



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

Geneva, 3–6 September 2018

Item 3 (c) (i) of the provisional agenda*

**Matters related to the work programme of the
Open-ended Working Group for 2018–2019:
legal, governance and enforcement matters:
consultation with the Committee Administering the
Mechanism for Promoting Implementation and Compliance**

**Guidance on the implementation of paragraph 4 of Article 6 of
the Basel Convention on transit transboundary movements**

Note by the Secretariat

As referred to in the note by the Secretariat on consultation with the Committee Administering the Mechanism for Promoting Implementation and Compliance with the Basel Convention (UNEP/CHW/OEWG.11/9), the annex to the present note contains draft guidance on the implementation of paragraph 4 of Article 6 of the Basel Convention on transit transboundary movements, as developed the Committee. The present note, including its annex, has not been formally edited.

* UNEP/CHW/OEWG.11/1/Rev.1.

Annex

Guidance on the implementation of paragraph 4 of Article 6 of the Basel Convention on transit transboundary movements

(Draft of April 2018 for consultation with the OEWG-11)

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Introduction

1. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention/Convention) was adopted in 1989 and entered into force on 5 May 1992. As of January 2018, the Convention had 186 Parties.
2. The Basel Convention establishes, among others, an internationally agreed binding mechanism to control transboundary movements of hazardous wastes and other wastes subject to the Convention. Such movements can only take place in compliance with specific conditions and procedures, generally referred to as the prior informed consent (PIC) procedure. The PIC procedure includes the obligations to notify the State of import and any State of transit of a proposed transboundary movement and obtain their prior consent. This document was prepared with a view to providing guidance to Parties and stakeholders on how to implement and apply the PIC procedure as applicable to transit States.
3. For general guidance on the Basel Convention PIC procedure you may refer to:
 - (a) *The Manual for the Implementation of the Basel Convention*, providing guidance to Parties on their obligations under the Basel Convention, including their obligations under the PIC procedure;¹
 - (b) *The Guide to the Control System*, providing explanation and guidance on the PIC procedure to persons involved in the transboundary movements, such as waste collectors, exporters, carriers, importers and disposers;²
 - (c) *The Revised notification and movement documents for the control of transboundary movement of hazardous wastes and instructions for completing these documents*;³
 - (d) *The Leaflet on international trade control measures under the Basel, Rotterdam and Stockholm Conventions*, providing a quick overview on the international trade control regimes of the Basel Convention, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) and the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention).⁴
4. Users should also ensure that they are familiar with relevant regional, national and/or other domestic laws implementing the Basel Convention, as each State's approach can vary slightly, and Parties have the right under the Convention to limit or prohibit imports, transit or exports. Parties may also take more stringent measures than provided under the Convention in order to better protect human health and the environment.
5. This guidance was prepared by the Committee Administering the Mechanism for Promoting Implementation and Compliance (Implementation and Compliance Committee/Committee), as part of its mandate to consider additional steps to improve the implementation of and compliance with Article 6 of the Basel Convention. In the context of the Committee's work programme for 2016–2017, Parties were invited to provide information about their experience in implementing paragraph 4 of Article 6 of the Convention by responding to a questionnaire available in English, French and Spanish. A separate questionnaire was developed for stakeholders with an invitation for them to share their views and experiences with transit transboundary movements. The information provided by Parties and stakeholders in response to the questionnaires is available on the website of the Convention.⁵ Subsequently, the thirteenth meeting of the Conference of the Parties tasked the Committee to develop guidance on the implementation of paragraph 4 of Article 6 of the Convention, as part of its work programme for the biennium 2018–2019, taking into account its report on the implementation of and compliance with paragraph 4 of Article 6 of the Basel Convention on transit

¹ The manual, adopted at the twelfth meeting of the Conference of the Parties, is available in Arabic, Chinese, English, French, Russian and Spanish at <http://www.basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

² The guide, adopted at the twelfth meeting of the Conference of the Parties, is available in Arabic, Chinese, English, French, Russian and Spanish at <http://www.basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

³ See <http://www.basel.int/Procedures/NotificationMovementDocuments/tabid/1327/Default.aspx>.

⁴ The leaflet, developed by the Secretariat, is available in Arabic, Chinese, English, French, Russian and Spanish at <http://www.basel.int/Implementation/Publications/BrochuresLeaflets/tabid/2365/Default.aspx>.

⁵ See <http://www.basel.int/Implementation/LegalMatters/Compliance/GeneralIssuesActivities/Activities201617/ControlSystemTransitIssues/tabid/4781/Default.aspx>.

transboundary movements.⁶ [The guidance was adopted by the fourteenth meeting of the Conference of the Parties by decision BC-14/[...].]

6. The development of this guidance document was made possible thanks to the financial support provided by the European Union [and ...].

I. Definitions

7. Pursuant to the Basel Convention, a State of transit is any State (Party or non-Party to the Basel Convention), other than the State of export or import, through which a movement of hazardous wastes or other wastes is planned or takes place.⁷

8. The definition of “State of transit” should be read in conjunction with the definitions of “State of export” and “State of import”. The “State of export” is the State (Party to the Basel Convention) from which a transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated.⁸ The “State of import” is the State (Party to the Basel Convention) to which a transboundary movement of hazardous wastes or other wastes is planned or takes place for the purpose of disposal therein (any operation listed in Annex IV to the Basel Convention, including interim disposal operations) or for the purpose of loading prior to disposal in an area not under the national jurisdiction of any State.⁹ For example, a State where wastes are repacked prior to submission to another disposal operation (D14) or stored pending another disposal operation (D15) is considered to be the State of import for the purpose of the Basel Convention PIC regime, and not the State of transit, even if the wastes are afterwards transported to a third State for a subsequent disposal operation. The later transport to another country for a subsequent disposal operation should be treated as a new transboundary movement, in which the previous State of import (the State where the interim disposal operation took place) acts as the new State of export.

