

Guidance Elements for Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes

INTRODUCTION

Purpose of these guidance elements

1. Decision V/11 of the first meeting of the Conference of the Parties for the Waigani Convention (COP1) invited Parties in their efforts to prevent, identify and manage illegal traffic to use the Guidance Elements for Detection, Prevention and Control of Illegal traffic in Hazardous Wastes developed under the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal (the Basel Convention) as an interim measure and further requested the Scientific and Technical Advisory Committee (STAC) to revise and amend the guidance elements for adoption by the Conference of the Parties (COP).

2. Decision V/12 of COP1 also invited Parties to use the Basel Convention Form for Confirmed Cases of Illegal Traffic to report confirmed cases of illegal traffic to the Secretariat as an interim measure and further requested STAC to revise and amend the guidance elements for adoption by the COP.

3. The purpose of the document is to be a practical guide to assist enforcement of national law implementing the Waigani Convention.

4. Its intended audience includes Party Governments, ministries, federal and state authorities and agencies, law enforcement authorities and competent authorities.

5. Various readers will be interested in paragraphs dealing with matters related to their particular sphere of concern.

6. Representatives of Governments and ministries will be mainly interested in those paragraphs providing guidance for developing their national legislation or institution arrangements (e.g. paragraphs 14 to 17; 37 to 41; 49-50 and Appendix 1). Police officers will be more interested in reading paragraphs which could be useful to their particular mandate and activity (e.g. paragraphs 45 to 47; 51 to 54; 82 to 88). Customs officers will find it useful to read those paragraphs dealing with techniques of inspection of consignments on how to determine whether the material is or is not a hazardous waste.

7. These guidance elements are intended to set out the recommended procedures requested at COP1 Decisions V/11 and V/12.

Objectives

8. These guidelines focus on enforcement at the domestic level. By reference to the Convention documents and other resources they also provide guidance for Parties who have yet to develop implementing legislation.

Background

9. Ensuring enforcement of law implementing Multilateral Environmental Agreements (MEAs) is a widely recognised problem because enforcing national legislation and procedures across international boundaries is difficult and complex. Nevertheless, there is much useful experience of enforcement of law implementing MEAs amongst countries.

10. By decision SS VII/4, the Seventh Special Session of the Governing Council/Global Ministerial Environment Forum of UNEP, adopted the Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements.

11. The process of adoption of these Guidelines has highlighted the need for Parties to have the flexibility to design domestic implementation measures that are suited to their national circumstances and attributes.

Developing a national capacity to identify and manage illegal traffic

12. In order to implement the Waigani Convention effectively, it is important to develop and/or maintain national capacity for identifying, controlling and managing illegal traffic. The secretariat of the Waigani Convention will continue to support measures designed to enhance national and local capacity to comply with the agreements. These include technical and financial assistance, training and technology transfer. The private sector should also be encouraged to take a role.

13. As there are a number of complex legal and technical aspects to effective management of illegal traffic, a multifaceted approach to combating illegal traffic will be required.

National legislation

14. A key element in preventing and managing illegal traffic is an effective national regulatory environment. States should develop and implement a participatory approach to determining domestic needs and to setting priorities to encourage a culture of compliance. States should also provide for effective participation by civil society, including industry and non-governmental organizations when developing legislation and strengthen domestic institutions, including the judiciary.

15. Building an effective legal and institutional framework for enforcement and awareness raising, taking into account interlinkages between obligations in various MEAs, should be considered by Parties.

16. The secretariat of the Waigani Convention will continue to offer legal assistance to Parties that request it.

17. Those Parties in need of assistance for developing their national legislation, in addition to contacting the secretariat of the Waigani Convention, could seek bilateral assistance from other parties, etc, or consult three documents adopted by the Conference of the Parties to the Basel Convention: Model National Legislation; the Manual for the Implementation of the Basel Convention and the Instruction Manual, noting the similarities between the Basel and Waigani Conventions.

Definitions

18. There are different interpretations for terms such as "compliance", "enforcement" and "environmental crime" in international practice and law. These definitions are currently the subject of considerable debate in the international area.

19. The Waigani Convention contains a number of definitions that are relevant to managing illegal traffic. They include, for example, "wastes", "transboundary movement", "disposal", "environmentally sound management", "area under the national jurisdiction of a State", "importing Party", "exporting Party", "transit Party", "person",

"exporter", "importer", "carrier" and "generator" and "disposer". These all have a bearing on how intelligence is gathered and how illegal traffic is detected and monitored. Moreover, different Parties implement their Waigani obligations under different forms of national legislation, which all carry their own definitions. These may be broader than those laid out by the Waigani Convention.

20. Hazardous wastes are defined, in Article 2.1(a) of the Waigani Convention, as wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex II. Annex I of the Waigani Convention lists the categories of wastes to be controlled.

21. Annex II lists the hazardous characteristics of Waigani Convention wastes. The seventh session of the Technical Working Group of the Basel Convention noted that the United Nations Committee of Experts on the Transport of Dangerous Goods *Recommendations on the Transport of Dangerous Goods, English revised edition* 1993 had defined test procedures that elaborated the interpretation of H1, H3, H4.1, H4.2, H4.3, H5.1, H5.2, H6.1 and H8. However, it also noted that these were relevant only to the transport of the wastes, not their disposal. Annex II notes that many countries have developed national tests which can be applied to materials listed in Annex I, in order to decide if these materials exhibit any of the characteristics listed in Annex II. Technical Working Group of the Basel Convention is still to finalise its work on some of these hazard characteristics.

22. Hazardous wastes are also defined, in Article 2.1(b) of the Waigani Convention, as wastes that are not covered under sub-paragraph (a) but are defined as, or are considered to be, hazardous wastes by the national legislation of the exporting, importing or transit Party. Article 3 states that each Party shall, within six months of becoming a Party, inform the secretariat of the wastes that, under its national legislation, are covered under Article 2.1(b). Parties shall also inform the secretariat of any significant changes to the information provided. The secretariat shall inform all Parties of the information it has received. Parties shall be responsible for making this information available to their exporters, importers and other appropriate bodies.

23. Interpretation of these definitions is complex and cases of illegal traffic may stem from differing interpretations of hazardous waste definitions. This may be further complicated by problems in translation from one language to another.

Summary of the provisions of the Waigani Convention concerning Illegal Traffic and of the Decisions of the Conference of the Parties

24. Illegal traffic is the subject of Article 9 of the Waigani Convention. Article 9.1 defines illegal traffic as any transboundary movement of hazardous wastes:

- (a) without notification pursuant to the provisions of this Convention to all countries concerned; or
- (b) without the consent pursuant to the provisions of this Convention of a country concerned; or
- (c) with consent obtained from countries concerned through falsification, misrepresentation or fraud; or
- (d) that does not conform in a material way with the supporting documentation; or
- (e) that results in deliberate disposal (e.g. dumping) of hazardous wastes in contravention of this Convention, other relevant international instruments and of general principles of international law, or in contravention of the import or export bans established by Article 4.1.

24bis. Article 9.2 specifies that each Party should introduce or adopt appropriate national legislation to prevent and punish illegal traffic, and that the Parties shall cooperate with a view to achieving the objects of this Article.

25. Article 9.3 specifies what must be done if a transboundary movement is deemed to be illegal traffic as the result of conduct on the part of the exporter or generator. The exporting Party shall ensure that the wastes in question are:

- (a) taken back by the exporter or the generator or, if necessary, by itself into the exporting Party, or, if impracticable,
- (b) otherwise disposed of in accordance with the provisions of this Convention, within 30 days from the time the exporting Party has been informed about the illegal traffic or such other period of time countries concerned may agree to. To this end the Parties concerned shall not oppose, hinder or prevent the return of those wastes to the exporting Party.

26. Article 9.4 specifies what must be done if a transboundary movement is deemed to be illegal traffic as the result of conduct on the part of the importer or disposer. The importing Party 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. This shall be done within 30 days from the time the illegal traffic has come to the attention of the importing Party or such other period of time as the countries concerned may agree on. To this end, the Parties concerned shall cooperate, as necessary, in the disposal of the wastes in an environmentally sound manner.

27. Article 9.5 specifies what must be done if 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 cooperate to ensure that the wastes in question are disposed of as soon as possible in an environmentally sound manner either in the exporting Party or the importing Party or elsewhere as appropriate.

28. Article 9.6 requires the Secretariat to coordinate with the Secretariat of the Basel Convention in relation to the effective prevention and monitoring of illegal traffic in hazardous wastes. This is to include the exchange of information on incidents or alleged incidents of illegal traffic in the Convention Area and on the appropriate steps to remedy such incidents, and providing assistance in the field of capacity building including development of national legislation and of appropriate infrastructure in the Pacific Island Developing Parties with a view to the prevention and penalisation of illegal traffic of hazardous wastes.

