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BASEL CONVENTION

GUIDANCE ON THE IMPLEMENTATION OF THE BASEL
CONVENTION PROVISIONS DEALING WITH ILLEGAL
TRAFFIC (PARAGRAPHS 2, 3 AND 4 OF ARTICLE 9)



UNEP



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© Secretariat of the Basel Convention, December 2019

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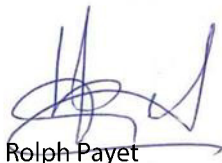
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PREFACE

Welcome to the issue **number 1** of the **Technical Series** of the Secretariat of the Basel, Rotterdam and Stockholm conventions. Launched in 2019, the Technical Series bring to you the authoritative guidance documents adopted by the respective Conferences of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the Stockholm Convention on Persistent Organic Pollutants.

The **Guidance on the implementation of the Basel Convention provisions dealing with illegal traffic (paragraphs 2, 3 and 4 of Article 9)** provides comprehensive advice and direction on how to implement in practice the provisions of the Convention that deal with the consequences of illegal traffic under the Basel Convention. The Parties to the Basel Convention consider that illegal traffic in hazardous wastes or other wastes is criminal, a rare feature for a multilateral environmental agreement. The Convention defines what behavior amounts to “illegal traffic” and sets out the consequences thereof, depending on whether the illegal traffic results from the conduct on the part of the importer or disposer, the exporter or generator, or in instances where the responsibility for the illegal traffic cannot be assigned. Bottom line is that the Parties to the Convention have the obligation to cooperate and ensure that the wastes illegally trafficked are, ultimately, disposed of in an environmentally sound manner, and that those who engage in illegal traffic are punished. In a world of increasing global trade, in which the distinction between wastes and goods can be complex, and where legal frameworks and institutional arrangements vary from country to country, this is of course easier said than done. This guidance is precisely there to help: the fruit of several years of work by the Basel Convention Implementation and Compliance Committee, it was consulted with a wide range of stakeholders, including the enforcement community that plays a key role in both preventing the export of wastes that should stay within a country, and in ensuring that wastes illegally imported are safely disposed of.



Rolph Payet

Executive Secretary of the Basel, Rotterdam and Stockholm conventions

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FOREWORD

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereinafter referred to as the “Basel Convention”) was adopted in 1989 and entered into force on 5 May 1992. As of June 2016, 183 States and the European Union were Parties to the Convention.

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. In Article 9, the Convention defines under what circumstances a transboundary movement of hazardous or other wastes is deemed to be illegal traffic and also provides for obligations regarding such illegal traffic.

Under the Convention, Parties consider that illegal traffic is criminal. Moreover, each Party has the obligation to introduce appropriate national/domestic legislation to prevent and punish illegal traffic. Parties have a general obligation to cooperate with a view to achieving the objects of Article 9 of the Convention. In cases where the transboundary movement of hazardous wastes or other wastes is deemed to be illegal traffic as the result of conduct on the part of the exporter or generator, paragraph 2 of Article 9 requires the State of export to ensure that the wastes in question are taken back by the exporter or generator or, if necessary, by itself into the State of export, or, if impracticable, are otherwise disposed of in accordance with the provisions of the Basel Convention. Paragraph 3 of Article 9 sets provisions for those cases where the transboundary movement of hazardous wastes or other wastes is deemed illegal traffic as the result of conduct on the part of the importer or disposer. In these cases the State of import shall ensure that the wastes in question are disposed of in an environmentally sound manner by the importer or disposer or, if necessary, by the State itself. In cases where the responsibility for the illegal traffic cannot be assigned either to the exporter or generator, or to the importer or disposer, the Parties concerned shall ensure through cooperation that the wastes in question are disposed of as soon as possible in an environmentally sound manner, as set forth in paragraph 4 of Article 9. Improper implementation of paragraphs 2, 3 and 4 of Article 9 may lead to the dumping of the wastes and therefore harm to human health and the environment.

This document has been prepared with a view to providing guidance to Parties on how to implement in practice the aforementioned provisions that deal with the consequences of illegal traffic under the Convention. 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 supplement the Basel Convention with their own national definitions of hazardous wastes, and their own restrictions or prohibitions of 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.