9. A “transit” under the Basel Convention must be understood accordingly as a movement through a “State of transit” as defined in the Convention, which is a movement through a State, where the movement is neither planned to be initiated or initiated in that State, nor planned to take place or taking place for the purpose of disposal therein, or for the purpose of loading prior to disposal in an area not under the national jurisdiction of any State.

10. The use of the term transit under the Basel Convention does not necessarily coincide with how the term is used at the national level for Customs purposes. In the context of Customs procedures, transit is usually described as the procedure whereby goods are transported under Customs control from one Customs office to another, including outbound and inbound transit.¹⁰ Because of potential differences at the national level in the meaning of the term “transit” for Competent Authorities and Customs, it is important to ensure that both are aware of the respective definitions and coordinate accordingly. Figures 1 and 2 below illustrate the concept of transit under the Basel Convention and under Customs terminology.

11. In the example of Figure 1, transit State B does not have a Customs transit regime. Any entry into the territory of State B through a Customs office of entry is treated as an import for Customs purposes, even if the wastes are destined to cross the territory of State B (without any disposal operation taking place), and then leave the country to be disposed of in State D. State B acts as a “State of transit” for the purpose of the application of the Basel Convention PIC procedure. This Basel Convention “transit” through State B does however involve an import and subsequent export in terms of State B’s Customs procedures.

⁶ UNEP/CHW/CC.12/11/Add.1, annex.

⁷ The definition is set out in paragraph 12 of Article 2 of the Basel Convention (‘State of transit’ means any State, other than the State of export or import, through which a movement of hazardous wastes or other wastes is planned or takes place).

⁸ The definition is set out in paragraph 10 of Article 2 of the Basel Convention (‘State of export’ means a Party to which a transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated).

⁹ The definition is set out in paragraph 11 of Article 2 of the Basel Convention (‘State of import’ means a Party to which a transboundary movement of hazardous wastes or other wastes is planned or takes place for the purpose of disposal therein or for the purpose of loading prior to disposal in an area not under the national jurisdiction of any State).

¹⁰ See, for example, the use of the word transit in Annex E (paragraph 2) of the International Convention on the Simplification and Harmonization of Customs Procedures (revised Kyoto Convention) of 1999 according to which “the Customs shall allow goods to be transported under Customs transit in their territory: (a) from an office of entry to an office of exit; (b) from an office of entry to an inland Customs office; (c) from an inland Customs office to an office of exit; and (d) from one inland Customs office to another inland Customs office.”

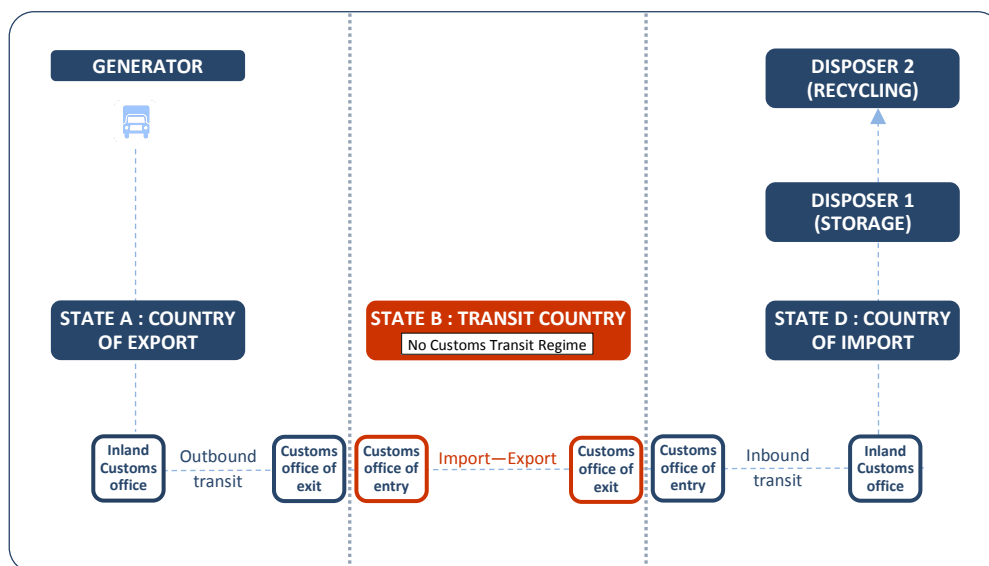


Figure 1 – The concept of transit under the Basel Convention as opposed to Customs terminology where the transit State does not have a Customs transit regime

12. In countries that do have a Customs transit regime, such as State C in Figure 2 below, a Basel Convention transit usually corresponds to a so-called “through transit” in terms of Customs procedures (i.e. direct transport from a Customs office of entry to a Customs office of exit).

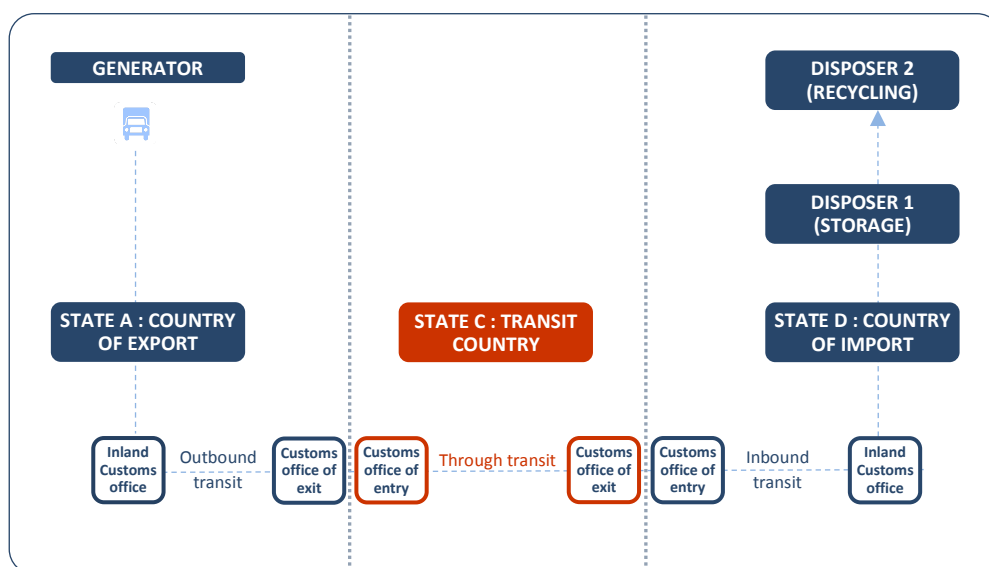


Figure 2 – The concept of transit under the Basel Convention as opposed to Customs terminology where the transit State does have a Customs transit regime

