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**Open-ended Working Group of the Basel Convention
on the Control of Transboundary Movements of
Hazardous Wastes and Their Disposal**

Sixth session

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Item 7 (a) of the provisional agenda*

**Legal and compliance matters: illegal traffic: review of the
outline of an instruction manual for the legal profession**

**Illegal traffic: outline of an instruction manual for the legal
profession**

Note by the Secretariat

I. Introduction

1. By its decision VIII/24, the Conference of the Parties, among other things, requested Parties and others to submit by 31 March 2007 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, taking into account the draft outline set out in the annex to the decision. Parties and others were also requested to provide information regarding concrete experiences and cases relevant to the proposed instruction manual. Furthermore, the Secretariat was requested to prepare, subject to the availability of funding, a draft detailed outline for an instruction manual for the legal profession and to submit the draft to the Open-ended Working Group for its consideration.
2. By that decision the Conference of the Parties also requested the Open-ended Working Group to consider the draft detailed outline for an instruction manual and make appropriate recommendations to the Secretariat for the preparation of a draft instruction manual for the consideration of the Conference of the Parties at its next meeting.
3. In addition, the Conference called upon the Secretariat to organize training seminars in cooperation, where feasible, with other international organizations, agencies or programmes to assist Parties, particularly developing countries and countries with economies in transition, in implementing the guidance elements on detection of illegal traffic, adopted by the Conference at its sixth meeting. Such training activities were to be funded from voluntary contributions.

* UNEP/CHW/OEWG/6/1/Rev.1.

II. Implementation

4. The Secretariat placed a request on its website and transmitted communications to the focal points of the Parties, seeking comments pursuant to decision VIII/24. As of 18 June 2007, comments and information on relevant national experience had been received from Canada, Mexico, Pakistan and the United States of America. The Secretariat did not receive additional funding and, accordingly, the draft detailed outline for an instruction manual contained in the annex to the present document was prepared by Secretariat staff. The draft sections proposed in the annex to the decision adopted by the Conference of the Parties have been adapted to take into account the comments received. Further development of the manual will require voluntary contributions to ensure that the appropriate level of expertise is available.
5. The Secretariat has learned that the Secretariat of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) has identified a means by which it can develop CD-ROM interactive manuals at relatively low cost and in-house. The acquisition of the necessary software by the CITES Secretariat cost approximately US\$6,000 and required in-house staff to spend time familiarizing themselves with the software and developing the first manual produced in this way. In the long-term, however, this mechanism will allow the CITES Secretariat to adapt manuals for regional and national activities within a very short space of time and will also make the dissemination of the manual relatively inexpensive because of the low cost of producing CD-ROMs.
6. The Secretariat of the Basel Convention will further explore this option with the CITES Secretariat. It is noted, however, that voluntary funding would be needed for the acquisition of the software, as well as the fees of a consultant with appropriate expertise to develop the text of a manual. It is suggested, however, that the acquisition of this software may be a cost-effective way to produce training materials for a wide scope of activities in the long-term. It could also provide an opportunity to develop the existing manual for enforcement agencies into an interactive training mechanism, which is something in which Parties have previously expressed a particular interest. The draft detailed outline for an instruction manual for judges and prosecutors contained in the annex to the present document is, however, presented in a hard copy format.
7. At the time of writing, the Secretariat has been unable to organize training seminars on the guidance elements because of lack of funding. The Secretariat will, however, shortly begin to assist the Government of Trinidad and Tobago to implement a project aimed at strengthening the capacity of small island developing States in the Caribbean to meet their obligations under the Basel Convention, with funding granted to Trinidad and Tobago under the Strategic Approach to International Chemicals Management (SAICM) Quick Start Programme Trust Fund. The Secretariat is consulting the secretariats of the Rotterdam and Stockholm Conventions, Interpol and the World Customs Organization, with a view to identifying how those institutions might wish to participate in the project. The project would include one regional workshop for competent authorities and SAICM and Basel Convention focal points; one regional workshop for the legal profession, including representatives of training institutions for the legal profession; and one regional workshop for security and enforcement agencies, including representatives of training institutions for such security and enforcement agents. The Secretariat will provide support for this project using funds contributed by Sweden.