The preparation of this guidance document was initiated under the 2012–2013 work programme of the Committee Administering the Mechanism for Promoting Implementation and Compliance (hereinafter referred to as the “Committee”) with the obligations under the Convention, more particularly the request that the Committee review Parties’ implementation of and compliance with the take-back provision set forth in paragraph 2 of Article 9 of the Basel Convention as well as develop a guidance document based on best practices suggesting a harmonized approach to the implementation of the take-back provision. Decision BC-12/7 provided a further mandate to the Committee, by which it was agreed to expand the guidance to instances falling within the scope of paragraphs 3 and 4 of Article 9 of the Convention. The finalization of this guidance document was undertaken within the framework of the 2016–2017 work programme of the Committee, including through consultations with the Open-ended Working Group of the Basel Convention during its tenth meeting (Nairobi, Kenya, 29 May–2 June 2016). It was adopted by the thirteenth meeting of the Conference of the Parties by decision BC-13/9.

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

1. OBJECTIVES OF THE GUIDANCE DOCUMENT

1. The Conference of the Parties at its tenth meeting, in its decision BC-10/11, mandated the Committee Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention (hereinafter referred to as the “Committee”) to review Parties’ implementation of and compliance with the take-back provision set forth in paragraph 2 of Article 9 of the Basel Convention,¹ as well as to develop a guidance document based on best practices and suggesting a harmonized approach to the implementation of the take-back provision.² Pursuant to the mandate enshrined in decision BC-12/7, the scope of the guidance was expanded to paragraphs 3 and 4 of Article 9 of the Convention.
2. The guidance document is intended to provide practical and workable guidance for all actors involved in the control of transboundary movements of the wastes subject to the Basel Convention: competent authorities, as well as the various entities involved directly or indirectly in the implementation and enforcement of the Convention (e.g. Customs, port authorities, environmental inspectors, police, prosecutors, judges). The guidance also aims at harmonizing the way Parties deal with illegal traffic as the result of conduct on the part of the exporter or generator (paragraph 2 of Article 9), the importer or disposer (paragraph 3 of Article 9), as well as with cases where the responsibility for the illegal traffic cannot be assigned either to the exporter or generator, or to the importer or disposer (paragraph 4 of Article 9).
3. The content of the guidance document is based on experiences of Parties and on guidance documents developed by relevant enforcement networks.³ These experiences were gathered by means of two questionnaires⁴ developed by the Committee, which aimed to collect information from Parties on their implementation of and compliance with the take-back provision set forth in paragraph 2 of Article 9 of the Basel Convention, and the provisions set forth in paragraph 3 and 4 of Article 9, including on the difficulties faced by Parties.
4. This guidance focuses on the determination of whether there is a case of illegal traffic and whose conduct is deemed to have resulted in the illegal traffic. Depending on who is responsible, or if no responsibility can be assigned, the guidance zooms in on the aspects of either the operationalization of the take-back obligation, or the environmentally sound disposal of the wastes in question. The last chapter covers related provisions in the Basel Convention of relevance to addressing damage caused by illegal traffic, notably Article 12 on liability for damage and Article 14, paragraph 2, on emergency funding. In this manner, the guidance aims to assist Parties implement and comply with these provisions in a consistent manner, thereby also facilitating the resolution of any resulting questions.
5. Seven appendices complete this guidance: appendix 1 is a form to be used for requesting the take-back and for notifying about the take-back of wastes deemed to be illegal traffic, appendix 2 provides a graphic illustration of the suggested take-back procedure (paragraph 2 of Article 9), appendix 3 is a case study of how the take-back procedure has been implemented in one instance, appendix 4 provides a graphic illustration for those cases where take-back of the wastes is considered impracticable (paragraph 2 of Article 9), appendix 5 provides a graphic illustration in case the illegal traffic is deemed to be the result of conduct on the part of the importer or disposer (paragraph 3 of Article 9), appendix 6 provides a graphic illustration of the implementation of the

¹ The text of the Basel Convention is available at: <http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>.