29. The prevention and control of illegal traffic in hazardous wastes is an important issue for the Waigani Convention, *particularly with respect to the ban on imports of hazardous wastes and radioactive wastes from outside the Convention area which is specified in Article 4.1(a). PICs continue to be targeted by persons outside the Convention area who propose the import of hazardous waste in the guise of "benign" material (eg "clean" landfill).*

30. At the first meeting of the Conference of the Parties, it was recognized that illegal traffic of hazardous wastes remains an issue of concern for the Pacific Region and requires close cooperation among States with the support of the secretariat, the Secretariat of the Basel Convention, as well as other relevant organisations.

31. The main provisions of the decision adopted by the Conferences of the Parties on the issue of illegal traffic are:

- requests Parties to ensure that national legislation for the management of chemical wastes and hazardous wastes to be developed also addressed the issue of illegal traffic of hazardous wastes and radioactive wastes;
- requests the Parties to incorporate in their legal systems, appropriate sanctions or penalties on all persons who have planned, carried out or assisted in illegal traffic in hazardous wastes and radioactive wastes;
- requests Parties to promote at the Ministerial level, all means to prevent and penalise illegal traffic in hazardous wastes; requests the Secretariat to assist Parties in developing national legislation and administrative procedures for the prevention, monitoring, repression and remediation of illegal traffic;
- encourages Parties to establish informal bilateral arrangements to better target illegal traffic between their countries;
- encourages Parties to bring any cases, or, if appropriate, alleged cases of illegal traffic to the attention of the Secretariat and to provide the Secretariat with all necessary information to enable it to take any appropriate action in accordance with Article 9.6;
- invites Parties in their efforts to preventing, identifying and managing illegal traffic to use the Guidance Elements for Detection, Prevention and Control of Illegal traffic in Hazardous Wastes developed under the Basel Convention as an interim measure and further requested STAC to revise and amend the guidance elements for adoption by the Conference of the Parties (COP); and
- invites Parties to use the Basel Convention Form for Confirmed Cases of Illegal Traffic to report confirmed cases of illegal traffic to the Secretariat as an interim measure and further requested STAC to revise and amend the guidance elements for adoption by the Conference of the Parties (COP).

32. The secretariat of the Waigani Convention was requested by the decision made at COP1 to report to the second meeting of the Conference of the Parties, through the STAC as appropriate, on information received by Parties, and encouraged to:

- to establish or strengthen collaboration with the Basel Convention Secretariat and the relevant international institutions in order to achieve better control and monitoring of cases of illegal traffic in hazardous wastes; and
- to explore ways of improving its cooperation with non governmental organisation, industry and the private sector for the prevention and monitoring of illegal traffic.

33. Appendix 1 contains all the provisions of the Waigani Convention related to illegal traffic and all the provisions of the decision adopted at COP1 by the Conference of the Parties of the Waigani Convention in relation to the issue of illegal traffic.

34. The five parts of the guidance elements for the detection, prevention and control of illegal traffic in hazardous waste should be considered in their entirety including all appendices, each part bringing specific suggestions for the same general goal.

35. Appendix 2 contains case studies/examples of successful actions of Parties under the Basel Convention.

36. These Draft Guidance Elements were prepared by the secretariat based on those developed under the Basel Convention and modified according to suggestions from Parties.

PART 1. NATIONAL CAPACITY BUILDING AND INTERNATIONAL COOPERATION

National Capacity Building

1a. Competent Authority/Focal Point

37. Article 5 of the Waigani Convention requires Parties to designate or establish one or more competent authority and one focal point. Parties must inform one another through the secretariat, of any changes in these arrangements.

38. National competent authorities have the main obligation to prevent, manage and punish illegal traffic of hazardous wastes. The secretariat should continue to organize training activities for competent authorities.

1b. Administrative procedures

39. Effective and transparent administrative procedures are another key agent in preventing and managing illegal cases of hazardous wastes.

Ic. National inventories

40. National authorities should adopt a common approach for compiling statistics (including from the export/importing companies) on the legal and illegal transboundary movements of hazardous wastes. Such an approach should incorporate both the Waigani Convention, Basel Convention and the Harmonised System of classification.

41. National inventories should be maintained on a yearly basis and should be used as a policy tool against illegal traffic, and to implement pragmatic and focused preventive and coercive measures against illegal traffic.

Id. Promotion of compliance

42. Competent authorities should develop compliance and enforcement strategies covering the four main components of compliance. These are education and information dissemination, permitting, detecting offences and investigations and enforcement action.

a. Education and information dissemination

43. This component focuses on behaviour modification and includes dissemination of information to shippers and exporters, responding to inquiries about the scope of the Convention and ensuring easy access for industry to guidance documents and promotional material. Another important thrust concerns proactive activities which seek to find solutions for waste disposal in country or to improve industry practice. These activities may include regular advertisements, production of guidance documents for dissemination to industry, initiating and participating in workshops, workgroups and discussions to assist where possible in establishing appropriate domestic solutions to waste disposal and encouraging companies to implement waste minimisation practices, cleaner production techniques and best practice technologies and methodologies.

b. Permitting

44. This component is about ensuring that any system of permits has in place checks and balances. It aims to ensure clarity of requirements, cross-checking of information, minimum standard requirements for public notices and tailoring of permit conditions to particular circumstances. Activities may include revision of forms to make requirements clear, ensuring the security of permit numbers, establishing procedures to cross check actual movements, as reported in Customs data,

against those specified in permits. The permits should clearly specify the obligations of the exporters.

c. Detecting offences

45. This component involves ad hoc inspections of shipments, taking of samples by inspectors, targeting particular types of export/import movements for compliance checks, checking of Customs data and provision of intelligence to Customs, targeting high-risk situations and initiating specific enforcement activities. Activities include ensuring a regular supply of information from Customs and establishing protocols for reviewing Customs data on a regular basis and responding to data that needs further action, targeting high-risk shipments for inspection and developing training courses for inspectors and Customs personnel.

d. Investigations and enforcement actions

46. This component consists of referral of possible breaches of the laws implementing the Convention to law-enforcement agencies. Activities may include developing standard operating procedures to assist in conducting investigation and developing comprehensive investigative procedures which do not risk compromising an investigation.

47. As enforcement of law becomes increasingly diverse and complex more demands are being made of all sectors of the community to ensure compliance with the law. This can be achieved proactively through education or reactively through investigation and subsequently, possible prosecution. Non-governmental organizations and community groups can make important contributions to enforcement and competent authorities should ensure that they can work effectively with them.

Ie. Training of enforcement personnel

48. Training of personnel involved in preventing, identifying and managing illegal traffic is central to effective control. Where there is a breach of a law an investigation is often necessary. Given the complexities inherent in such an investigation it is essential that the investigator be equipped with appropriate competencies and knowledge in order to fulfil the role effectively and efficiently. A basic training manual, jointly prepared by the Secretariat for the Basel Convention, Interpol and WCO but still with obvious relevance for the Waigani Convention, will be attached to this Guidance as Appendix 4.

If. Technical expertise/facilities

49. Lack of technical expertise/facilities is an obstacle to effective prevention, monitoring and

management of illegal traffic in hazardous wastes. The secretariat shall develop Guidelines on the development of incident, accident and contingency preparedness plan for hazardous wastes. Regional and sub-regional mechanism for Dump Watch alert system are encourage.

50. Where use of a national laboratory or facility is not feasible a regional solution should be sought. Regional training centres could play a key role in addressing this issue. Advice may be sought from the secretariat of the Waigani Convention, which may refer inquiries to relevant experts. The International Network on Compliance and Enforcement (INECE) can also help.

Ig. Enforcement/intelligence capacity

51. When developing strategies for preventing and managing illegal traffic in hazardous wastes, Parties could use any existing draft guidelines for compliance and enforcement. In particular, recommendations on transparency of approach, strengthening treaty reporting requirements, site monitoring, compliance incentives, building national capacity and education and awareness raising would provide a sound basis for such work.

52. Data gathering and information analysis is also a very important tool. In particular, close monitoring of hazardous waste import and export statistics, should be based on waste trade patterns and the modus operandi of confirmed illegal shipments to form an overall picture. For example, much of the data on illegal traffic in hazardous wastes is related to contaminated waste (i.e. wastes mixed with hazardous substances) or non-recyclable wastes. Past experience indicates that illegally imported or exported waste is often declared as non-hazardous scrap (e.g. mixed metal scrap and plastic scrap) and tends to be exported by small trading firms or agents with no waste recycling facilities, rather than original waste generators. Prior to the arrival of the waste at its destination, the waste is likely to have changed hands several times. Consequently, illegal traffic is generally suspected where the origin or exporter of a shipment is difficult to determine.

53. Some countries have been liaising with their major waste trade partners to share operational experience and refine the criteria for selecting shipments for inspection. Cooperation between competent authorities is also useful in determining the legal status of a shipment.

54. Heavy cargo traffic at many international ports and the time taken to conduct random screening and inspection, mean that sometimes illegal traffic is not detected prior to departure. Where an illegal shipment is suspected, competent authorities can exchange information on the name of the vessel, the contained number(s) and the date of departure so that the waste can be intercepted on its arrival at its destination. This type of cooperation can benefit both parties, as it allows time for shipping documents to be scrutinised and for inspections to be organized.