III. Proposed action

8. The Open-ended working group may wish to establish an in-session contact group to consider the annex to the present document and to provide guidance to the Secretariat on how to develop the manual further.
9. The Open-ended working Group may wish to consider adopting a decision along the following lines:

The Open-ended Working Group,

1. *Requests* the Secretariat to develop, subject to the availability of funding, the instruction manual for the legal profession on the prosecution of illegal traffic either in interactive electronic form, or as a hard copy manual, in accordance with the guidance provided by the Open-ended Working Group;

2. *Requests* Parties and others to submit, by 31 January 2008, comments on the draft instruction manual in the light of the recommendations made and text developed by the Open-ended Working Group;

3. *Calls upon* Parties and others to offer expertise and in-kind and pecuniary contributions for the preparation of the instruction manual and for the development and delivery of training seminars on illegal traffic;

4. *Also requests* the Secretariat, subject to the level of voluntary contributions received for these purposes:

(a) To submit the draft instruction manual for consideration and possible approval by the Conference of the Parties at its next meeting;

(b) To report to the Conference of the Parties at its next meeting on steps it has taken to develop and deliver training seminars on illegal traffic;

(c) To develop a draft decision on illegal traffic for consideration and possible adoption by the Conference of the Parties at its next meeting.

Annex

Outline of an instruction manual on the prosecution of illegal traffic of hazardous wastes or other wastes for the legal profession

Introduction

1. The introduction of the manual could set out the target audience of the manual and the objective of prosecutions for illegal traffic, that is, protecting communities and the environment from the harmful consequences of improperly managed transboundary movement and disposal of hazardous wastes and other wastes through punishment and deterrence of illegal traffic. The main function of the manual could be to highlight, for judges and prosecutors, their role in combating illegal traffic in hazardous wastes and other wastes. Accordingly, the audience for the manual could be limited to prosecutors and judges, and not address all the considerations that defence counsel may need to address.
2. The manual could seek to draw upon best practices and provide examples drawn from the national experience of Parties in the prosecution of illegal traffic, including information on how such matters are managed, and case law, and could seek to encourage users to confirm the arrangements and rules that apply within their national jurisdiction.
3. Given that prosecution is a matter of national law, the manual will seek to highlight the requirements of the Basel Convention that should be reflected in national law and will allow for the insertion of references to applicable national law, so that the document can be adapted by users for their national needs.
4. The manual will seek to minimize duplication of other existing materials. Therefore, as appropriate, cross-reference will be made to the Training Manual on Illegal Traffic for Customs and Enforcement Agencies,¹ and the Guidance Elements for Detection, Prevention and Control of Illegal Traffic.² Similarly, reference may also be made to publications of other bodies that may be of relevance, for example, those developed by the United Nations Environment Programme (UNEP) and the International Network for Environmental Compliance and Enforcement (INECE). There may be some need for repetition, however, so that the manual can be used as a stand-alone document and where information is of fundamental importance (for example, a brief overview of the Basel Convention).

I. Enforcement of the Basel Convention at the national level

5. Comments received suggested that a section on environmental principles and concepts, which was proposed in the draft outline contained in the annex to decision VIII/24, may be unnecessary. Accordingly, it is proposed to replace that section with another briefly outlining the “monist” and “dualist” legal traditions, drawing upon the text formulated and adopted by Parties in the Instruction Manual for the Implementation of the Basel Protocol on Liability and Compensation.³
6. In addition, examples of which courts have jurisdiction over environmental crimes in some countries could be provided. For example, legal action may take place in special environmental courts or tribunals or through the normal court system, and can take the form of criminal or civil proceedings.
7. Users could be invited to customize their copies of the manual by inserting information on their national legal system, for example, on which courts address Basel Convention matters and who may institute proceedings.

¹ Adopted by the Open-ended Working Group at its fifth session by decision OEWG-V/9 on behalf of the Conference of the Parties.

² Adopted by the Conference of the Parties at its sixth meeting by decision VI/16.

³ Adopted by the Open-ended Working Group at its fourth session by decision IV/7 on behalf of the Conference of the Parties. See paragraphs 9 to 13 for the text on the monist and dualist legal traditions.

II. What do judges and prosecutors need to know about the Basel Convention?

8. This section could provide a brief overview of the Basel Convention's basic obligations and its procedures. It could address the scope of the Convention and the provision under Article 3 of the Convention relating to national definitions. It could highlight where to find information, for example on the internet, on the Basel Convention.