² It is worth noting that the Conference of the Parties at its tenth meeting also adopted BC-10/3 on the Indonesian-Swiss country-led initiative to improve the effectiveness of the Basel Convention, that requests the Secretariat to collect and disseminate examples of best practices in enforcement in addition to practical arrangements such as procedures for take-back in case of detected illegal traffic. Clarity as to the practical implementation – or operationalization - of the take-back provision embedded in paragraph 2 of Article 9 thus appears to be of particular importance to the Parties to the Convention. The issue of the implementation of the take-back provision was discussed at the seventh session of the Implementation and Compliance Committee. At that time Committee members and observers, for instance the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) -Transfrontier Shipments of Waste (TFS) cluster, engaged in a discussion on possible opportunities of cooperation to ensure the take back of waste (Paragraph 10 of the report of the seventh session of the Committee (UNEP/CHW/CC/7/10)).

³ IMPEL TFS Manual on the return of illegal shipments of waste: <http://impel.eu/projects/manual-on-the-return-of-illegal-shipments-of-waste/>; International Network for Environmental Compliance and Enforcement (INECE) Operational Guidance for the Take-back of Detected Illegal Shipments of Waste.

⁴ Document UNEP/CHW/CC.9/INF/4: Take-back provision: responses from Parties and examples of take-backs, is available at: <http://www.basel.int/TheConvention/ImplementationComplianceCommittee/Meetings/ICC9/MeetingDocuments/tabid/2872/Default.aspx>. Responses from Parties to the questionnaire pertaining to paragraphs 3 and 4 of Article 9 are available at: <http://www.basel.int/Implementation/LegalMatters/Compliance/GeneralIssuesActivities/Activities201617/IllegalTraffic/tabid/4581/Default.aspx>.

duty to cooperate where the responsibility for the illegal traffic cannot be assigned (paragraph 4 of Article 9), and appendix 7 includes a case study of the implementation of the duty to cooperate where the responsibility for the illegal traffic could not be assigned (paragraph 4 of Article 9).

6. This guidance builds on and, as appropriate, refers to some of the guidance developed in the framework of the Convention to assist Parties implement and comply with their obligation, under paragraph 4 of Article 4 and paragraph 5 of Article 9, to adopt adequate legal, administrative and other frameworks. Regarding the take-back provision, the Checklist for the Legislator,⁵ for instance, mentions that national legislation should include provisions for actions to be taken by the exporter, generator, importer or disposer in the case of illegal traffic. This guidance document is also intended to complement existing guidance available under the Basel Convention pertaining to the detection, investigation and prosecution of illegal traffic, namely:

- (a) The *Guidance Elements for the Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes* adopted by the sixth meeting of the Conference of the Parties;⁶
- (b) 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* adopted by the fifth session of the Open-ended Working Group of the Basel Convention (hereafter the "OEWG"),⁷ on behalf of the Conference of the Parties;⁸
- (c) The *Instruction Manual on the Prosecution of Illegal Traffic of Hazardous Wastes or Other Wastes* approved by the tenth meeting of the Conference of the Parties.⁹

7. It is important to note that a proper understanding of the Basel Convention control procedure for transboundary movements of hazardous and other wastes is a prerequisite for the implementation of the Convention's provisions pertaining to illegal traffic. Information and guidance on the Basel Convention control procedure, as set out in Article 6 of the Convention, is available in a leaflet on *Controlling Transboundary Movement of Hazardous Wastes*,¹⁰ in the *Guide to the Control System*¹¹ and, more generally, in the *Manual for the Implementation of the Basel Convention*.¹² The attention of the reader is therefore directed to these resources as well.

8. It should also be noted that priority should be given to promoting various measures to prevent illegal traffic from occurring in the first place. Such measures may encompass measures for enhanced cooperation at the national and international levels including with Customs, national and international awareness raising campaigns, effective detection and enforcement measures, intelligence on patterns of non-compliance, and strategies to identify certain waste streams at source.¹³

⁵ The Checklist for the legislator is set out in annex I to the Manual for the implementation of the Basel Convention adopted by the twelfth meeting of the Conference of the Parties by decision BC-12/7. The manual is available at: <http://www.basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

⁶ Decision VI/16. The Guidance Elements for the Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes is available at: <http://www.basel.int/Implementation/LegalMatters/IllegalTraffic/Guidance/tabid/3423/Default.aspx>.

⁷ Decision OEWG-V/9. 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 is available at: <http://www.basel.int/Implementation/LegalMatters/IllegalTraffic/Guidance/tabid/3423/Default.aspx#> Decision VII/34.