It is also relevant to all modes of transport including sea, road, rail, river and air.

55. Competent authorities should use a risk management approach to setting compliance and enforcement priorities, to ensure that their resources are targeted effectively. A typical approach would involve five steps, namely:

1. Establish the context
2. Identify the risks
3. Analyse the risks
4. Assess the risks and set priorities
5. Treat the risks
6. Following-up the process

56. Guidelines for such a risk management approach are provided in Appendix 5.

Ih. Effective licensing and monitoring of facilities

57. The Waigani Convention provides that each Party shall prohibit all persons under its national jurisdiction from transporting or disposing of hazardous wastes or other waste unless such persons are authorised or allowed to perform such types of operation. In order to meet this obligation all parties must have effective licensing and monitoring systems in place.

Ii. Effective inter-agency cooperation etc.

58. National environmental agencies generally work with local, national and international authorities to enforce controls on transboundary movements of hazardous waste. Customs agencies and competent authorities are key partners in detecting, intercepting and inspecting suspect hazardous waste shipments at critical control points.

59. International and national environmental agencies should collaborate with competent authorities, local police, transport companies, recycling industries, NGOs, etc. in detecting, investigating and managing illegal waste traffic. A high level of cooperation is crucial in managing and

monitoring the waste if it is to be safely and quickly returned to its place of origin.

60. Illegal hazardous waste shipments can often be detected by reviewing information contained in shipping manifests. Information received from partner agencies is also useful in building profiles for targeting illegal waste traders. For example, companies previously involved in illegal or problematic shipments are targeted for inspection as are shipments with profiles describe above. Often such shipments are identified in cooperation with overseas control authorities, and provide an effective additional check to random inspections.

International Cooperation

a. Levels of international cooperation

61. International cooperation for detection, prevention and control of illegal traffic in hazardous wastes can occur on the following levels:

- interaction of competent authorities
- use of international intelligence networks by enforcement/intelligence officers
- role of/cooperation with other international organizations such as the World Customs Organization (WCO), Interpol, etc.

62. The interaction between the competent authorities of the country of export, country of import and countries of transit is necessary and could help in detecting, preventing and controlling the illegal traffic of hazardous wastes. Formal and informal communication could be used, including e-mail messages which facilitate quick interaction.

63. The World Customs Organization initiated in July 2000 a network called Customs Enforcement Network (CEN). The aim of this network is to link all customs administrations for enforcement purposes and provide them with a common database and reference system. Any national customs administration should be connected to CEN through its National Contact Point. By using the CEN network, national customs administration can have immediate and direct access to the database of all previous cases of illegal traffic of hazardous wastes.

64. Another source of intelligence and useful information about past cases of illegal traffic of hazardous wastes and modus operandi could be obtained from Interpol through National Central Bureaus.

65. Such profiles will need to be continually updated if regulatory authorities are to keep abreast of developments in illegal traffic trends.

b. Role of the secretariat of the Waigani Convention

66. The secretariat of the Waigani Convention is rapidly improving its ability to facilitate international cooperation in the prevention, identification and management of illegal traffic in hazardous waste. In particular, the secretariat has identified a large number of relevant international organizations (other than the Secretariat for the Basel Convention) that could cooperate in joint activities aimed at better controlling and monitoring alleged or confirmed cases of illegal traffic. These include Interpol, World Customs Organization, UN Commission on Crime Prevention and Criminal Justice, UNEP, UNDP, IAEA/World Atom, the Secretariat of Climate Change, CITES, Ozone Secretariat, the UN High Commissioner for Human Rights, the Food and Agriculture Organization of the United Nations (FAO), the European Commission, the International Maritime Organization (IMO), the Organization for Economic Cooperation and Development (OECD), the Organization for the Prohibition of Chemical Weapons (OPCW).

67. The secretariat intends to develop Memoranda of Understanding or similar agreements with most, if not all, these organizations. These agreements will outline each party's area of responsibility and modalities for cooperation.

68. Future cooperative efforts will be focused on achieving practical and concrete results in the following priority areas:

- (i) identifying opportunities for combating illegal traffic;
- (ii) information exchange;
- (iii) improving data collection and analysis;
- (iv) updating criminal profiling;
- (v) improving methodologies for compliance and enforcement;
- (vi) identifying and resolving deficiencies in existing national legislation;
- (vii) training in compliance and enforcement;
- (viii) awareness raising and information dissemination.

PART 2. PREVENTION

69. It is very important for Parties prohibiting the import of various wastes to ensure that this information is transmitted to other Parties via the secretariat as required by Article 7 of the Convention.

70. Article 3.1 of the Waigani Convention requires each Party, within six months of becoming a Party to the Convention, to inform the secretariat of the Convention of the wastes, other than those listed in Annex I, considered or defined as hazardous under its national legislation and of any requirements concerning transboundary movement procedures applicable to such wastes.

71. Article 3.4 requires Parties to be responsible for making the information transmitted to them by the secretariat available to their exporters, importers and other appropriate bodies.

72. In cases where national legislation is defective or where there is information or technical obstacles to compliance, there are a range of measures that might enhance the capacity of Parties to comply, such as legal and technical assistance which could be requested through the Waigani secretariat.

73. Prevention can encompass detection, investigation, management of the intercepted cargo and legal action.

2a. Cooperation with Customs and other regulatory authorities

74. Cooperation with Customs and other regulatory authorities is central to preventing illegal traffic. Work currently being undertaken on the Harmonised System (HS) of the World Customs Organization will provide a much greater understanding of the extent of the illegal traffic problem and will allow greater scope for identifying and targeting problem areas.

75. There is today wide agreement about the importance of strengthening linkages among MEAs that will allow greater compliance verification and problem identification. Cooperation between secretariats, government agencies and non-governmental experts in on-site monitoring as a measure for increasing transparency is developing.

2b. Identification of waste streams at source

76. Exporting countries should develop strategies for identifying hazardous waste streams at the point of exit. This could be achieved by identifying regular hazardous waste exporters, maintaining tight administrative control at the

notification stage, promoting enhanced cooperation and information exchange amongst relevant national authorities, and tightening legal provisions relating to the 'duty to reimport' under their national laws in accordance with Article 8 of the Waigani Convention.

77. For some wastes, however, it may be best to identify waste streams at source. For example, hazardous electronic scrap is likely to be shipped under a general customs code such as "mixed metal scrap". It is very difficult to identify electronic scrap among the numerous entries for this code. However, companies that collect and dispose of electronic scrap will advertise their services, and it should be possible to check what each company is doing with the waste it collects.

2c. Promoting awareness

78. Some cases of illegal traffic are due to lack of information and for this reason a key strategy for prevention will be international and national awareness raising campaigns. This might include activities such as training courses, seminars, advertising, information papers and guidance documents targeted at those involved in the import and export of hazardous waste. Ensuring clear and enforceable regulations is also an effective prevention measure.

79. For intentional cases, publicity of prosecuted illegal cases may be an effective deterrent if detection and enforcement measures are successful. Other options for prevention might be advertising, strengthening detection and enforcement measures, closing loopholes in legislation and raising penalties to a level that will act as an effective deterrent.

2d. Guidance documents by national authorities

80. Guidance documents targeted at importers and exporters are essential for preventing inadvertent breaches of legislation. In areas of uncertainty such as determining waste from non-waste, whether or not a waste is hazardous, and what constitutes environmentally sound management, guidance documents can be useful in clarifying the Convention's rules. They also provide a transparent and consistent basis for determining how the Convention will be interpreted. For hazardous waste importers and exporters, such guidance provides clarification on issues that could potentially lead to illegal activity and leads to greater certainty in planning and administration.

81. Guidance documents are also useful for providing a simple explanation of the rules that need to be followed. Often legislation is difficult to

interpret and contains ambiguities that could lead to potential inadvertent breaches. Providing simple explanation and clarification of legislative instruments promotes an environment of transparency, cooperation, awareness and trust and can therefore be a useful tool in preventing illegal traffic.

2e. *Inspection: overt and covert*

82. In preventing illegal activity, it is important to know how and why breaches occur. It is also useful to know whether there are patterns or linkages of non-compliance that may point to potential or further illegal activity and whether there are obstacles or loopholes that act as disincentives to compliance. Strategies to promote transparency, cooperation amongst parties, public awareness and opportunities for a wide range of stakeholders to contribute to identifying problems and possible solutions should be encouraged.

83. In some cases it would be more convenient to inspect a transboundary shipment when it arrives at the importer's facility rather than at the border crossing. In this case the inspectors may wish to follow up their inspection of transboundary shipment by also inspecting equipment and processes at the inspector's facility to assess if they are consistent with the recycling and/or disposal operation(s) indicated in their licences/permits. Non-tariff requirements could be established so that at the border the environmental inspectors could verify the documents related to hazardous wastes.