9. The section could include examples of implementing legislation adopted by some Parties to give effect to the Convention's obligations, as well as examples of national definitions communicated by Parties under Article 3.

10. Space could be provided for users of the manual to insert information on their national implementing legislation.

III. Illegal traffic of hazardous wastes and other wastes

11. This section could set out the definition of illegal traffic as contained in Article 9 of the Convention.

12. It could also give examples of how this definition has been translated into the domestic laws of some Parties and could identify matters that must be addressed in national legislation to give effect to the Convention but which are not addressed in detail in the Convention. Such matters may include the definition of the offence, the burden of proof, the establishment of penalties. Reference could be made to an annex providing examples of penalties provided for under the legislation of some Parties.

13. Users could be invited to insert a list containing information in issues such as relevant laws addressing the offence, procedures and evidence.

IV. Preparing to prosecute a suspected case of illegal traffic

14. This section could set out the issues that a prosecutor would need to consider when preparing a case for prosecution, and could set out general recommendations for the process. Since matters such as the identity of those responsible for coordinating investigations or gathering evidence will largely be guided by the national legal system, the section may need to be limited to the general considerations that a prosecutor should have when preparing a case. That could include the kinds of information that the prosecutor should request from other agencies to prepare the case for prosecution, even if he or she is not in charge of the investigation, and mechanisms for ensuring coordination between the various entities that should be involved in preparing a case.

15. The section could also describe the complexities of proving environmental crimes and, in particular, those relating to the transboundary movement of hazardous wastes. Challenges include, for example, tracing the shipment, identifying and measuring the nature of the pollutant, and highlighting the particular technical and legal challenges posed by such cases.

16. The section could also identify some widely used techniques for preparing a case, such as interview techniques and searches. Examples from some Parties could be included.

17. Users could then be invited to insert information relating to the allocation of responsibility for the preparation of a case under national law, rules on the gathering of evidence, a list of the various agencies that should be involved on the preparation of a case and the identification of the relevant roles and responsibilities of each agency in the preparation of a case.

18. Users could also be invited to identify how to determine whether a case should be the subject of a criminal prosecution, or addressed by civil or administrative means under their national laws. Furthermore, they could be invited to identify the difference, if any, between the legal requirements for the prosecution of an individual and the prosecution of a company.

19. Reference could be made to the training manual for enforcement agencies on the use of protective equipment and investigative techniques.

V. Trial of a case of alleged illegal traffic of hazardous wastes or other wastes

20. This section could briefly identify matters not addressed earlier in the manual and, in particular, draw attention to the procedural rules that may also need to be addressed. This could be done in the form of a checklist indicating, for example, which of the standard rules relating to locus standi, timeliness of action and burden and standard of proof, may apply.

21. Examples from the national legislation from some Parties could be included.

22. Users could be invited to identify the procedural rules that would apply in their national legal system.

VI. Sentencing for illegal traffic

23. This section could describe the possible penalties for illegal traffic of wastes including prison terms, fines, and remediation, possibly noting a difference between cases where illegal traffic is proven to have resulted in damage to human health or the environment and those cases where damage has been prevented because an illegal act was identified before it caused such damage.

24. The section could then provide examples of the sentencing options provided under some national laws and procedures.

25. The section could also provide information on the valuation techniques that have been applied in some countries when a monetary penalty has been applied.

26. Users could be invited to identify the sentencing options available under their national legal system.

VII. Keeping informed about illegal traffic

27. This section could briefly address the need for regular briefing of judges and prosecutors on new legal, technical and procedural issues at a national level, such as newly passed laws. It could propose mechanisms for establishing such regular briefing, for example, biennial meetings or newsletters.

28. The section could also identify those international forums, which may be making decisions of relevance to illegal traffic cases, and identify where information can be obtained. That could include a list of websites providing guidance on practices in other countries or information on new decisions taken at the international level, which should be considered at the national level.

Annexes

29. The annexes could contain:

(a) A checklist for the preparation of national legislation for the implementation of the Basel Convention developed by the Secretariat, in consultation with the Implementation and Compliance Committee of the Basel Convention, pursuant to decision VII/32;

(b) A table indicating the penalties dispensed in different countries;

(c) A bibliography.