13. The Convention requires Parties to notify and obtain consent for any transit of hazardous wastes or other wastes which is planned or takes place through an area under the national jurisdiction of another State, which is a Party to the Convention.¹¹ This area comprises “any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health and the environment.”¹² According

¹¹ See the definition of “transboundary movement” in paragraph 3 of Article 2 of the Basel Convention, which means “any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or *through an area under the national jurisdiction of another State* or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement.”

¹² The definition of “area under the national jurisdiction of a State” is set out in paragraph 9 of Article 2 of the Basel Convention (“Area under the national jurisdiction of a State” means any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment).

to international maritime law, coastal States' regulatory jurisdiction with regard to the protection and preservation of the marine environment extends to their territorial sea¹³ and their exclusive economic zone.¹⁴ Both areas therefore a priori fall within the Basel Convention definition of "area under the national jurisdiction of a State," with the result that any transboundary movement crossing the territorial sea and/or exclusive economic zone constitutes a "transit" transboundary movement for the purposes of the Basel Convention, which requires prior notification to and consent of the coastal State.¹⁵

14. In practice, however, some Parties are understood to use a narrower definition of the term transit, according to which the mere passage through their exclusive economic zone and/or territorial sea falls outside that definition and does not require notification and consent.¹⁶ However, the PIC procedure applies for these Parties, where a ship calls at a port under their jurisdiction.¹⁷ Some Parties go even further and only require notification and consent if it is planned that the wastes be offloaded and then reloaded again in a port under their national jurisdiction.¹⁸

15. Parties are encouraged to inform other Parties through the Secretariat of their national definitions of "State of transit". A national definition of "State of transit" may, in particular, serve to clarify whether the Party requires notification and consent for passages through its different marine areas (passage through the exclusive economic zone; passage through the territorial sea without call at a port/roadstead; passage through straits used for international navigation without call at port/roadstead; passage through channels, etc.) and for calls at a port/roadstead under its jurisdiction (call at port/roadstead without offloading; call at port/roadstead with offloading and reloading on the same ship; call at port/roadstead with offloading and reloading on a different ship, etc.). Parties should use Question 8 of the revised standardized reporting format for transmitting information on import and export prohibitions,¹⁹ or Question 3 (h) of the revised reporting format.²⁰ The received notifications are made available on the Convention's website.²¹

II. The PIC procedure as it applies to transit States

A. Overview of the PIC procedure

16. The PIC procedure for transboundary movements of hazardous wastes or other wastes forms the foundation of the control system of the Basel Convention. A transboundary movement of hazardous wastes or other wastes can take place only upon prior written notification by the State of

¹³ Paragraph 2 of Article 2 of the United Nations Convention on the Law of the Sea (UNCLOS) provides that "[the] sovereignty [of a coastal State] extends beyond the air space over the territorial sea as well as to its bed and subsoil."

¹⁴ Subparagraph 1 (b) of Article 56 of UNCLOS provides that "[i]n the exclusive economic zone, the coastal State has: [...] jurisdiction as provided for in the relevant provisions of this Convention with regard to, [inter alia] the protection and preservation of the marine environment."

¹⁵ Parties that indicated in their response to Question #2b that passages through the exclusive economic zone, without calling a port, constitute a "transit" for the purpose of the Basel Convention include, for example, Colombia, Dominican Republic, Malaysia, the Republic of the Congo and Thailand. All those countries also consider a passage through the territorial sea to constitute a "transit".

¹⁶ Parties that responded to Question #2b that a mere passage through their exclusive economic zone or territorial sea is not considered a transit for the purpose of the Basel Convention include, for example, Austria, Belgium, Bulgaria, Croatia, Estonia, Germany, Ireland, Portugal and Slovakia. Parties that indicated in their response to Question #2b that passages through the exclusive economic zone only are not considered to constitute a "transit", but passages through the territorial sea do so, include, for example, Argentina, Australia, Canada, Cuba and Singapore.

¹⁷ During a visit to a port there is always a risk that wastes may be unloaded onto the dock, even if this was not planned, and then abandoned. The risks associated with the unloading of wastes also apply where a ship enters a roadstead (an area of water which is used for the loading, unloading and anchoring of ships and considered to be part of the territorial sea, not internal waters) instead of a port.

¹⁸ See for example Montenegro's response to Question #2b indicating that it is not a transit where a ship calls at a port, without offloading the wastes, and leaves for a different port of discharge. However where the ship offloads and reloads the wastes on the same or a different ship it is a transit for the purpose of the Basel Convention.

¹⁹ The standardized reporting format for transmitting information under paragraphs 1 (a) and (b) of Article 4 and paragraphs 2 (c) and (d) of Article 13 of the Convention, as amended at the thirteenth meeting of the Conference of the Parties (import and export prohibitions) is available at <http://basel.int/Procedures/ImportExportProhibitions/tabid/2751/Default.aspx>.

²⁰ National reports may be consulted at <http://www.basel.int/Countries/NationalReporting/ElectronicReportingSystem/tabid/3356/Default.aspx>.

²¹ [Add hyperlink].

export, generator or exporter to the competent authorities of the States of import and transit, and upon receipt by the notifier of the written consent from these authorities permitting the transboundary movement of wastes to or through their jurisdiction. The PIC procedure is primarily regulated in Article 6 of the Basel Convention. This guidance focuses on the role of transit States in the PIC procedure. The appendix includes a diagram on the PIC procedure that reflects the guidance provided in this document on the role of transit States in the procedure and related obligations of the State of export, the exporter and the generator.