84. In other cases, taking into account intelligence information, the inspection could also be undertaken at an export facility.

85. In all circumstances, the inspection procedure will begin with collection of all documents related to the generation of hazardous wastes, related to plans of export/import, related to recycling activities, disposal facilities and any other documents which might be useful (record information about exporter, carrier, importer, etc.).

86. After the documents are gathered and checked, a visual inspection of the hazardous waste is necessary, including storage facilities. People undertaking inspections should always take appropriate precautions. For example, closed shoes with steel caps should normally be worn in cargo-handling areas. Care should be taken when opening containers in case cargoes have shifted in transit. Respiratory protection and gloves should be worn if there is a risk of exposure to hazardous dusts.

87. Last, but not least, sampling might be necessary, for determining precisely what are the characteristics of the hazardous wastes. Sampling should always be done in accordance with the guidance in Appendix 3. As with visual inspections, appropriate safety precautions must always be taken.

88. In all cases of inspection, if there are signs of violation, the inspectors should remember that the purpose of inspection is to collect evidence to determine if a violation of the law was made. Subsequently, if this is the case the appropriate procedures of investigation should be followed.

2f. *International cooperation at all levels*

89. International cooperation amongst key players and at all levels is central to prevention and management of illegal traffic. These include national competent authorities, the secretariat of the Waigani and Basel Conventions, the secretariats of other environmental conventions, UNEP, Interpol, World Customs Organization, etc.

90. In addition, Parties should promote, as appropriate, strategies to bring their actions as well as actions of other relevant participants in the open for appropriate scrutiny by Parties, and as appropriate, other groups in the international system. The public should have access to information about the Convention, including reports on national compliance pursuant to Article 7 of the Waigani Convention and opportunities to assist in monitoring compliance.

91. Parties should consider making provision for measures designed to enhance national and local capacity, to comply with the Waigani Convention requirements. These include such measures as technical and financial assistance, training and supplying necessary equipment. The private sector should be encouraged to assist in enhancing the national capacity to comply. Economic or other incentives should be considered to facilitate effective implementation of the Waigani Convention.

92. Cooperation amongst the secretariats of relevant international Conventions, non-government and government experts, business and industrial association, recycling industries, universities, technical institutes, research centres, NGOs and individuals should be initiated in order to prevent and reduce illegal traffic.

2j. *Insurance and bonds*

Insurance

93. Article 6(11) of the Waigani Convention provides that any transboundary movement of hazardous wastes shall be covered by an insurance policy, bond or other guarantee as may be required or agreed to by the importing Party or any transit Party. It does not stipulate the level of or type of insurance that is required.

94. There are many insurance options that competent authorities can consider when determining insurance scheme. For example, insured legal liability to third parties covers claims in respect of personal injury or damage to property. It can also cover the cost of removing, nullifying or cleaning up any contamination or pollution, which is caused by a "sudden and accidental" event (insurance policies commonly exclude liability caused by or arising out of contamination or pollution unless caused by a sudden, identifiable, unintended, unexpected and accidental event). Competent authorities could choose to accept this double exclusion or they could require a less restrictive (but more expensive) type of insurance such as environment impairment liability insurance. This may cover any disposal, release, dispersal, discharge or seepage, even if it is not "sudden and accidental".

95. Geographical exclusions and conditions are also common in policies. Competent authorities may wish to consider not accepting such exclusions if the excluded countries include the proposed importing Party, export or transit.

96. A common feature of insurance policies however, is that they generally do not cover cases where shipments are deemed illegal. Where an accident occurs as a result of an illegal shipment, it may be difficult to apportion liability and even more difficult to enforce laws that will ensure adequate environmental clean up. In cases where an illegal shipment has resulted from an inadvertent error, financial guarantees or bonds, in addition to insurance, may minimize the exporting country's risk of having to meet the cost of environmental damage.

97. An analysis of the amount required for insurance, bonds or other guarantees in relation to the quantity and quality of hazardous wastes described in the shipping or movement documents could also provide useful for the detection or prevention of illegal traffic.

Financial Guarantees and Bonds

98. Article 8 of the Waigani Convention requires exporting Parties to ensure that wastes are taken back, by the exporter, if a transboundary movement cannot be completed in accordance with the terms of the contract. To ensure that exporters are able to do this, competent authorities may require financial guarantees and bonds. The amount of money involved should be calculated so that all likely costs of a forced return and disposal of the wastes are covered. Financial guarantees and bonds may not be required if the competent authority is satisfied that the exporter has sufficient assets to be able to meet these costs.

99. The major benefit of financial guarantees and bonds over insurance is that financial payouts are assured regardless of the legal status of the shipment. In short, they ensure that the risk lies with those responsible for shipping the waste.

100. Multiple financial guarantees or bonds may be required by all Parties concerned, that is the exporting, importing and transit Parties. It is not normally appropriate for one Party to rely on another Party's financial guarantee because for example, the importing Party may wish to call on a financial guarantee in circumstances outside the scope of the financial guarantee held by the exporting Party.

PART 3. DETECTION, MONITORING AND INTELLIGENCE

3a. *Problems relating to transit*

101. The Waigani Convention defines "transit Party" as any Party, other than the exporting Party or importing Party, through which a movement of hazardous wastes is planned or takes place. The definition of "transboundary movement" includes movement through an area under the jurisdiction of any Party, , to or through an area under the jurisdiction of another Party, or to or through an area not under the jurisdiction of another Party, provided at least two Parties are involved in the movement. Article 2.4 states that nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea, the sovereign rights and jurisdiction that States have in their exclusive economic zones and continental shelves, and the exercise by vessels and aircraft of all States of navigational rights and freedoms, as provided for in international law and as reflected in the 1982 United Nations Convention on the Law of the Sea and other relevant international instruments.

102. Put simply, the general principles of maritime law are in one part the sovereignty of States over internal waters (which include ports), in the other part freedom of passage through the territorial sea and the exclusive economic zone. The right of freedom of passage in the territorial sea has been increasingly affected by regulations made by coastal States, particularly for reasons of security and protection of the environment. To a lesser extent, national regulations relating to the exclusive economic zone may be made to protect and preserve the marine environment. This is why, today, ships travelling in the territorial waters of States are subject to numerous regulations.

103. The Convention allows a Party to require notification and consent for transits of hazardous wastes which are planned to cross its territorial sea or exclusive economic zone. In practice, however, most Parties are understood to require notification and consent only when a ship enters a port under their jurisdiction. This is because during a visit to a port there is always a risk that wastes may be unloaded, even if this was not planned, and then abandoned. However, some Parties only require notification and consent if it is planned that the wastes be unloaded and then loaded again.

104. Because there is a risk associated with unloading of the wastes, some Parties require notification and consent if the ship enters a roadstead instead of a port. At international law a roadstead is an area of water which is normally used for the loading, unloading and anchoring of ships. The definition of a port would not include a roadstead: in referring to ports Article 11 of the UN Law of the Sea Convention (UNCLOS) does not expressly include roadsteads. Rather, the provision includes “permanent harbour works which form an integral part of the harbour system” but expressly excludes off-shore installations and artificial islands. Article 12 of UNCLOS provides for roadsteads to be considered part of the territorial sea and not part of internal waters.

105. It is recommended that Competent Authorities should follow the notification and consent procedure for all transboundary movements involving entry into a port or roadstead, unless they are aware that the wastes are not proposed to be unloaded and the particular Transit Party does not require notification under those circumstances. It is recommended that Parties which require notification and consent for transits through their territorial sea or exclusive economic zone should advise other Parties, through the secretariat, of their requirements.

106. Similar principles apply to proposed transits through airspace and airports.

107. Written consent from a transit Party is required for each movement that passes through it. International canals and free ports present special problems where a central system of control should be instituted.

3b. *Data gathering and information analysis*

108. It is important and necessary that each Party shall designate a competent authority to work together to address illegal traffic and share enforcement information through a confidential network.

109. Data gathering and analysis can take place at many stages, especially where the activity has been observed by intelligence gathering operations as potentially illegal. This may then trigger requests to customs authorities to investigate as the next paragraph suggests.

110. Typically, investigation of alleged illegal traffic is triggered by the detection of suspect material by customs officials or competent authorities in the country of import. Generally such shipments are not accompanied by the relevant documentation or the documentation provided does not correspond to description of the material being transported. Such cases tend to be intentional and are generally more difficult to resolve than unintentional breaches of the Convention involving companies that routinely comply with established regulations.

111. Intelligence about intentions of identified illegal traffic is crucial for preventing, monitoring and detecting illegal activities. Where unintentional breaches are detected, the reasons for non-compliance can be assessed and procedures refined or education programmes targeted to reduce the likelihood of a recurrence. Intentional breaches can point to loopholes in national legislation or procedures that may need amended or may point to wider organized criminal activity that may require further monitoring.

112. Once an illegal shipment is detected, further investigation is necessary to confirm who is responsible for the illegal activities and whether or not prosecution is likely to be successful. Collection of evidence is crucial for successful prosecution, and should be conducted strictly in accordance with established procedures.

