within such geographical areas as the Party may think fit, for receiving the notification of a transboundary movement of hazardous wastes or other wastes, and any information related to it, and for responding to such a notification, as provided in Article 6;
7. **“Focal point”** means the entity of a Party referred to in Article 5 responsible for receiving and submitting information as provided for in Articles 13 and 16;
8. **“Environmentally sound management of hazardous wastes or other wastes”** means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes;
9. **“Area under the national jurisdiction of a State”** means any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment;
10. **“State of export”** means a Party from which a transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated;
11. **“State of import”** means a Party to which a transboundary movement of hazardous wastes or other wastes is planned or takes place for the purpose of disposal therein or for the purpose of loading prior to disposal in an area not under the national jurisdiction of any State;
12. **“State of transit”** means any State, other than the State of export or import, through which a movement of hazardous wastes or other wastes is planned or takes place;
13. **“States concerned”** means Parties which are States of export or import, or transit States, whether or not Parties;
14. **“Person”** means any natural or legal person;
15. **“Exporter”** means any person under the jurisdiction of the State of export who arranges for hazardous wastes or other wastes to be exported;

16. **“Importer”** means any person under the jurisdiction of the State of import who arranges for hazardous wastes or other wastes to be imported;
17. **“Carrier”** means any person who carries out the transport of hazardous wastes or other wastes;
18. **“Generator”** means any person whose activity produces hazardous wastes or other wastes or, if that person is not known, the person who is in possession and/or control of those wastes;
19. **“Disposer”** means any person to whom hazardous wastes or other wastes are shipped and who carries out the disposal of such wastes;
20. **“Political and/or economic integration organization”** means an organization constituted by sovereign States to which its member States have transferred competence in respect of matters governed by the Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve, formally confirm or accede to it;
21. **“Illegal traffic”** means any transboundary movement of hazardous wastes or other wastes as specified in Article 9.

ANNEX II

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ANNEX III

RELEVANT BASEL CONVENTION ARTICLES WITH REGARD TO ILLEGAL TRAFFIC

Article 4

General Obligations

1. (a) Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal shall inform the other Parties of their decision pursuant to Article 13.

(b) Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, when notified pursuant to subparagraph (a) above.

(c) Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes.

2. Each Party shall take the appropriate measures to:

[...]

(d) Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement;

(e) Not allow the export of hazardous wastes or other wastes to a State or group of States belonging to an economic and/or political integration organization that are Parties, particularly developing countries, which have prohibited by their legislation all imports, or if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner, according to criteria to be decided on by the Parties at their first meeting;

(f) Require that information about a proposed transboundary movement of hazardous wastes and other wastes be provided to the States concerned, according to Annex V A, to state clearly the effects of the proposed movement on human health and the environment;

(g) Prevent the import of hazardous wastes and other wastes if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner;

(h) Cooperate in activities with other Parties and interested organizations, directly and through the Secretariat, including the dissemination of information on the transboundary movement of hazardous wastes and other wastes, in order to improve the environmentally sound management of such wastes and to achieve the prevention of illegal traffic.

3. The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal.

4. Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention.

5. A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party.

6. The Parties agree not to allow the export of hazardous wastes or other wastes for disposal within the area south of 60° South latitude, whether or not such wastes are subject to transboundary movement.

7. Furthermore, each Party shall:

[...]

(b) Require that hazardous wastes and other wastes that are to be the subject of a transboundary movement be packaged, labelled, and transported in conformity with generally accepted and recognized international rules and standards in the field of packaging, labelling, and transport, and that due account is taken of relevant internationally recognized practices;

(c) Require that hazardous wastes and other wastes be accompanied by a movement document from the point at which a transboundary movement commences to the point of disposal.

[...]

Article 6

Transboundary Movement between Parties

1. The State of export shall notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the State of export, the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes. Such notification shall contain the declarations and information specified in Annex V A, written in a language acceptable to the State of import. Only one notification needs to be sent to each State concerned.

2. The State of import shall respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. A copy of the final response of the State of import shall be sent to the competent authorities of the States concerned which are Parties.

3. The State of export shall not allow the generator or exporter to commence the transboundary movement until it has received written confirmation that:

(a) The notifier has received the written consent of the State of import; and

(b) The notifier has received from the State of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question.

4. Each State of transit which is a Party shall promptly acknowledge to the notifier receipt of the notification. It may subsequently respond to the notifier in writing, within 60 days, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. The State of export shall not allow the transboundary movement to commence until it has received the written consent of the State of transit. However, if at any time a Party decides not to require prior written consent, either generally or under specific conditions, for transit transboundary movements of hazardous wastes or other wastes, or modifies its requirements in this respect, it shall forthwith inform the other Parties of its decision pursuant to Article 13. In this latter case, if no response is received by the State of export within 60 days of the receipt of a given notification by the State of transit, the State of export may allow the export to proceed through the State of transit.

5. In the case of a transboundary movement of wastes where the wastes are legally defined as or considered to be hazardous wastes only:

(a) By the State of export, the requirements of paragraph 9 of this Article that apply to the importer or disposer and the State of import shall apply mutatis mutandis to the exporter and State of export, respectively;

(b) By the State of import, or by the States of import and transit which are Parties, the requirements of paragraphs 1, 3, 4 and 6 of this Article that apply to the exporter and State of export shall apply mutatis mutandis to the importer or disposer and State of import, respectively; or

(c) By any State of transit which is a Party, the provisions of paragraph 4 shall apply to such State.

