Response received from Canada

Introduction

1. Decision VIII/24 of the Eighth Conference of the Parties requested Parties and other to submit proposals for items and the specific content pertaining to such items that could be addressed in an instruction manual for the legal profession on the prosecution of illegal traffic. Further, the decision requested the Secretariat to prepare a draft detailed outline of the manual, subject to the availability of funding, based on the proposals and comments received. It also requested the OEWG to consider the draft detailed outline and make appropriate recommendations to the Secretariat for the preparation of a draft instruction manual for the consideration of COP-9.

2. Below are Canada’s detailed comments on the outline. Once the outline is agreed at OEWG, we will be in a position to provide more detailed material for the manual.

3. In general, we are of the view that this should be a compendium of best practices, available through the Basel website. Given that there are substantial differences in approach between domestic systems, particularly those with adversarial versus inquisitorial approaches to prosecution, it may prove difficult to provide information relevant to all without overloading the manual. It may also be possible to provide best practices in various languages for consideration of those still preparing to implement laws.

4. We may wish to discuss at the OEWG whether the title of the document and its scope should be for the “legal profession” – this would appear to cover the private bar, as well as prosecutors and judges. It may be more appropriate to limit the ambit to prosecutors.

Comments on the outline

5. Section 1: In this context, we do not believe that general environmental principles and concepts are relevant. Illegal traffic involves violation of the Basel Convention and national implementing legislation which already define environmental principles and concepts. For that reason, legal information provided to service prosecutions has to be of a very precise nature. It is not clear how a discussion of general environmental principles will assist in prosecutions.

6. Section 2: We agree that those members of the legal profession involved in the prosecution of illegal traffic would benefit from a general knowledge of the Convention. This understanding of its provisions and the context in which they were negotiated may help foster a sense of why prosecution of illegal traffic is an important priority, and also provide understanding of public policy arguments at the time of sentencing. At the same time, the manual would have to make it clear that offences have to be translated into domestic law and it is under domestic law that the prosecution of offences occurs. While for certain civil code countries the Convention may have automatically become part of their domestic law upon ratification, the Convention requires further implementation to make it functional at the national level e.g. establishment of fines for violations. There should also be some discussion at OEWG about the independence of the judiciary, as each jurisdiction may have different practices relating to the training of judges aimed at preserving such independence.

7. Section 3: We consider it to be useful to outline what constitutes illegal traffic under the Convention, but the manual will have to be clear that individual countries still need to refer to their specific national law definitions and offences. A compendium of best practices could be of assistance in outlining reasonable fines for those jurisdictions which have yet to enact implementing laws.

8. Section 4: We have doubts about the appropriateness of including references to “investigating” and to enforcement officers (inspectors and/or investigators). In Canada, enforcement officers are not part of the federal prosecution service, but rather employees of Environment Canada. There is an arm’s length relationship between enforcement officers and the Prosecution Service. The inspection and enforcement aspects are undertaken by Environment Canada officials and when a case is ready for prosecution, it is then referred to federal prosecutors, who remain independent of the enforcement officials. It is our view that the enforcement aspects were already treated in the guidance elements and should not be the focus of this work. However, we are of the view that this is one section that would particularly benefit from a “best practices” approach, particularly as regards practical matters of evidence.

9. Section 5: We again question whether “judging” is the right focus for this section, particularly if it is decided to focus on the prosecution. If the latter is the focus, then this could be retitled as “Prosecuting a
case of alleged illegal traffic”, which could be different to section 4, if that section were to focus on preparing a case for prosecution, i.e. the lead up to the court case. As regards the italicized text under the heading, in cases of prosecution, it is not clear that types of action or locus standi are relevant, as these are matters of civil law. The burden and standard of proof, although likely to be similar, will vary to some degree from country to country.

10. Section 6: This is one section that could benefit from a best practices approach, although we could change the title to “Sentencing for Illegal Traffic”. We consider it appropriate for this section to deal with restitution, remediation and quantification or valuation of damage as long as these are related to the penalty phase of a prosecution for illegal traffic. Contribution by Parties of creative sentencing options would be a useful reference for other Parties. However, we do not feel that “potential mechanisms to ensure compliance with judicial decisions at national level” is appropriate for inclusion. This is too big a task for the Basel Convention to take on, as it applies across the board in any domestic legal system.

11. Section 7: We support the inclusion of the checklist as an annex.