113. Proper procedure for evidence collection and witness interviewing are vital if a successful prosecution is to take place under the relevant jurisdiction.

3c. Packaging, labelling, sampling and analysis

114. The Waigani Convention obliges each Party to ensure that all hazardous wastes and other wastes that are to be transported are packed, labelled and transported in conformity with generally accepted and recognised international rules and standards. Accepted international standards have been established under the UN Dangerous Goods Codes and ISO 14000 and all packaging, labelling and transportation procedures should conform to these standards.

115. Improper packaging and labelling may be indicative of illegal traffic, and any shipment that does not conform to the above standards should be investigated.

116. Sampling and analysis is dealt with in Appendix 3.

3d. Waigani Convention, national and other legal requirements

117. All legal requirements (provisions of the Waigani Convention, national laws and regulations) should be taken into account when determining whether or not a transboundary shipment of hazardous wastes is illegal.

3e. Liaison with customs authorities

118. Customs authorities are key players in detecting and intercepting illegal traffic. However, the current Harmonised System Code does not allow for the identification of hazardous wastes, making the task of customs even more difficult in identifying illegal traffic. For this reason, competent authorities, in cooperation with Customs, have begun to develop procedures for aligning Basel Convention wastes with categories in the Harmonised System. This will be of benefit for the Waigani Convention as well, and it is only through close cooperation between the customs authorities and national environmental agencies will customs authorities be able to become effective agents in the battle against illegal traffic in hazardous wastes.

3f. Dealing with ambiguity

119. Ambiguities can be of a legal, technical and/or practical nature and important ones must be resolved before an illegal shipment can be confirmed.

120. Legal ambiguities stem from different interpretations about what is or is not covered by the Convention. These are further complicated by national definitions of hazardous wastes. Consequently, a certain level of ambiguity will always remain. Ultimately Parties will need to resolve these matters through existing mechanisms established under the Convention, or through lengthy and costly legal proceedings in the Courts.

121. Technical ambiguities are related to determining the physico-chemical properties of a material. These relate to questions of whether a material is considered to be a waste or whether a waste is considered hazardous. Currently, these ambiguities are resolved by the Waigani Convention Scientific and Technical Advisory Committee (STAC) which can debate the issues and provide the opportunity for Parties to state their case and have their proposal examined by experts in a number of countries.

122. Ambiguities may also arise from disputes over sampling and analytical methods (see Appendix 3, Sampling and analysis).

123. Practical ambiguities relate to problems such as identifying a party or parties responsible for an illegal shipment, the ability of an aggrieved party to recover costs, differences in opinion about concepts such as temporary storage and determining the responsibility of concerned parties in meeting the Waigani Convention obligations on the cooperative resolution of illegal traffic.

124. In establishing certainty, it is useful to consult Part 3 of these Guidelines, especially paragraphs 127 to 130.

PART 4 - MANAGING ALLEGED AND CONFIRMED CASES

125. There are many challenges that face regulators in their efforts to effectively manage alleged cases of illegal traffic. One of the most difficult amongst them is determining whether the alleged case constitutes illegal traffic. Another key issue is determining who is responsible until illegal traffic has been confirmed. And once liability has been apportioned, the question of how to bring the perpetrator or perpetrators to justice poses further problems that can be extremely difficult to resolve.

126. Given the multiple jurisdictions and different legal systems that are often involved, resolving these challenges can be a complex and lengthy process. In many cases, national legislation is unable to effectively deal with inter-jurisdictional matters, making incidents of illegal traffic extremely

difficult, if not impossible, to resolve within the 30-day time period contemplated in Article 9 of the Convention. However, with effective cooperation of all authorities involved, cases of illegal traffic can be successfully resolved with minimal impact on the environment.

4a. *Determining whether Article 9.1 has been violated*

127. Once suspected illegal shipments are detected, further investigation must be carried out to confirm whether or not it is illegal traffic. Through intelligence received from various national and international sources, waste shipments may be intercepted for inspection at key control points such as container terminals. In later stages, investigations will be aimed at determining those responsible for undertaking the alleged illegal activities and whether or not prosecutions will be likely to succeed. As evidence is collected both locally and internationally, cooperation between relevant competent authorities is central to illegal traffic management.

128. Identification of hazardous waste in one country may not necessarily provide a basis for enforcement in another. Even where there is general agreement, Parties' rights under Article 3 of the Convention, to define non-Waigani waste as hazardous wastes under national legislation, may make prosecution difficult. This highlights the importance of the Waigani Convention's notification and consent procedures and the requirement under Article 3 to inform the secretariat of any non-Waigani hazardous wastes defined under national legislation.

129. There may also be a time lag between the arrival of the wastes in the importing Party and notification of the exporting Party of illegal traffic. Within 30 days from the time the exporting Party has been informed of the illegal traffic, the exporting Party or the generator shall take back the waste in question. The States concerned could agree to extend the period of 30 days. If it is impracticable to take back the wastes, the exporting Party or the generator shall dispose of the waste in accordance with the provisions of the Waigani Convention. Nevertheless, Parties' obligations to cooperate to resolve illegal traffic incidents should ensure that the material is returned to the country of origin and dealt with in an environmentally sound manner as soon as possible.

130. The tendency for countries to reject extra-territorial application of national laws in criminal cases makes it difficult for the exporting country to pursue prosecution of illegal traders based solely on allegations of the country of import. The country of

export has to have legal authority to require reimportation and the country of import has the right to insist on the duty of the Party of export to take back the illegal waste.

4b. *Determining who was the exporter of the waste*

131. Under the Waigani Convention, exporter means any person under the jurisdiction of the exporting Party who arranges for hazardous wastes to be exported. National legislation reflecting elements of the Convention, could provide that the exporter may be the generator, broker, carrier or other person with responsibility for the waste.

132. Considerable time may be spent determining the person or persons responsible for an illegal shipment. Complications increase with complexity in relationships between companies especially where foreign companies are involved. For example, the use of subsidiary companies, foreign brokers and agents and the sale of wastes to foreign companies prior to physical transfer of the waste can introduce complexities that obscure the identity of the exporter.

Additional questions may arise if the exporter is an overseas-based company without a presence or agent in the exporting Parties. In the absence of adequate legislative provisions to ensure legal liability is enforceable, the country of export must accept responsibility for making arrangements for the return of the waste. It is therefore in a party's interest to ensure that all loopholes in its national legislation are eliminated.

4c. *Determining how to return the waste*

133. Although the provisions of the Waigani Convention require the exporting Party or the generator to take back the illegal waste within 30 days from the time of receiving information about the illegal traffic, experience shows that complications could occur, such as determining who owns the waste.

134. Where there is a dispute between parties as to the legal ownership of the waste, the time taken to resolve the dispute could be lengthy, thus delaying the speedy return of the waste as required by the Waigani Convention.

135. The domestic law of some countries requires a successful conviction before steps can be taken to reimport an illegal shipment. In such cases, if the company involved in the illegal shipment does not voluntarily agree to reimport the waste, the time taken to resolve the illegal traffic incident is likely to be lengthy.

136. Once an illegal shipment of hazardous or contaminated waste has been intercepted, the country of import is often responsible for arranging the return of the waste to the country of origin. To facilitate early return of the waste in accordance with the requirements of the Waigani Convention, effective cooperation and liaison between the competent authority of the importing state and other relevant states should be a priority.

4d. Whether the exporter followed the requirements of the Waigani Convention

137. The country of export may take all reasonable steps to ensure that an illegal shipment is reimported and disposed of in accordance with the Convention. Nevertheless, it is possible that the Convention could once again be breached, either fraudulently or unintentionally, in the course of reimportation. In such cases, the reimport of the material would also be considered to be illegal traffic. Once confirmed, steps should be taken to investigate the breach and the perpetrators brought to justice.

4e. Seizure of the material

138. If the waste (in particular recyclable material that has economic value) is still legally owned by the exporting or importing company, but this company refuses to comply with requests to return the waste, government authorities may face legal difficulties in seizing or moving wastes that they do not own. Difficulties encountered by governments in seizing or moving waste may be addressed through provisions in national law.

4f. Temporary storage

139. It is important that the material is safely stored during an illegal traffic investigation. In particular, consideration should be given to protecting human health and the environment, safeguarding the chain of evidence and avoiding any counter-claims by companies relating to damage to their material.

140. Once an alleged illegal shipment of wastes has been identified, sampling and analysis is carried out to determine whether or not the material is hazardous. As the quality of sampling and analysis is central to legal proceedings and, later, whether or not a prosecution is likely to succeed, it is crucial that correct procedures are followed and evidence is not compromised. To ensure that highest quality results are obtained, the considerations in Appendix 3 should be taken into account in investigations of alleged illegal traffic.

4g. Dealing with abandoned waste

141. Cases of abandoned illegal shipments of hazardous wastes are increasing. It is therefore important to institute national legal and technical provisions and mechanisms for dealing with each case. For example old ships are being abandoned in the ports of developing countries or are dumped in the territorial waters of developing countries.