⁹ Decision BC-10/18. The Instruction Manual on the Prosecution of Illegal Traffic of Hazardous Wastes or Other Wastes is available at: <http://www.basel.int/Implementation/LegalMatters/IllegalTraffic/Guidance/tabid/3423/Default.aspx>.

¹⁰ This publication, developed by the Implementation and Compliance Committee, is available at: <http://www.basel.int/TheConvention/Publications/BrochuresLeaflets/tabid/2365/Default.aspx>.

¹¹ The Guide to the control system was adopted by the twelfth meeting of the Conference of the Parties by decision BC12/7. The Guide is available at: <http://www.basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

¹² The Manual for the implementation of the Basel Convention was adopted by the twelfth meeting of the Conference of the Parties by decision BC-12/7. The Manual is available at: <http://www.basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

¹³ See paragraphs 71 to 125 of the Guidance Elements for the Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes, available at: <http://www.basel.int/Implementation/LegalMatters/IllegalTraffic/Guidance/tabid/3423/Default.aspx>.

2. DETERMINING WHETHER A SHIPMENT IS DEEMED TO BE ILLEGAL TRAFFIC

2.1. THE BASEL CONVENTION PROVISIONS PERTAINING TO ILLEGAL TRAFFIC

9. The Basel Convention defines in paragraph 1 of its Article 9 in what instances a transboundary movement of hazardous wastes or other wastes shall be deemed to be illegal traffic. Five specific instances are listed:

- (a) A transboundary movement without notification pursuant to the provisions of this Convention to all States concerned.

The State of export, or the generator or exporter of the wastes,¹⁴ needs to notify¹⁵ in writing, through the channel of the competent authority of the State of export, the competent authority of the States concerned (import and transit if applicable) of any proposed transboundary movement of hazardous wastes and other wastes (paragraph 1 of Article 6). A transboundary movement of wastes undertaken without such prior notification to all concerned competent authorities amounts to illegal traffic;

- (b) A transboundary movement without the consent pursuant to the provisions of this Convention of a State concerned.

The State of import has to respond to the notifier (State of export, generator or exporter) in writing, consenting to the movement with or without conditions, or denying permission for the proposed transboundary movement of hazardous wastes and other wastes, or requesting additional information (paragraph 2 of Article 6). The Convention also contains provisions with respect to the State of transit (paragraph 4 of Article 6). Under this provision, the State of export is not allowed to commence the transboundary movement until it has received the written consent of the State of transit. The State of transit may, however, decide not to require prior written consent, either generally or under specific conditions, and thereby allow the State of export to proceed with the transboundary movement within 60 days of the receipt of a given notification by the State of transit, provided that the State of export has not received a response from the State of transit within that time period. In order to waive the prior written consent requirement, the State of transit must inform the other Parties of its decision through the Secretariat, pursuant to Article 13. A transboundary movement of wastes undertaken without the consent of a State concerned, as provided under the Convention, amounts to illegal traffic;

- (c) A transboundary movement with consent obtained from States concerned through falsification, misrepresentation or fraud is considered to amount to illegal traffic;
- (d) A transboundary movement that does not conform in a material way with the documents is considered as illegal.

If there is a material discrepancy between the movement document¹⁶ accompanying the waste and the actual amount/nature of the wastes, the transboundary movement is considered to amount to illegal traffic;

- (e) A transboundary movement that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law is considered to amount to illegal traffic.

¹⁴ In the case of a transboundary movement of wastes where the wastes are legally defined as or considered to be hazardous only by the State of import or by the States of import and transit which are Parties, the requirements of paragraph 1 of Article 6 that apply to the exporter and State of export shall apply mutatis mutandis to the importer or disposer and State of import, respectively.

¹⁵ The notification and movement documents as well as instructions for completing them were adopted by COP-8 and are available at: <http://www.basel.int/Procedures/NotificationMovementDocuments/tabid/1327/Default.aspx>.

¹⁶ See footnote 15.

10. All the competent authorities concerned, namely from the State of export, the State of transit (if any) and the State of import, are to check whether the movement is planned to or is taking place in accordance with applicable rules and regulations implementing the Basel Convention.