17. For general guidance on the PIC procedure you may refer to:

- (a) The *Manual for the Implementation of the Basel Convention*, providing guidance to Parties on their obligations under the Basel Convention, including the PIC control regime;²²
- (b) The *Guide to the Control System*, providing explanation and guidance on the PIC procedure to persons involved in the transboundary movements, such waste collectors, exporters, carriers, importers and disposers;²³
- (c) The *Revised notification and movement documents for the control of transboundary movement of hazardous wastes and instructions for completing these documents*;²⁴
- (d) The *Leaflet on international trade control measures under the Basel, Rotterdam and Stockholm Conventions*, providing a quick overview on the respective international trade control regimes.²⁵

18. In accordance with Article 9 paragraph 1 of the Convention, a transboundary movement of hazardous wastes or other wastes:

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

shall be deemed to be illegal traffic. "States concerned" means any Parties which are States of export or import, or transit States, whether Parties or not.²⁶ Pursuant to paragraph 3 of Article 4 of the Convention, the Parties consider that illegal traffic in hazardous wastes or other wastes is criminal.

B. Transboundary movements through a transit State which is a Party

1. Notification of proposed transboundary movement to transit States

19. Pursuant to paragraph 1 of Article 6 of the Basel Convention, each State of transit must be notified of any proposed transboundary movement of hazardous wastes or other wastes.

20. Transit notifications must be addressed to the competent authority designated to receive the notification in case of transit.²⁷ The list of competent authorities and their contact information as transmitted to the Secretariat by Parties is available on the Convention's website.²⁸

²² The manual, adopted by the twelfth meeting of the Conference of the Parties, is available in Arabic, Chinese, English, French, Russian and Spanish at <http://www.basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

²³ The guide, adopted by the twelfth meeting of the Conference of the Parties, is available in Arabic, Chinese, English, French, Russian and Spanish at <http://www.basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

²⁴ See <http://www.basel.int/Procedures/NotificationMovementDocuments/tabid/1327/Default.aspx>.

²⁵ The leaflet, developed by the Secretariat, is available in Arabic, Chinese, English, French, Russian and Spanish at <http://www.basel.int/Implementation/Publications/BrochuresLeaflets/tabid/2365/Default.aspx>.

²⁶ Article 2 paragraph 12 of the Basel Convention.

²⁷ See Paragraph 1 of Article 5 of the Basel Convention, which obliges Parties to "[d]esignate or establish one or more competent authorities and one focal point. *One competent authority shall be designated to receive the notification in case of a State of transit.*" (emphasis added)

²⁸ <http://www.basel.int/Countries/CountryContacts/tabid/1342/Default.aspx>.

21. In most cases, namely where the hazardous wastes or other wastes subject to the transboundary movement fall within the categories of wastes listed in the annexes to the Basel Convention,²⁹ the duty to notify the transboundary movement to the State of transit lies with the State of export, or the generator or exporter if so required by legislation applicable in the State of export.

22. Where the wastes are not covered by the annexes but are defined as, or considered to be, hazardous wastes by the domestic legislation of any State concerned,³⁰ the obligation to notify the transboundary movement to the State of transit applies to:

(a) The *State of export*, or the exporter or generator, where they are legally defined as, or considered to be, hazardous only by the State of export,³¹ or where they are legally defined as, or considered to be, hazardous only by the State of transit;³²

(b) The *State of import*, or importer or disposer, where the wastes are legally defined as, or considered to be, hazardous wastes only by the State of import, or where they are legally defined as, or considered to be hazardous wastes by the State of import and some or all States of transit.³³ In cases where the State of import, or importer or disposer, acts as the notifier, the guidance on the application of the PIC procedure to transit Parties below applies *mutatis mutandis*.

23. The duty to notify the transboundary movement implies the preliminary step of identifying all States of transit that need to be notified of a proposed transboundary movement of hazardous or other wastes. As mentioned above, Parties appear to have different interpretations of the Convention's provisions regarding the meaning of a "State of transit". One way to overcome challenges associated with differing interpretations, is for all Parties to agree to a common interpretation of the term, for instance through a decision adopted by the Conference of the Parties.

24. Should the development of a common understanding of the terms "State of transit" not prove to be possible, the following steps are recommended: Firstly, the State of export, or the generator or exporter, should identify any State that may fit the definition of "State of transit" pursuant to the provisions of the Basel Convention, namely any State through whose territorial sea and/or the exclusive economic zone a transboundary movement of hazardous wastes or other wastes is proposed. Secondly, the State of export, or the generator or exporter, would identify each of the States' definition of the term "transit". This should be done by contacting the competent authorities or by reviewing information transmitted/notified to the Secretariat pursuant to paragraphs 2 and 3 of Article 13 of the Convention.³⁴ Thirdly, should there be a definition of "transit" in the State of transit, the State of export, or the generator or exporter, would, unless otherwise provided in the legislation of the State of export, rely on that definition; however, should no information be available from a State of transit on its definition of "transit", the State of export, or the generator or exporter, would, unless otherwise provided in the legislation of the State of export, rely on the definition of the Basel Convention, which should be interpreted as including transit transboundary movement through the territorial sea and/or exclusive economic zone of any coastal State.

25. Figure 3 below illustrates the situation where a hazardous waste generator located in State A plans to export hazardous wastes to a disposer located in State D. The waste generator proposes to use a transport route through the territorial seas of States B and C, which does not however involve any call at a port other than the port of destination in State D.

26. In the example, State B has informed Parties through the Secretariat of its national definition of "transit", according to which passages through its territorial sea and/or economic zone that do not involve a call at a port are not considered to constitute a "transit" for the purpose of the

²⁹ This applies to all wastes defined as hazardous pursuant to subparagraph 1 (a) of Article 1 of the Convention and all other wastes falling under paragraph 2 of Article 1 of the Convention.