4h. Notification to the Secretariat of the Waigani Convention and concerned Parties

142. Article 16,(1)(j) of the Waigani Convention gave the secretariat the mandate to assist Parties upon request in identification of cases of illegal traffic and to circulate immediately to the Parties concerned, any information it has received regarding illegal traffic, and to coordinate with the Secretariat for the Basel Convention.

143. Ensuring that all relevant countries are aware of alleged illegal shipments is crucial in preventing illegal traffic. Notification, either by the secretariat for the Parties, or directly between Parties, encourages governments, companies, NGOs and other stakeholders to work together to develop effective prevention strategies and provides an incentive to quickly and effectively resolve illegal traffic incidents, to the extent that is consistent with legal requirements and enforcement practice.

4i. Differences in interpretations of the countries involved

144. On-going negotiation by relevant countries is crucial in resolving cases of illegal traffic where the countries of export and import disagree on the status of the shipment. Where agreement cannot be reached, despite the genuine effort of both Parties, it might be necessary to resort to the procedure for settlement of disputes described in Article 20 of the Convention.

PART 5 - USE OF ELECTRONIC INFORMATION

5a. Domestic Examples

145. Opportunities for increasing the automated administration of national legislation are increasing all the time. This includes both the collection of notification information from companies regarding proposed exports, imports and transits, the issuance of permits electronically, and the development of software for the electronic tracking of shipments. Some considerations experience include not only hardware and software capability within the administering agency, but also parallel and compatible electronic systems within industry and among trading partners.

146. Automated administration would likely require a large electronic database of information for example that is drawn from notification and movement documents. Other software uses could include systems that query these databases and can quickly provide information to officers in the field via a secure website which limits access to authorized individuals. These systems allow for direct access to the database, and at the same time, reports can be generated, shared and transmitted electronically. These are all technologies that Parties to the Conventions may have already implemented, or could consider developing.

147. For communication with regulated companies, one possibility is an internet based system of electronic data exchange (EDE). With such a system, it is possible to deposit notifications and movement documents directly into a database using either of the following methods:

- regulates fill out electronic forms over the internet; or
- regulates transfer bulk notification and movement document information from their databases using an e-mail attachment.

148. Given that not all regulates have the same level of technological capacity, an electronic system should also allow interface with traditional paper-based systems.

149. The systems outlined above support the generation and collection of data. The collected data can then be used to monitor regulatees' regulatory compliance. Additionally, the same or similar databases may be used to support intelligence and enforcement activities. Details regarding these activities may be considered to be confidential for security reasons. One possibility is the use of electronic libraries that contain case assessments.

5b. International Examples

150. In the international setting, there are also automated customs, trade and investigative processes that can incorporate electronic information and allow customs and law enforcement officers to track shipments and possession of wastes and to detect illegal shipments or dumping. For example, the World Customs Organization has a Customs Enforcement Network which has international accessibility restricted to authorized customs enforcement officers.

151. Bar codes and global positioning systems represent other electronic technologies with applicability to transboundary movements of hazardous wastes, particularly during their transportation. Partnerships among regulatory and enforcement authorities, and the affected industry (e.g. transportation) can be important aspects of the effective operation of such initiatives. These technologies can expedite customs clearance at international borders and also flag shipments which do not comply.

Appendix 1

Provisions of the Waigani Convention and
decisions adopted by the Conferences of the Parties to the Waigani Convention

Decisions adopted by the Conferences of the Parties to the Waigani Convention

Appendix 2

Case studies/examples of successful actions of Parties

Three cases from Australia

1. FIRST CASE FROM AUSTRALIA CONFIRMED CASES OF ILLEGAL TRAFFIC

A. TRANSMITTING AUTHORITY

Name:	Environment Australia	Party	
Address:	GPO Box 787 CANBERRA ACT 2601	Competent Authority	<input type="checkbox"/>
Tel:	61 2 6274 1411	Focal Point	?
Fax:	61 2 6274 1164	National Authority	?
E-mail:	hwa@ea.gov.au		
Date of transmission:			

B. REPORTING BODY

Name:	“As Above”		
Address:		Party ¹	?
		Observer State	?
Tel:		NGO	?
Fax:		Company	?
E-mail:		Individual	?

C. DESCRIPTION OF THE ILLEGAL ACT

C.1. Act(s) found to be illegal traffic (please include information on which Basel Convention provisions has (have) been contravened)

Description:

On 13 December 1996, 84,000kgs of used lead acid batteries were exported from Australia destined for recycling/recovery operations in Manila, Philippines. The export contravened Articles 6.1 and 6.3 of the Basel Convention because the requirements for notification and consent were not observed. The export also contravened section 40 of the Australian *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, which prohibits the export of hazardous waste without a permit.

C.2. Name of States affected by the illegal traffic (i.e. country of origin, transit or destination):

Country of Origin: Australia

Countries of Transit: Singapore

Country of Destination: Philippines

¹ Please specify if different from Transmitting Authority.

C.3. Brief description of the waste(s) subject to the illegal act, including modes of transport, place of discovery, environmental conditions of the location:

Description of the waste: Scrap drained/dry whole intact lead batteries (“Rains”).

Modes of Transport: The waste was loaded into shipping containers, transported by road, loaded onto a ship at the Port of Burnie, Tasmania, Australia and offloaded at Manila in the Philippines.

Place of Discovery: The illegal export was discovered in Australia during a routine check of Australian Customs records.

Date of discovery of the wastes: April 1997

C.4. Date of the infraction:

Day Month Year

Infraction: **13 / 12 / 96**

D. WASTE IDENTIFICATION

D.1. Description of the waste:

Name of the Waste: Waste lead-acid batteries, whole or crushed (Annex VIII entry A1020).

Origin of the Waste: Tasmania, Australia.

Physical form: Solid.

Major constituents: Lead, plastic.

Typical contaminants: Not known.

Volume/Quantity of wastes: 84,000kgs.

Waste Code:	Y number(s) Y31	UN Class 6.1	
	H number(s) 6.1,11,12	UN number	
	IWIC	OECD	HS
	EWC		

D.2. Sampling and testing:

No sampling or testing was done on the waste.

Results:

D.3. Other relevant information (e.g. containment appearance, etc.):

None

E. DETECTION OF ILLEGAL TRAFFIC, TYPES OF DAMAGES, REMEDIAL ACTIONS AND DISPOSAL

E.1. Detection of illegal traffic:

By whom: Environment Australia

Where: Australia

When: April 1997

E.2. Damages:

Details of type and extent of known damages:

There were no damages reported from the illegal traffic.

E.3. Remedial actions:

Type of action(s):

No remedial actions were necessary.

Date:

Cost:

Allocation:

E.4. Final disposal of wastes subject to illegal traffic (i.e. measures taken, State of disposal, etc.)

The waste was disposed of by recycling/reclamation of metals and metal compounds in the Importing Party, by Philippine Recyclers Inc at Manila, Philippines.

F. PUNISHMENT

F.1. State of conviction: Australia

F.2. Date of conviction:

Day Month Year

Conviction: 25 / 05 / 1999

F.3. Description of punishment by the authority in the State of conviction:

The exporting company pleaded guilty to negligently contravening Section 40(1) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* by exporting a hazardous waste without an export permit. An executive officer of the company pleaded guilty to contravening Section 40B(1) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* by being negligent as to whether the contravention of section 40(1) would occur, being in a position to influence the conduct of the company and failing to take all reasonable steps to prevent the contravention. The exporting company was convicted and fined AUD2,000. The executive officer was convicted and fined AUD500.

As this matter was the first prosecution under the amendments to the Act, which entered into force on 12 December 1996, the Magistrate made a number of general remarks in relation to the offences prior to passing sentence. Of particular note were his comments that this was not a matter where there had been a deliberate plot to export the battery waste or a conscious decision not to apply for a permit. Rather, the commission of this offence was the unintentional consequence of a series of events which had been occurring over a number of months. The Magistrate noted that the plea of guilty was in respect of a negligent export of lead battery waste without a permit, rather than a deliberate act.

2. SECOND CASE FROM AUSTRALIA

On 1 September 1997, a shipment of approximately 60 tonnes of waste, mainly computer scrap, was exported from Sydney, Australia, bound for Hong Kong. On 22 September 1997, the Hong Kong authorities, after being notified by Greenpeace Australia of the hazardous nature of the goods, refused to allow the scrap entry. The containers were subsequently returned to Sydney, together with another two containers, also consigned to Hong Kong, that were removed from another vessel before it left Brisbane, Australia, on 1 October 1997.

The shipments contravened Articles 6.1 and 6.3 of the Basel Convention because the requirements for notification and consent were not observed. The export also contravened section 40 of the Australian Hazardous Waste (Regulation of Exports and Imports) Act 1989 ('Act'), which prohibits the export of hazardous waste without a permit. The suspected contravention of the Act was the subject of a joint investigation by the Australian Federal Police (AFP) and the Department of the Environment and Heritage.