11. Legislation implementing the Basel Convention must implement at a minimum paragraph 1 of Article 9. Examples of additional related offences in national law could include the following circumstances:

- (a) The intended disposer does not exist;
- (b) The intended disposer does not have a license to dispose of the wastes in an environmentally sound manner;
- (c) The intended disposer does not have the required capacity to treat the wastes in an environmentally sound manner;
- (d) There is no contract between the exporter and the disposer specifying environmentally sound management (hereinafter referred to as "ESM") of the wastes in question;
- (e) There is an import ban in the State of import;
- (f) There is an export ban in the State of export.

12. However, it is important to note that Parties are only bound by the obligations set out in paragraphs 2, 3 and 4 of Article 9 in the event the shipment of hazardous wastes and other wastes is deemed to be illegal traffic pursuant to paragraph 1 of Article 9.

13. In addition to defining what is deemed to constitute illegal traffic, the Basel Convention provides that Parties consider that illegal traffic is criminal,¹⁷ and each Party has the obligation to introduce appropriate national/ domestic legislation to prevent and punish illegal traffic.¹⁸

14. The Basel Convention goes one step further by specifying the obligations of States concerned in instances in which the transboundary movement of hazardous or other wastes is deemed to be illegal traffic.

15. Paragraph 2 of Article 9 of the Convention addresses the specific cases where a transboundary movement is deemed to be illegal traffic as the result of conduct on the part of the exporter or generator:

"2. In case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part of the exporter or generator, the State of export shall ensure that the wastes in question are:

- (a) taken back by the exporter or the generator or, if necessary, by itself into the State of export, or, if impracticable,
- (b) are otherwise disposed of in accordance with the provisions of this Convention,

within 30 days from the time the State of export has been informed about the illegal traffic or such other period of time as States concerned may agree. To this end the Parties concerned shall not oppose, hinder or prevent the return of those wastes to the State of export."

16. In paragraph 3 of Article 9, the Convention specifies the requirements in instances in which a transboundary movement of hazardous or other wastes is deemed to be illegal traffic as a result of conduct on the part of the importer or disposer, along with the obligations of the State of import and other States concerned in these instances:

"3. In the case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part of the importer or disposer, the State of import 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 within 30 days from the time the illegal traffic has come to the attention of the State of import or such other period of time as the States concerned may agree. To this end, the Parties concerned shall cooperate, as necessary, in the disposal of the wastes in an environmentally sound manner."

¹⁷ Paragraph 3 of Article 4 of the Basel Convention.

¹⁸ Paragraph 4 of Article 4 of the Basel Convention; Paragraph 5 of Article 9 of the Basel Convention.

17. Paragraph 4 of Article 9 provides for the requirements in those instances in which the responsibility for the illegal traffic cannot be assigned to either the exporter or generator or the importer or disposer:

“4. In cases where the 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 ensure, through cooperation, that the wastes in question are disposed of as soon as possible in an environmentally sound manner either in the State of export or the State of import or elsewhere as appropriate.”

18. Regardless of the scenario, Parties have an obligation to cooperate with a view to achieving the objects of Article 9 of the Convention.¹⁹

19. In addition to the introduction of appropriate national legislation to prevent and punish illegal traffic, an adequate legal basis at the domestic level needs to be in place to give full effect to all aspects of Article 9.

2.2. DETERMINING THE APPLICABILITY OF PARAGRAPHS 2, 3 OR 4 OF ARTICLE 9

20. The starting point for implementing the provisions of the Basel Convention dealing with the obligations in cases of illegal traffic is the detection of a particular shipment whose transboundary movement may amount to illegal traffic, as well as of the location of that shipment. The determination of whether there is an instance of illegal traffic that may lead to implementing paragraphs 2, 3 or 4 of Article 9 requires a three-step approach: to determine (1) whether the case falls within the scope of the Convention; (2) whether there appears to be a case of illegal traffic; and (3) whose conduct resulted in the illegal traffic. This section of the guidance will also look in more detail into the actors involved in making such a determination.

2.2.1. Steps for determining whether paragraph 2, 3 or 4 of Article 9 of the Convention applies

2.2.1.1. Determination that the case falls within the scope of the Convention

21. The Parties concerned must determine that:

- (a) The content of the shipment falls within the definition of “wastes”;²⁰
- (b) The wastes in question are “hazardous”²¹ wastes or “other” wastes;²²
- (c) A “transboundary movement”²³ has taken place (this determination will involve identifying the State of export, the State of import and any transit State).