³⁰ See subparagraph 1 (b) of Article 1 of the Basel Convention.

³¹ Subparagraph 5 (a) of Article 6 of the Basel Convention does not modify Paragraph 1 of Article 6 of the Basel Convention, providing that the duty to notify lies with the State of export, or the exporter or generator.

³² Subparagraph 5 (c) of Article 6 of the Basel Convention.

³³ Subparagraph 5 (b) of Article 6 of the Basel Convention.

³⁴ Parties can use Question 3 (h) of the revised reporting format and Question 8 of the standardized reporting format for transmitting information under paragraphs 1 (a) and (b) of Article 4 and paragraphs 2 (c) and (d) of Article 13 of the Convention (import and export prohibitions) on national definitions of "State of transit" (or "transit") to transmit such information to the Secretariat. The standardized format for reporting is available at <http://basel.int/Procedures/ImportExportProhibitions/tabid/2751/Default.aspx>, while the national reports transmitted by Parties are available at: <http://www.basel.int/Countries/NationalReporting/NationalReports/tabid/4250/Default.aspx>.

Basel Convention and therefore do not require prior notification and consent. In consequence, State A is not required to notify the transit transboundary movement to State B.

27. The second transit State in the example, State C, has never informed Parties of its national definition of transit. If not otherwise provided in the national legislation of State A, State A should therefore, in addition to notifying the State of import (State D), also notify the proposed transboundary movement to transit State C, unless it has contacted the competent authority of State C and received confirmation that a notification is not required.

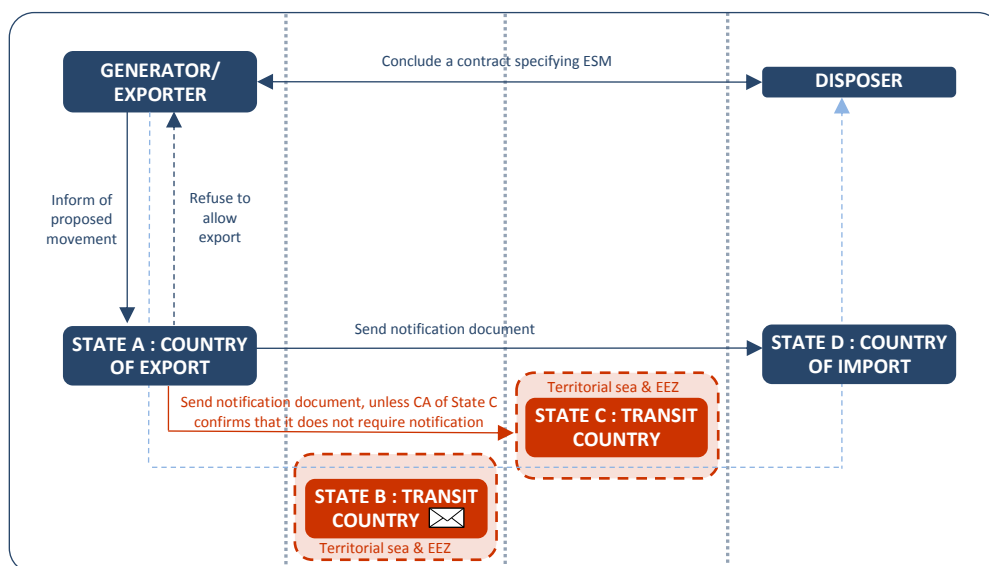


Figure 3 – Notification of proposed transboundary movement to State of transit

28. The Basel Convention requires a new notification for each proposed transboundary movement of hazardous or other wastes, except where all States concerned allowed, by providing their written consent, the generator or the exporter to use a general notification procedure for multiple shipments of hazardous wastes or other wastes of the same physical and chemical characteristics to the same disposer.³⁵ All shipments covered by a general notification must be shipped via the same Customs office of exit of the State of export, via the same Customs office of entry of the State of import, and, in the case of transit, via the same Customs office of entry and exit of the State(s) of transit.³⁶ The general notification may cover multiple shipments during a maximum period of twelve months.³⁷

2. Transit State promptly acknowledges receipt of notification

29. Paragraph 4 of Article 6 of the Basel Convention compels States of transit to promptly acknowledge to the notifier receipt of the notification.³⁸ Where the notifier is the generator or exporter a copy of the acknowledgement should be sent to the competent authority of the State of export. Acknowledgement of receipt does not imply that the transit movement will be approved and should not, ideally, take longer than a few days.

30. In the event a competent authority may not be contacted, or if the notifier does not receive an acknowledgment within a reasonable time (e.g. [] days), it may be possible to follow up with a second communication, to contact a State through the focal point or, if needed, through diplomatic channels (e.g. Ministry of Foreign Affairs, embassy or permanent mission). In such instances, it is recommended to ensure a copy of the communication is nonetheless sent to the competent authority. The notifier may also invite the Secretariat to confirm with the State concerned that its contact information, as available on the website of the Convention, is up to date. If a Party concludes that it has concerns or is affected by a failure to comply with and/or implement the Convention's obligations

³⁵ See paragraph 6 of Article 6 of the Basel Convention.

³⁶ See paragraph 6 of Article 6 of the Basel Convention.

³⁷ See paragraph 8 of Article 6 of the Basel Convention.

³⁸ Paragraph 4 of Article 6 of the Basel Convention provides that “[e]ach State of transit which is a Party *shall* promptly acknowledge to the notifier receipt of the notification. [...]” See also subparagraph 18 (b) of Decision BC-13/9 which reminds Parties of “the *obligation* [t]o promptly acknowledge receipt of notifications of proposed transit transboundary movements, as provided for in paragraph 4 of Article 6 of the Convention.” (emphasis added)

by another Party with whom it is directly involved under the Convention, it may make a submission to the Implementation and Compliance Committee.³⁹ Alternatively, it may rely on the dispute provisions of the Convention.