The investigation found that the computer scrap had been collected by an Australian company concerned with the collection and re-sale of most kinds of metal and electrical scrap. In August 1997, the Australian company sold the scrap to a foreign company for AUD26,693. The Australian company then stuffed the containers and transported them to the docks. During the process of stuffing the containers, Greenpeace Australia became aware of the possible hazardous nature of the goods.

The problem during the investigation centred upon which company was responsible for the illegal export of the goods. The investigation found that the terms of the contract between the Australian company and the foreign company were Free on Board (FOB) and under commercial law this in effect made the foreign company the owner and exporter of the waste. However, there was no basis for criminal proceedings against the foreign company because an offence against section 40 of the Act can only be committed by a person who acts knowingly or recklessly. It could not be shown that anyone associated with the foreign company knew or ought to have known that the containers contained hazardous waste.

It could be argued that the Australian company was the exporter of the scrap for the purposes of section 40, having sold the scrap and packed it into the containers knowing that it was to be shipped to Hong Kong. Nevertheless, the investigation found that the prospects for a successful prosecution were not good, partly because the only individual who clearly knew precisely what was in the containers had died during the investigation, and partly because it was uncertain whether a company could be an exporter for the purpose of section 40 unless it was also the exporter for the purpose of commercial law. The Australian company was wound up while the investigation proceeded.

The Act is currently being amended to close this loophole by making it illegal for Australian companies to sell hazardous waste to foreign companies unless an export permit is in place.

The hazardous waste was disposed of in Australia, under Australian law, at the expense of the Australian Federal Government and at a total cost of AUD94,426. There are provisions in the Act under which the Government may seek to recover these costs from the foreign company.

3. THIRD CASE FROM AUSTRALIA

An alleged import of waste oil from a South Pacific island country was detected in October 1999 when the oil was transported from an Australian port to a storage facility without the waste transport certificates that were required by the local environment agency.

Investigations by the Australian Federal Police confirmed that 20,000 litres of waste oil had been imported on 12 October 1999 in an isotainer that was owned/leased by an Australian oil company. The oil was owned by a mining company based in the South Pacific island country. This company was unable to dispose of the oil in their previous manner, through a local liquid soap manufacturer, because that manufacturer had closed due to civil unrest.

Enquiries subsequently found that a previous import of 16,800 litres of waste oil had occurred on 17 June 1999. This oil had been treated by a local recycling facility before disposal to a power generating plant.

The Director of Public Prosecutions determined that a *prima facie* case existed against the Australian oil company but prosecution would not be in the public interest after considering that:

- (a) the imports were designed to ensure the disposal of the waste oil in a more environmentally friendly manner in the light of the civil unrest in the South Pacific island country at the time;
- (b) no waste oil was spilled or caused any damage as a result of the import; and
- (c) the two imports were isolated incidents occurring four months apart and were not part of a continuing course of conduct.

A letter of caution was formally issued to the Australian oil company.

Case from the United Kingdom of Great Britain and Northern Ireland

(Please specify if different from Transmitting Authority.)

(Form for) CONFIRMED CASES OF ILLEGAL TRAFFIC

A. TRANSMITTING AUTHORITY

Name: Department for Environment, Food and Rural Affairs
Address: Waste Policy Division,
Ashdown House
123 Victoria Street
London, SW1 6DE

Tel: + 44 (0) 20 7944 6424
Fax: + 44 (0) 20 7944 6409
E-mail: waste_policy@defra.gsi.gov.uk
Date of transmission: 3 September 2001

B. REPORTING BODY

Name: As above
Address:

Tel:
Fax:
E-mail:

C. DESCRIPTION OF THE ILLEGAL ACT

C.1. Act(s) found to be illegal traffic (please include information on which Basel Convention provisions has (have) been contravened)

Description:

Shipment of hazardous waste from Sweden to the UK without notification to the relevant Competent Authorities. This contravened Article 9(1)(a) of the Basel Convention and Article 26(1)(a) of Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community.

C.2. Name of States affected by the illegal traffic (i.e. country of origin, transit or

destination):

Sweden (country of origin) and the United Kingdom (country of destination)

C.3. Brief description of the waste(s) subject to the illegal act, including modes of transport, place of discovery, environmental conditions of the location:

Waste rags, gloves, overalls and liquid solvents, including acetone. The waste arrived in 45 gallon drums at a solvent recovery facility in Morecambe, Lancashire. An employee at the site contacted the Environment Agency as the load was not accompanied by all the necessary paperwork. The waste was inspected by Agency officers and some of the drums were found to be damaged, there was a strong smell of solvents coming from the drums and wood and rags were visible in a number of drums without lids. The load was poorly secured and was not clearly labelled. Further examination of the load revealed rags, overalls, gloves and liquid solvents. The paperwork with the drums indicated a further load which were eventually traced (again 45-gallon drums) to the docks at Immingham. These drums were crudely packaged in shrink-wrapped polythene and there was no waste description, or hazard warning labels.

Date of discovery of the wastes:

1 December 1999

C.4. Date of the infraction:

1 December 1999

D. WASTE IDENTIFICATION

D.1. Description of the waste:

Name of the Waste: Acetone and waste cloths contaminated with resins and polymers.

Origin of the Waste: Malmö, Sweden

Physical form: Liquids, sludges and contaminated solids

Major constituents: Contaminated rags, packaging, protective clothing, polymers and resins.

Typical contaminants: Resins and Polymers.

Volume/Quantity of wastes: 13500 Kg

Waste Code: Y number(s) Y13 UN Class 3

H number(s) _H3_ UN number: 1993

IWIC Q16/D9/P13/C42/H3/A243 OECD ___ HS ___

EWG: 000102

D.2. Sampling and testing:

On 13 December 1999 seven samples of liquid solvent waste were submitted by the Environment Agency to Lancashire County Council Laboratory for analysis. These samples were obtained by Environment Agency officers on 10 December 1999.

Results:

The samples were found to contain concentrations of acetone varying from 4.1% to 67%. Flash point analysis carried out on the waste sampled varied from -10 degrees centigrade to 55 degrees centigrade.

D.3. Other relevant information (e.g. containment appearance, etc.):

The waste was poorly packaged in 45 gallon drums some of which had missing lids and sealing bungs. The waste gave off strong solvent odours and was a potentially explosive cocktail of substances.

Only a small amount of the total quantity of waste would have been suitable for solvent recovery, whilst the majority of the waste would have required final disposal.

E. DETECTION OF ILLEGAL TRAFFIC, TYPES OF DAMAGES, REMEDIAL ACTIONS AND DISPOSAL

E.1. Detection of illegal traffic:

By whom: Employee of the solvent recovery site at Morecambe, Lancashire, UK.

Where: Solvent recovery site, Morecambe, Lancashire, UK.

When: 1 December 1999

E.2. Damages:

Details of type and extent of known damages: None

E.3. Remedial actions:

Type of action(s):

Date:

Cost:

Allocation:

E.4. Final disposal of wastes subject to illegal traffic (i.e. measures taken, State of disposal, etc.)

The Environment Agency arranged for the waste to be shipped back to Sweden at Stirling Lloyd's cost. TFS notification no. GB 004528

F. PUNISHMENT

F.1. State of conviction:

United Kingdom

F.2. Date of conviction:

Conviction: 17 November 2000

F.3. Description of punishment by the authority in the State of conviction:

Stirling Lloyd Contracts Limited were fined £1500 for the illegal shipment and were ordered to pay £4594.80 costs to the Environment Agency.

If more space required, please use additional sheet(s)

Authority completing the Form shall forward a copy to all Competent Authorities or Focal Points in the State(s) concerned as appropriate.

Adopted by the fourth meeting of the
Conference of the Parties to the Basel Convention
February 1998

Appendix 3

Sampling and analysis

A. Quality of Investigations

1. It is important that investigation officers are familiar with sampling and analysis procedures before proceeding with investigations. Improper collection of evidence may compromise the likelihood of a successful prosecution. Consequently, investigation officers should be trained in determining the chain of custody, retaining samples and security procedures that the sampling team and laboratory intend to follow.
2. Experienced government agencies that regularly deal with environmental crime will have the relevant background and expertise to carry out investigations to a high standard. However, if a less experienced local officer, the person in charge of the investigation, is taking samples will need to ensure that appropriate chains of custody procedures are followed.

B. Quality of Analysis

3. Similarly, it cannot be assumed that laboratories will necessarily follow appropriate procedures once samples have been taken. This is especially true for laboratories or personnel that are relatively inexperienced in collecting and analysing samples for use in criminal proceedings. Consequently, it is important to work with accredited or certified laboratories that are familiar with the relevant procedures.