22. Determining these elements will require the involvement and cooperation of the competent authorities of the States of import and export, and if any, the State(s) of transit. Available guidance outlining the obligations of Parties in this regard includes the previously mentioned leaflet on *Controlling Transboundary Movement of Hazardous Wastes*,²⁴ the *Guide to the Control System* (aimed at the private sector)²⁵ and, more generally, the *Manual for the Implementation of the Basel Convention*.²⁶

¹⁹ Paragraph 5 of Article 9 of the Basel Convention.

²⁰ For the purpose of the Convention, “wastes” are substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law (paragraph 1 of Article 2). In order to assist Parties in distinguishing a “waste” from a “non-waste”, the Conference of the Parties adopted by decision BC13/2 a Glossary of terms (<http://www.basel.int/Implementation/LegalMatters/LegalClarity/Glossaryofterms/tabid/3623/Default.aspx>).

²¹ “The following wastes that are subject to transboundary movement shall be “hazardous wastes” for the purposes of this Convention: (a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and (b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.” (paragraph 1 of Article 1). Annex I is further elaborated upon in Annexes VIII and IX of the Convention.

²² “Wastes that belong to any category contained in Annex II that are subject to transboundary movement shall be “other wastes” for the purpose of the Convention. (paragraph 2 of Article 1). Annex II lists: wastes collected from households and residues arising from the incineration of household wastes.

²³ For the purpose of the Convention, a transboundary movement means any movement of hazardous 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 (paragraph 3 of Article 2).

²⁴ This publication, developed by the ICC, is available at: <http://www.basel.int/TheConvention/Publications/BrochuresLeaflets/tabid/2365/Default.aspx>.

²⁵ This manual is available at: <http://www.basel.int/TheConvention/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

²⁶ This publication is available at: <http://www.basel.int/TheConvention/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

23. When determining whether the case falls within the scope of the Convention, one must bear in mind that the national legal framework may provide for a national definition of hazardous wastes under paragraph 1 (b) of Article 1 and Article 3, or import/transit/export restrictions and prohibitions under paragraph 1 (a) of Article 4 and paragraph 2 of Article 13. Such national specificities must be notified to all Parties through the Secretariat which maintains a collection of the notifications on its website.²⁷ If properly notified under the Convention, these national specificities must be respected as they will affect the determination of whether a transboundary movement of hazardous or other wastes falls within the scope of the Basel Convention. It should also be noted, and this must be kept in mind in assessing what is a case of “illegal traffic”, that paragraph 5 of Article 6 provides for different responsibilities for the transboundary movement where the waste is only considered hazardous by one of the Parties to the transaction.

24. Paragraph 5 of Article 6 may come into play for instance in the following cases:

- (a) A Party may, on the basis of paragraph 1 (b) of Article 1 of the Convention, also classify other wastes than those listed in Annexes I and II of the Convention as hazardous wastes in accordance with its national legislation; or
- (b) The competent authorities may disagree on whether a certain waste possesses any of the hazardous characteristics referred to in Annex III of the Convention.²⁸

25. In such cases, paragraph 5 of Article 6 must be consulted to see with respect to the particular movement which Party or actor has the responsibility in the context of the particular transboundary movement.

26. Paragraph 5 (a) of Article 6 provides that in case a transboundary movement of wastes is legally defined as or considered to be hazardous wastes only by the State of export, the requirements of paragraph 9 of Article 6 that apply to the importer or disposer and the State of import shall apply *mutatis mutandis* to the exporter and State of export, respectively. This means that the exporter, rather than the disposer, must inform the competent authority of the State of export of receipt by the disposer of the wastes in question and, in due course, of the completion of disposal as specified in the notification. If no such information is received within the State of export, the competent authority of the State of export or the exporter shall notify the State of import.²⁹

27. Paragraph 5 (b) of Article 6 provides that in case a transboundary movement of wastes is legally defined as or considered to be hazardous wastes only by the State of import, or by the States of import and transit which are Parties, the requirements of paragraphs 1, 3, 4 and 6 of Article 6 that apply to the exporter and State of export shall apply *mutatis mutandis* to the importer or disposer and State of import, respectively. This means that in such a case:

- (a) The importer or disposer, or the State of import shall be required to notify, in writing, the States of transit and/or import of the proposed transboundary movement of hazardous wastes or other wastes;
- (b) The movement shall not be allowed to commence until the notifier has received the written consent from the State of import and the written consent from the State of transit or its tacit consent pursuant to paragraph 4 of Article 6, and the notifier has received from the State of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question.

