

COMMUNICATION

DRAFT INSTRUCTION MANUAL FOR THE LEGAL PROFESSION ON THE
PROSECUTION OF ILLEGAL TRAFFIC

CONSULTANCY ANNOUNCEMENT AND CALL FOR
APPLICATIONS BY 28 FEBRUARY 2011

The Secretariat of the Basel Convention hereby draws the attention of Parties and Signatories to the Basel Convention as well as that of the Basel Convention Regional and Coordinating Centres to the following consultancy announcement.

By decision OEWG-VII/14, the Open-ended Working Group of the Basel Convention has agreed, "subject to the availability of resources from voluntary contributions, to convene, by electronic means a small expert group to develop a draft instruction manual for the legal profession on the prosecution of illegal traffic based upon the draft outline prepared by the Secretariat, in addition to any proposals and comments provided in accordance with decisions VIII/24 and IX/23". Decision OEWG-VII/14 requests the small group of experts to report on the outcome of its work and to submit a draft decision, through the Secretariat, to the Conference of the Parties for consideration at its tenth meeting (17-21 October 2011, Colombia).

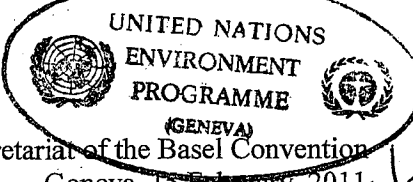
Nineteen countries have nominated experts to form the above mentioned small group of experts. In addition, the Secretariat has received contributions to hire a consultant to assist in the development of the draft instruction manual.

A consultant shall be retained for the purpose of assisting the small expert group, through the Secretariat, with the development of the draft instruction manual for the legal profession on the prosecution of illegal traffic, in accordance with decision OEWG-VII/14.

The Secretariat invites interested candidates to consult the attached terms of reference and to submit their candidature by 28 February 2011 to juliette.kohler@unep.org, using the P11 form available on the website of the Convention (<http://www.basel.int/legalmatters/index.html>).

The Secretariat would welcome the assistance of Parties, Signatories as well as the Centres in making this information available to potential candidates.

Thank you in advance for your kind cooperation and assistance.



UNITED NATIONS
ENVIRONMENT
PROGRAMME
(GENEVA)
Secretariat of the Basel Convention
Geneva, 15 February 2011

To: Focal Points and Competent Authorities of Parties and Signatories to the Basel Convention
Basel Convention Regional and Coordinating Centres
cc: Permanent Missions to the United Nations in Geneva

Annex

Terms of Reference for a Consultant

Development of a Draft Instruction Manual for the Legal Profession on the Prosecution of Illegal Traffic

Introduction

Under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Parties consider that illegal traffic in hazardous wastes or other wastes is criminal (Article 4.3). Each Party is required to take appropriate legal, administrative and other measures to implement and enforce the provisions of the Convention, including appropriate national/domestic legislation to prevent and punish illegal traffic (Articles 4.4 and 9.5).

By decision OEWG-VII/14, the Open-ended Working Group of the Basel Convention has agreed, "subject to the availability of resources from voluntary contributions, to convene, by electronic means a small expert group to develop a draft instruction manual for the legal profession on the prosecution of illegal traffic based upon the draft outline prepared by the Secretariat, in addition to any proposals and comments provided in accordance with decisions VIII/24 and IX/23". Decision OEWG-VII/14 requests the small group of experts to report on the outcome of its work and to submit a draft decision, through the Secretariat, to the Conference of the Parties for consideration at its tenth meeting (17-21 October 2011, Colombia).

Twenty one countries have nominated experts to form the above mentioned small group of experts. In addition, the Secretariat has received contributions to hire a consultant to assist in the development of the draft instruction manual.

A consultant shall be retained for the purpose of assisting the small expert group, through the Secretariat, with the development of the draft instruction manual for the legal profession on the prosecution of illegal traffic, in accordance with Decision OEWG-VII/14.