C. Sampling Procedures

4. A number of questions may be asked to ensure proper handling of samples, as follows:
 - (a) Does the chain of custody form follow the samples from the time they are taken until the time they are delivered to the laboratory for analysis?
 - (b) If sampling exceeds one day or samples require storage prior to delivery to the laboratory, investigators should determine what the samples are intended to be used for and what security procedures are in place to protect existing samples. Procedures should ensure secure overnight storage for all samples which are to be used as evidence in criminal cases. For example if the samples are to be stored in a locked vehicle, then the vehicle should be garaged in secure conditions. Where samples are being taken to determine clean-up costs for civil cases, secured storage is not required. They should also determine whether there are any other storage or packaging requirements relevant to the material being sampled and check how the samples will be packaged. For example the samples may need to be stored at a certain temperature, in a dark place and/or away from moisture until analysis is carried out to ensure their integrity. Ensure that all packaging and storage requirements are met.
 - (c) Is a chain of custody procedure or other record generated when the laboratory receives the samples?
 - (d) How does the laboratory store the samples prior to analysis?
 - (e) Will the samples be handled by multiple personnel during the course of analysis? If so, what records are maintained to track samples and procedures?
 - (f) What happens to the samples after analysis? Does the laboratory retain the samples? If so, how long are the samples retained and are the samples secure?

D. Capability of Laboratory

- (a) Are approved testing methods used to analyse samples and are the correct methods used for the specific circumstance?
- (b) Are appropriate quality assurance/quality control procedures strictly applied?
- (c) Does the laboratory have a track record in providing high quality services for criminal investigation? The experience and reputation of the laboratory undertaking the analysis will have a direct bearing on the quality of the analysis. Certification or accreditation should be a minimum requirement for all cases involving criminal investigations. To this end, consideration should be given to establishing a regional network of accredited laboratories that can be used for this purpose.
- (d) Does the laboratory understand the objectives of the investigation?

E. Capability of Inspectors

6. A number of questions may be asked to ensure laboratory capability, as follows:

- (a) Does the investigator understand the correct analytical procedures to be followed and what information is required? As with sampling, it is important to furnish scientific personnel with as much relevant case history as possible prior to analysis to maximise the accuracy of the results.
- (b) Can the investigator accurately interpret the results? If not, has he/she clarified any areas of confusion? It is important to obtain early clarification of results in areas where there may be confusion or a lack of understanding.
- (c) Has the investigators asked the laboratory to retain the samples for the requisite period of time?

F. Treatment of video and photographic evidence

7. As a general rule, photographic or videotaped evidence is not recommended for recording sampling or analysis procedures. However, should photographic or videotaped evidence be required, the following measures should be taken:

- (a) personnel undertaking sampling or analysis should not be videotaped or photographed.
- (b) the sample area and sample jars should be videotaped or photographed before and after sampling takes place as a record that correct procedures have been followed.
- (c) where a videotaped record of sampling and analysis procedures is undertaken, a new video cassette should be used, the sound turned off and the original tape retained by the investigator in charge.
- (d) where a photographic record of sampling and analysis procedures is undertaken, a full record of the photographic evidence should be kept including photo sequence numbers, a description of the photograph and the time and date of photography. As with videotaped evidence, films should be retained by the investigator in charge.
- (e) should the company under investigation request the right to videotape or photograph sampling procedures, permission should not be granted where there is a risk of interference with the sampling being undertaken.

G. Treatment of original documents

8. The sampling team and other technical staff involved in investigations should be informed that all original documents must be stored in a secure location until the investigator notified them that the documents are no longer required. These documents include chain of custody forms, field notes and reports.

9. Likewise, the laboratory responsible for analysing the samples should be requested to maintain all original documents relating to the analysis until otherwise informed. These documents include laboratory notes, chromatograms and final reports.

H. Treatment in the Laboratory

10. Treatment in the laboratory includes the following operations:

- (a) Sample pre-treatment: homogenisation, subsampling, extraction, clean-up, purification, irradiation, etc.
- (b) Component separation, chemical and physico-chemicals.
- (c) Components measure: detection, identification, quantification.

I. Results and Data

11. Reliability of analytical data means that it is precise and true. Precision is achieved when random errors are minimised. Accuracy is reached when systematic errors are eliminated.

Note: At some later date Appendix 3 might benefit from some worked examples. Such examples could be added after the guidance elements have been adopted and used in practice.

Appendix 4

Guidelines for Risk Management Approach

Step 1: Establish the context

1. The political, social, economic, legal and physical environments in which the competent authority operates must be considered in establishing the context. The following questions may be asked:

- What legislation is being enforced?
- What does the legislation seek to control?
- What, broadly, is the nature, size and complexity of the business or community activity concerned?
- What are the major threats of non-compliance?
- What are the major outcomes expected/desired?
- Who has an interest in ensuring compliance with the legislation?
- Who must comply with the legislation?
- What is their interest in the matters the legislation is protecting?
- What must individuals or organizations external to the competent authority do, in order to comply with the legislation?
- What problems or obstacles have been identified?

Step 2: Identify the risks

2. For the purposes of compliance and enforcement, risk means the risks, or incidents, of failure to comply with the legislation. This step is concerned with identifying the potential or actual incident. The consequences and likely occurrence of these non-compliance risks or incidents will be analysed in step 3. The following questions may be asked:

- What is the source of each non-compliance risk or incident?
- When is an incident of failure to comply with the Convention likely to occur?
- What is the compliance rate at present for similar activities?
- Are there any geographical regions in which breaches of the Convention are particularly prevalent?
- Why might an individual or organization not comply with the Convention?
 - ❖ ignorance of existence of the Convention
 - ❖ knowledge of the Convention but insufficient awareness of provisions
 - ❖ wilful non-compliance
 - ❖ lack of clarity of Convention/processes/regulations
 - ❖ ignorance/inadvertence/recklessness/negligence
- What advantages might be gained by failing to comply with the Convention?
- What is the nature of penalties vis-à-vis potential advantages from non-compliance?
- Are individuals or organizations aware of their responsibilities under the Convention?
- Have any individual, or classes, of people or organizations displayed a particular tendency not to comply with the Convention in the past?
- What problems might arise from excessive or inadequate enforcement activity?

Step 3: Analyse the risks

3. In this step the level of risk will be determined. The level of risk is determined by the relationship between the likelihood that a person or organization will fail to comply with the Convention and the consequences of that failure. The consequence of a failure to comply should be considered from three perspectives:

- the consequences for the environment,
- consequences for the community, present and future, and
- consequences for the Government

4. The level of risk may be determined by answering the following questions:
- What is the potential likelihood of the non-compliance risks or incidents occurring?
 - What is the compliance rate at present for similar activities?
 - Are there any geographical regions in which breaches of the legislation are particularly likely to occur?
 - What advantages might be gained by failing to comply with the legislation?
 - What is the nature of penalties vis-à-vis potential advantages from non-compliance
 - Are individuals or organizations aware of their responsibilities under the legislation?
 - Have any individual, or classes, of people or organizations displayed a particular tendency not to comply with the legislation in the past?
 - What are the potential consequences of each non-compliance risk or incident, should it occur?
 - What environmental damage may result from the failure to comply with the legislation?
 - Are there any classes of illegal activities that are likely to damage the environment more than others?
 - Are there any geographic regions where damage as a result of failure to comply with the legislation may be particularly severe?
 - Are there any protected elements of the environment (e.g. particular species, objects and/or places, or cultural values) which are particularly vulnerable to illegal actions (or failures to act)?
 - Are there any matters covered by the legislation that have a high public profile in which there is a high degree of community or political interest?
 - What are the current controls which may detect or prevent potential non-compliance risks or incidents?

Step 4: Assess risk and set priorities

5. This steps involves deciding whether a given risk (assessed in Step 3 as severe, high, etc.) is acceptable or unacceptable. An assessment of the acceptability of the risk involves, takes into account cost impact, benefits and opportunities presented by the risk. Thresholds may be appropriate in some cases, to determine how much effort is warranted in relation to each area of level of risk.
6. In order to set priorities and assess the risk, the following key questions should be answered:
- What is the acceptable level of risk (for the environment, for the community and for the Government)?
 - Are there any matters covered by the legislation that have a high public profile or in which there is a high degree of community or political interest?
 - What level or priority is the risk (severe, high, etc.)?

Step 5: Treat the risks

7. This step involved deciding what measures need to be taken to minimise identified risks and their impacts. Promoting compliance with legislation will reduce the risks and incidents; certain measures may be necessary to promote compliance. The information identified in the previous steps will help identify which strategies are the most appropriate under a given set of circumstances.

- What are the current controls which may detect or prevent potential non-compliance risks or incidents?
- How may these be improved?
- What other strategies may promote compliance and enforcement activities?

8. Possible strategies include:

- Compliance assistance
- Education and awareness
- Technical assistance
- Partnership arrangements
- Monitoring and investigation
- Addressing contraventions
- Enforcement options
- Remedial actions
- Managing key partnerships
- Ensuring other agencies can be relied upon for some of the compliance and enforcement functions.

Monitoring and review

9. Periodic review is necessary to ensure changing circumstances do not alter risk priorities.

Note: At some later date Appendix 4 might benefit from some worked examples. Such examples could be added after the guidance elements have been adopted and used in practice.