31. The lack of an acknowledgement of receipt cannot as such be interpreted as consent to a proposed transit movement.

3. Transit State may consent with or without conditions, or deny permission

32. Subsequently, the State of transit may respond to the notifier within 60 days, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. The response must be given in written form, such as via email or other electronic correspondence, letter or fax. Additional formal requirements may arise from national legislation. A response by email without electronic signature is thus a valid response, unless national legislation of the responding State provides otherwise.

33. Although transit States are not obliged to respond to a notification, they are encouraged to do so within the stipulated period of 60 days after having acknowledged receipt of the notification.⁴⁰

34. State of export only allows the transboundary movement to commence after receipt of consent. The State of export must not allow the transboundary movement to commence until it has received the *written* consent of all transit States. If the State of export has received a negative response or no response, the transboundary movement cannot proceed.

35. There is however one exception to this rule, where the required consent can take the form of *tacit* consent. This is the case, where a Party has informed other Parties through the Secretariat of its decision not to require prior written consent for transits of hazardous wastes or other wastes, either generally or under specific conditions. In such a case, the State of export may allow the transboundary movement to proceed through that State of transit, if no response has been received within 60 days after receipt of the notification by the State of transit (*tacit* consent). As long as the State of transit does not acknowledge receipt of the notification, the 60-day deadline does not start running, and the State of export should not allow the transboundary movement to commence. It is however worthwhile noting that at least one Party understands this exception to also include the possibility for Parties to waive the requirement of written acknowledgement of receipt.⁴¹

36. Parties that wish to waive the requirement of written consent either generally or under specific conditions have two ways of doing so: either by notifying the Secretariat of their decision by completing Question 7 of the revised standardized reporting format for transmitting information on import and export prohibitions;⁴² or by answering Question 3 (g) of the revised reporting format.⁴³ The information received by the Secretariat is made available on the Convention's website.⁴⁴

37. In Figure 4 below, State B has notified Parties through the Secretariat of its decision not to require prior *written* consent for all transits of hazardous wastes or other wastes through its territory. Transit State C did not waive the requirement of written consent. In this example, State A (State of export) may authorize the transboundary movement to proceed only after it has received the *tacit* consent of State B (no objection within 60 days after acknowledgement of receipt of notification) and the *written* consent of State C.

³⁹ See the terms of reference, including paragraph 9 (b), available at: <http://www.basel.int/TheConvention/ImplementationComplianceCommittee/Mandate/tabid/2296/Default.aspx>.

⁴⁰ See paragraph 20 (a) of Decision BC-13/9, which “*encourages* Parties to respond to notifications of proposed transit transboundary movements of hazardous wastes and other wastes within 60 days in accordance with paragraph 4 of Article 6 of the Convention.” (emphasis added)

⁴¹ See Switzerland's submission in its national report for 2016 with regard to Questions 3 (g): “Consent for the transit movement of waste through Switzerland is generally granted tacitly. There is also no written confirmation of receipt of the transit documents. For checking purposes, a list is available on the FOEN website, which shows the transit application that have been entered with the FOEN. When applications for amendments are submitted subsequently (e.g. additional transport carrier or a longer transport route), tacit consent is granted if the FOEN does not raise an objection within 7 days.”

⁴² The standardized format is available at <http://basel.int/Procedures/ImportExportProhibitions/tabid/2751/Default.aspx> (not yet available).

⁴³ National reports may be consulted at <http://www.basel.int/Countries/NationalReporting/ElectronicReportingSystem/tabid/3356/Default.aspx>.

⁴⁴ See <http://www.basel.int/Countries/NationalReporting/NationalReports/tabid/4250/Default.aspx> and [Add hyperlink].

	Description of scenario	Definition of “transit State” / “transit”	Transit prohibitions/restrictions
Example 1	State A prohibits the introduction into national territory of nuclear residues and hazardous wastes, including the use of the national territory for transit. The national territory is defined to include the mainland, the subsoil, the territorial sea and the exclusive economic zone, as well as the airspace above those areas.	State A uses the Basel Convention definition of “State of transit” or “transit” for the purpose of the application of the PIC procedure, which extends to any transboundary movements through the territorial sea and the exclusive economic zone (even if those movements do not involve a call at a port or roadstead).	All transits movements of hazardous wastes through State A are prohibited. Transit movements of “other wastes” are subject to the PIC procedure.
Example 2	State B prohibits the transit of hazardous wastes on land and internal waters, as well as the offloading and re-loading on national territory of hazardous wastes in transit. Transshipments that do not involve off-loading and re-loading of hazardous wastes require prior notification to and consent of the Ministry of the Environment.	State B’s definition of “transit State” or “transit” for the purpose of the application of the PIC procedure extends to any transboundary movement that involves a call at a port or roadstead under its jurisdiction. Transboundary movements through the territorial sea and/or exclusive economic zone that do not involve a call at a port or roadstead fall outside the scope of the definition of “transit” and, therefore, the PIC procedure. State B is however advised to be more explicit in its notification to the Secretariat as to whether it requires prior notification and consent for such transboundary movements. (Although they are not mentioned in the implementing legislation, State B might consider that the Convention text directly applies to transboundary movements through the territorial sea and/or exclusive economic zone.)	Transit movements of hazardous wastes (falling within the definition of “transit”) through State B are prohibited, except, transit movement by sea that do not involve off-loading and re-loading on national territory (e.g. in port/roadstead). Transit movements of hazardous wastes by sea that do not involve off-loading and re-loading on national territory and transit movements of “other wastes” are subject to the PIC procedure.
Example 3	State C, a landlocked country, prohibits transit traffic of hazardous wastes and other wastes that involve the off-loading and re-loading of the wastes on a different means of transport.	State B’s definition of “transit State” or “transit” does not require clarification, as State B does not control any marine areas. Any transboundary movement through State B’s territory (land, internal water, airspace) constitutes a Basel Convention “transit”.	Transit movements of hazardous wastes (land, internal water, airspace) that do involve the off-loading and re-loading of those wastes on a different means of transport are prohibited. Transit movement of hazardous wastes that do not involve the off-loading and re-loading of wastes, and all transit movements of “other wastes” are subject to the PIC procedure.