6. The State of export may, subject to the written consent of the States concerned, allow the generator or the exporter to use a general notification where hazardous wastes or other wastes having the same physical and chemical characteristics are shipped regularly to the same disposer via the same customs office of exit of the State of export via the same customs office of entry of the State of import, and, in the case of transit, via the same customs office of entry and exit of the State or States of transit.
7. The States concerned may make their written consent to the use of the general notification referred to in paragraph 6 subject to the supply of certain information, such as the exact quantities or periodical lists of hazardous wastes or other wastes to be shipped.
8. The general notification and written consent referred to in paragraphs 6 and 7 may cover multiple shipments of hazardous wastes or other wastes during a maximum period of 12 months.
9. The Parties shall require that each person who takes charge of a transboundary movement of hazardous wastes or other wastes sign the movement document either upon delivery or receipt of the wastes in question. They shall also require that the disposer inform both the exporter and the competent authority of the State of export of receipt by the disposer of the wastes in question and, in due course, of the completion of disposal as specified in the notification. If no such information is received within the State of export, the competent authority of the State of export or the exporter shall so notify the State of import.
10. The notification and response required by this Article shall be transmitted to the competent authority of the Parties concerned or to such governmental authority as may be appropriate in the case of non-Parties.
11. Any transboundary movement of hazardous wastes or other wastes shall be covered by insurance, bond or other guarantee as may be required by the State of import or any State of transit which is a Party.

Article 7

Transboundary Movement from a Party through States which are not Parties

Paragraph 1 of Article 6 of the Convention shall apply *mutatis mutandis* to transboundary movement of hazardous wastes or other wastes from a Party through a State or States which are not Parties.

Article 8

Duty to Re-import

When a transboundary movement of hazardous wastes or other wastes to which the consent of the States concerned has been given, subject to the provisions of this Convention, cannot be completed in accordance with the terms of the contract, the State of export shall ensure that the wastes in question are taken back into the State of export, by the exporter, if alternative arrangements cannot be made for their disposal in an environmentally sound manner, within 90 days from the time that the importing State informed the State of export and the Secretariat, or such other period of time as the States concerned agree. To this end, the State of export and any Party of transit shall not oppose, hinder or prevent the return of those wastes to the State of export.

Article 9

Illegal Traffic

1. For the purpose of this Convention, any transboundary movement of hazardous wastes or other wastes:

- (a) without notification pursuant to the provisions of this Convention to all States concerned; or
- (b) without the consent pursuant to the provisions of this Convention of a State concerned; or
- (c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or
- (d) that does not conform in a material way with the documents; or
- (e) that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law,

shall be deemed to be illegal traffic.

2. In case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part of the exporter or generator, the State of export shall ensure that the wastes in question are:

- (a) taken back by the exporter or the generator or, if necessary, by itself into the State of export, or, if impracticable,
- (b) are otherwise disposed of in accordance with the provisions of this Convention,

within 30 days from the time the State of export has been informed about the illegal traffic or such other period of time as States concerned may agree. To this end the Parties concerned shall not oppose, hinder or prevent the return of those wastes to the State of export.

3. In the case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part of the importer or disposer, the State of import shall ensure that the wastes in question are disposed of in an environmentally sound manner by the importer or disposer or, if necessary, by itself within 30 days from the time the illegal traffic has come to the attention of the State of import or such other period of time as the States concerned may agree. To this end, the Parties concerned shall cooperate, as necessary, in the disposal of the wastes in an environmentally sound manner.

4. In cases where the responsibility for the illegal traffic cannot be assigned either to the exporter or generator or to the importer or disposer, the Parties concerned or other Parties, as appropriate, shall ensure, through cooperation, that the wastes in question are disposed of as soon as possible in an environmentally sound manner either in the State of export or the State of import or elsewhere as appropriate.

5. Each Party shall introduce appropriate national/domestic legislation to prevent and punish illegal traffic. The Parties shall cooperate with a view to achieving the objects of this Article.

[...]

Article 13

Transmission of Information

[...]

2. The Parties shall inform each other, through the Secretariat, of:

(a) Changes regarding the designation of competent authorities and/or focal points, pursuant to Article 5;

(b) Changes in their national definition of hazardous wastes, pursuant to Article 3;
and, as soon as possible,

(c) Decisions made by them not to consent totally or partially to the import of hazardous wastes or other wastes for disposal within the area under their national jurisdiction;

(d) Decisions taken by them to limit or ban the export of hazardous wastes or other wastes;

(e) Any other information required pursuant to paragraph 4 of this Article.

[...]

Article 16

Secretariat

1. The functions of the Secretariat shall be:

[...]

(i) To assist Parties upon request in their identification of cases of illegal traffic and to circulate immediately to the Parties concerned, any information it has received regarding illegal traffic.

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The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted in 1989 and it came into force in 1992. It is the most comprehensive global environmental agreement on hazardous wastes and other wastes. With 179 Parties (as at 10 July 2012), it has nearly universal membership.

The Convention aims to protect human health and the environment against the adverse effects resulting from the generation, transboundary movements and management of hazardous wastes and other wastes. The Convention covers toxic, poisonous, explosive, corrosive, flammable, ecotoxic and infectious wastes. Parties consider that illegal traffic in hazardous wastes or other wastes is criminal and have an obligation to introduce appropriate national/domestic legislation to prevent and punish illegal traffic.

This instruction manual, which was developed on the basis of a mandate from the Conference of the Parties to the Basel Convention and adopted by the tenth meeting of the Conference of the Parties (Cartagena, Colombia, 17-21 October 2011), is intended to provide guidance for those involved in the prosecution of cases of illegal traffic in hazardous and other wastes. Global in scope, it provides practical information that will be particularly relevant for judges and prosecutors in their role in preventing and combating illegal traffic in hazardous and other wastes. The manual seeks to draw upon best practices and provides examples taken from the experience of Parties to the Basel Convention in prosecuting illegal traffic cases.