Activities

The consultant, who shall report to the small expert group through the Secretariat of the Basel Convention, shall undertake the following tasks:

1. Prepare a draft instruction manual for the legal profession on the prosecution of illegal traffic, based upon the draft outline prepared by the Secretariat (contained in the annex to document UNEP/CHW/OEWG/6/12, attached to these terms of reference), in addition to any proposals and comments provided in accordance with decisions VIII/24 and IX/23, as posted on the website of the Convention (<http://www.basel.int/legalmatters/illegaltraffic/comments-manual/index.html>) as well as any input received from the small expert group.
2. The draft instruction manual will be prepared in English and be no more than 25 pages long, excluding annexes. It will follow the structure of the above mentioned draft outline prepared by the Secretariat. It will contain examples of state practice (legislation and cases that have been prosecuted, possibly from every geographical region) and provide information in an accessible form (text, questions and answers, diagrams, boxes – see as an example the "Training Manual for the Enforcement of Laws Implementing the Basel Convention: Guidance for Safe and Effective Detection, Investigation and Prosecution of Illegal Traffic in Hazardous and other Wastes"). It will build on and make reference to existing materials from the Secretariat (see <http://www.basel.int/legalmatters/illegaltraffic/index.html>). When meaningful, it will also make reference to other relevant publicly available materials (eg. from INECE, Interpol, CITES secretariat, domestic tools).

3. A first draft will be based on the specifications contained in paragraph 1 and 2 above. In addition, the first draft instruction manual will address the following matters:
 - Introduction: the possible link between environmental crime and other crimes (such as money laundering, tax fraud, drug trafficking, illegal trafficking under CITES)
 - Part II: the Basel Convention check list for the legislator and the model national legislation
 - Part III: definition and examples of attempt, conspiracy and aiding/abetting
 - Part IV: the trigger for prosecutorial action (including issues of prosecutorial discretion), establishing whether there is jurisdiction *ratione materiae*, *temporis* and *loci*, various national models for conducting investigations, national and international cooperation during an investigation.

4. The first draft will be consulted, through the Secretariat, with the small expert group and with countries that have provided comments in accordance with decisions VIII/24 and IX/23. Experts will also be invited to provide examples of national legislation and practice that could be inserted in the draft instruction manual. A second draft will be produced by the consultant, taking into account the comments received from the experts, individual countries that provided comments, and the Secretariat. The second draft will be consulted, through the Secretariat, with the small group of experts. Following integration of comments, the consultant will produce a third and final draft, for consideration by the Conference of the Parties at its tenth meeting.

Qualifications and experience

The consultant must have at least 10 years' work experience in the field of MEAs, including 5 years working on the Basel Convention and/or MEA implementation and illegal traffic issues. The consultant must be familiar with the work on illegal traffic under the Basel Convention. Experience with the prosecution of environmental crimes, in particular of cases of illegal traffic of hazardous wastes, as well as with legislative drafting is highly desirable. The consultant must possess excellent English reading and writing skills.

Time frame

The contract will require 60 days of work, to be executed between 15 March 2011 and 8 June 2011.

The consultant shall transmit the first draft of the manual to the Secretariat of the Basel Convention by 31 March 2011 for onward transmittal to the small expert group. The consultant will produce the second draft by 30 April 2011 and the third and final draft by 1 June 2011. All drafts shall be provided to the Secretariat in electronic version.

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

Introduction

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

I. Enforcement of the Basel Convention at the national level

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

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

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

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

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

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

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

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

III. Illegal traffic of hazardous wastes and other wastes

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

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

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

IV. Preparing to prosecute a suspected case of illegal traffic

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

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

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

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

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

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

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

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

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

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

VI. Sentencing for illegal traffic

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

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

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

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

VII. Keeping informed about illegal traffic

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

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

Annexes

29. The annexes could contain:

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

A table indicating the penalties dispensed in different countries;

A bibliography.