Figure 5 – Examples on the distinction between national definitions of “State of transit” and transit prohibitions/restrictions

40. Restrictions can take a variety of forms, such as:
- (a) Restrictions related to the transit itinerary and transportation mode (e.g. entry/exit point, transit route, means of transport, loading/unloading-operations, transit time, etc.);
 - (b) Restrictions related to the type of wastes (e.g. hazardous/other wastes, hazardous waste categories); or
 - (c) Restriction related to the place and type of disposal operation (e.g. country of disposal, final disposal/recovery operation, etc.).
41. Parties that have not adopted general prohibitions or restrictions on transit maintain their right to not consent to, or impose conditions on, any proposed transit transboundary movement of hazardous wastes or other wastes on a case-by-case basis.

5. Specific issues

(a) Re-routing of shipments

42. The concept of re-routing refers to situations where it becomes necessary to change the transport route of a transboundary movement of hazardous or other wastes after all consents having been obtained, for example, because the transporter (e.g. shipping line) modifies the itinerary of the ship transporting the wastes.

43. If the new transport route involves one or several new transit States, the Basel Convention requires that the new transit State(s) must be notified of the proposed transboundary movement and that the State of export shall not allow the transboundary movement to commence until it has received the consent of the new transit State(s). A change in the transport route may also require a new notification to and consent of the State of import, if so requested by applicable legislation in the State of import. This is, for example, the case for transboundary movements to a member State of the European Union.⁴⁹

44. Sometimes the cause of re-routing emerges after the transboundary movement has already commenced (e.g. change to transport route related to weather conditions). If the required consents from the new States of transit, and the State of import, if applicable, can be obtained, the transboundary movement may proceed. If not, the transboundary movement cannot be completed as approved by the States concerned. Similar to cases in which the transboundary movement cannot be completed in accordance with the terms of the contract between the exporter and the disposer,⁵⁰ the State of export should ensure that the wastes in question are taken back into the State of export, by the exporter, if alternative arrangements cannot be made for their disposal in an environmentally sound manner. The State of export and any State of transit should cooperate in the return of the wastes to the State of export.

45. Because of the obligation to submit new notifications and obtain consents, re-routing shipments of hazardous or other wastes, especially if the transboundary movement has already been initiated, can have important practical consequences (e.g. delays, extra documentation, storage and transportation costs, relabelling and repackaging, permit fees, etc.). A possible solution could consist of notifying and obtaining the consent not only of the States of transit concerned by the planned route but also of any State that may become, following a need to re-route the shipment, a transit State, provided that such an approach is agreeable to all States concerned and permitted under the national legislations of the States of export and import.

(b) Innocent passage and freedom of navigation

46. During the negotiation of the Basel Convention, the rights to be given to transit States were subject to a lot of discussions. Some States proposed that transit States should have the same rights as States of import. Others argued against this, maintaining that such rights would not be consistent with navigational rights and freedoms guaranteed in international law, in particular the right of innocent passage and overflight.⁵¹ Several texts were on the table, and the compromise is reflected on the one hand in the definition of “State of transit” in paragraph 12 of Article 2 of the Convention, and on the other hand in paragraph 12 of Article 4 of the Basel Convention which provides: “Nothing in this

⁴⁹ See Article 17 of Regulation (EC) No 1013/2006 of the European Parliament and the Council of 14 June 2006 on shipments of waste, which reads: “If any essential change is made to the details and/or conditions of the consented shipment, including changes in the intended quantity, route, routing, date of shipment or carrier, the notifier shall inform the competent authorities concerned and the consignee immediately and, where possible, before the shipment starts. (2) In such cases a new notification shall be submitted, unless all the competent authorities concerned consider that the proposed changes do not require a new notification. (3) *Where such changes involve competent authorities other than those concerned in the original notification, a new notification shall be submitted.*” (emphasis added)

⁵⁰ This case is addressed by Article 8 of the Basel Convention which reads: “When a transboundary movement of hazardous wastes or other wastes to which the consent of the States concerned has been given subject to the provisions of this Convention, cannot be completed in accordance with the terms of the contract, the State of export shall ensure that the wastes in question are taken back into the State of export, by the exporter, if alternative arrangements cannot be made for their disposal in an environmentally sound manner, within 90 days from the time that the importing State informed the State of export and the Secretariat, or such other period of time as the States concerned agree. To this end, the State of export and any Party of transit shall not oppose, hinder or prevent the return of those wastes to the State of export.”

⁵¹ Article 17 of the United Nations Convention on the Law of the Sea (UNCLOS) provides that “[s]ubject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea”. “Passage means navigation through the territorial sea for the purpose of: (a) traversing the sea without entering internal waters or calling at a roadstead or port facility outside internal waters, or (b) proceedings to or from internal waters or a call at such roadstead or port facility” (Article 18.1). Paragraph 2 of Article 18 further provides that “[p]assage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.” Article 21 entitles the coastal State to “adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following [...] (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof.”

Convention shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircrafts of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments.”

47. In line with the Convention’s objective to protect human health and the environment against adverse effects that may result from the generation and management of hazardous wastes, including transboundary movements, this guidance, as reflected in its paragraph 22 above, recommends that the State of export, or exporter or generator, apply a definition of “transit” that includes so-called innocent passages through the territorial sea, unless the State concerned by the transit movement has notified or otherwise informed Parties to the contrary, provided that the application of that definition is not inconsistent with legislation applicable in the State of export.⁵²

48. The same approach is also proposed for passages through the exclusive economic zone. Under international maritime law, foreign ships and aircrafts enjoy freedom of navigation and overflight in the exclusive economic zone of a coastal State,⁵³ subject to the obligation to comply with the laws and regulations adopted by that State in accordance with international law.⁵⁴ Again, the State of export, or exporter or generator, should, in line with the objective of the Basel Convention, apply a definition of “transit” that includes passages through the exclusive economic zone, unless the State concerned by the transit movement has notified or otherwise informed Parties that it does not require notification of such transit transboundary movements, provided that the application of that definition is not inconsistent with legislation applicable in the State of export.

49. Coastal State Parties that understand the definition of “State of transit” not to include passages through their territorial sea and/or exclusive economic zone, have the possibility to inform other Parties of their national definition as described in paragraph 13 of this guidance. If a coastal State has notified Parties of such a decision, the PIC procedure would not apply to transit transboundary movements through its territorial sea and/or exclusive economic zone.

50. Instead of excluding those types of transit transboundary movements from the definition of “State of transit” and the PIC procedure, coastal States may also choose the intermediate approach of subjecting such transboundary movements to tacit consent pursuant to paragraph 4 of Article 6 of the Basel Convention. This second approach has the advantage of reducing the administrative burden on a coastal State, while preserving its control over the proposed transit movements through the receipt of notifications.

(c) Land-locked countries

51. Land-locked countries that do not have proper facilities for the environmentally sound disposal of hazardous wastes (or certain categories of hazardous wastes), may experience difficulties in ensuring their environmentally sound disposal, if all neighbouring countries prohibit or do not consent to the transit of such wastes.⁵⁵ Similar difficulties may arise, where transit States with strategically located hub ports decide to prohibit the transit of certain categories of hazardous wastes. In addition to

⁵² Even where a Party has notified other Parties that it does not require prior notification and consent for so-called innocent passages through its territorial sea, other international obligations applying to hazardous waste transports still apply. See Article 23 of UNCLOS, which provides that “[f]oreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements.”

⁵³ See paragraph 1 of Article 85 of UNCLOS which reads as follows: “1. In the exclusive economic zone, all State whether coastal or land-locked enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight [...]”

⁵⁴ See paragraph 3 of Article 85 of UNCLOS which reads as follows: “3. In exercising their right and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”

⁵⁵ See, for example, Kazakhstan’s response to Question #10. Kazakhstan highlights difficulties with exports of wastes containing POPs for environmentally sound disposal, because its neighbouring countries enacted legislation that prohibits the import or transit of such wastes. See also UNDP’s responses to Questions #7 and #8 to the Questionnaire, on the same case.

bilateral discussions, Basel Convention Regional Centres or other regional bodies (e.g. Customs Unions⁵⁶) may provide an appropriate forum to raise, discuss and resolve such concerns.⁵⁷

C. Transboundary movement through a transit State which is not a Party

1. Notification of proposed transboundary movement to transit States

52. The obligation to notify a proposed transboundary movement of hazardous wastes or other wastes to transit States also applies where the transit State is not a Party to the Basel Convention. Article 7 of the Basel Convention requires that paragraph 1 of Article 6 of the Convention, which sets out the duty of the State of export, or the generator or exporter, to notify any proposed transboundary movement, shall apply mutatis mutandis to transboundary movements of hazardous wastes or other wastes from a Party through a State or States which are not Parties. Notifications should be addressed to the transit State's contact point.⁵⁸

53. It is recommended that non-Party transit States should be notified of all transits through their territorial sea and exclusive economic zone, independently of whether the passage involves a call at a port or a roadstead within their jurisdiction or not.

54. The obligation to notify a transboundary movement only applies to transports of hazardous wastes and other wastes that fall within the categories of wastes listed in the annexes to the Basel Convention.⁵⁹ Where the wastes are not covered by the annexes but are defined as, or considered to be, hazardous wastes by the domestic legislation of the State of import or export, the Convention does not require notification of the transboundary movement to a transit State that is not a Party to the Convention.

2. State of export may allow the transboundary movement to commence without consent

55. The Basel Convention does not require written or tacit consent of non-Party transit States. However many Parties' national legislations provide that a transboundary movement shall not be allowed to proceed, until all States of transit, including non-Party States, have given their written consent to the movement.⁶⁰

III. Transit movements as part of take-back operations

56. In cases of take-back of hazardous wastes or other wastes that are deemed to be illegal traffic pursuant to paragraph 2 of Article 9 of the Basel Convention, the Convention text provides that the State of transit "shall not oppose, hinder or prevent the return of those wastes to the State of export."⁶¹ On this basis, it is suggested that the specific consent of transit States is not required in those circumstances. Although the Basel Convention is silent on this point, best practice suggests that the transit States should nonetheless be notified of the take-back, unless all the involved competent authorities agree that this is not necessary. Detailed guidance on the procedure that should be followed in cases of illegal traffic is available in the *Guidance on the implementation of the Basel Convention provisions dealing with illegal traffic*.⁶²

⁵⁶ See Kazakhstan's response to Question #10: Kazakhstan repeatedly brought up the issue of PCB transits in the intergovernmental commission of the Customs Union. As a result, a proposal to delete PCB waste oils from the list of prohibited transit goods was approved and adopted by the Commission in April 2014.

⁵⁷ A possible solution could also involve the construction of disposal plants using environmentally sound disposal techniques at the national level in the long term.

⁵⁸ All country contacts that have been notified to the Secretariat are available at <http://basel.int/Countries/CountryContacts/tabid/1342/Default.aspx>.

⁵⁹ This applies to all wastes defined as hazardous pursuant to Subparagraph 1(a) of Article 1 of the Convention and other wastes falling under Paragraph 2 of Article 1 of the Convention.

⁶⁰ See Guide to the Control System, at paragraph 27.

⁶¹ See paragraph 2 of Article 9 (*in fine*) of the Basel Convention.

⁶² See, in particular, paragraphs 68 and 81-87 of the *Guidance on the implementation of the Basel Convention provisions dealing with illegal traffic*. The guidance was adopted by the thirteenth meeting of the COP (BC-13/9, paragraph 15) and is available in document UNEP/CHW.13/9/Add.1/Rev.1, available on the Conventions' website at: <http://www.basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

Appendix: Overview of PIC procedure, with a focus on transit States