28. Finally, paragraph 5 (c) of Article 6 specifies that in case a transboundary movement of wastes is legally defined as or considered to be hazardous wastes only by any State of transit which is a Party, the provisions of paragraph 4 of Article 6 shall apply to such State. This means that, the transboundary movement can only commence after the State of transit has provided written consent to the movement or, in case the State of transit does not require prior written consent, after 60 days following the receipt by the State of transit of a

²⁷ <http://www.basel.int/Countries/NationalDefinitions/tabid/1480/Default.aspx>; and <http://www.basel.int/Countries/ImportExportRestrictions/tabid/1481/Default.aspx>.

²⁸ See paragraph 29 of the Guide to the control system and pages 16/17 of the Manual for the implementation of the Basel Convention, adopted at the twelfth meeting of the Conference of the Parties. Both documents are available at: <http://www.basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx>. See also paragraph 42 of the Technical guidelines on transboundary movements of electrical and electronic waste and used electrical and electronic equipment, in particular regarding the distinction between waste and non-waste under the Basel Convention, available in document UNEP/CHW.12/5/Add.1/Rev.1 at: <http://www.basel.int/TheConvention/ConferenceoftheParties/Meetings/COP12/tabid/4248/mctl/ViewDetails/EventModID/8051/EventID/542/xmid/13027/Default.aspx>.

²⁹ See paragraph 32 of the Guide to the control system, available at: <http://www.basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

given notification, provided that the State of transit has not objected to the transboundary movement within that time period. The Convention does not define the procedures that should be applied to notify the State of transit in such a situation. For practical reasons, it is recommended that the exporter or State of export, through negotiations or by other means make arrangements to notify the competent authority of the State of transit in accordance with paragraph 4 of Article 6.

29. In case of disagreement between States on the classification of the shipment as waste or non-waste, or on the classification of the waste as hazardous or not, the Convention does not resolve this specific situation. However, paragraph 4 of Article 9 requires that where the 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 ensure, through cooperation, that the wastes in question are disposed of as soon as possible in an environmentally sound manner either in the State of export or the State of import or elsewhere as appropriate. Paragraph 5 of Article 9 requires Parties to cooperate with a view to achieving the objects of the Article.

30. The European Union (EU) treats shipments involving the waste/non-waste or a disagreement about the hazardous nature of the waste by treating the shipment as if it was, respectively, waste, and hazardous or other wastes falling under the scope of the Basel Convention.³⁰

31. If, despite communication at different levels (operational and political), no agreement can be reached, the Secretariat of the Basel Convention may assist Parties upon their request in their identification of cases of illegal traffic (paragraph 1 (i) of Article 16).

2.2.1.2. Determination that there appears to be a case of illegal traffic

32. The Parties concerned must determine that at least one of the five conditions set out in paragraph 1 of Article 9, which defines “illegal traffic”, is fulfilled:

- (a) The lack of notification may be determined by the competent authority given its central role in the implementation of the control procedure;
- (b) The lack of consent may be determined by the competent authority given its central role in the implementation of the control procedure;
- (c) The determination that consent was obtained through misrepresentation, fraud or falsification may require that a more thorough investigation take place;
- (d) The lack of material conformity between documents (e.g. disposal contracts, business records, weighing slips, delivery documents, invoices and notification and movement documents) and the wastes may be established through visual inspection, but it may also require physical inspection, including sampling and analysis of the wastes;
- (e) Deliberate disposal of the wastes took place in contravention of the Convention and general principles of international law. For relevant disposal operations, see Annex IV to the Convention.³¹

33. Existing guidance on the detection and determination of whether a shipment is deemed to be illegal traffic, including issues such as storage of the shipment and how to conduct an investigation, is available in the above mentioned *Guidance Elements for the Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes*, the *Basel Convention Training Manual on Illegal Traffic for Customs and Enforcement Agencies*, and the *Instruction Manual on the Prosecution of Illegal Traffic of Hazardous Wastes or Other Wastes*.

³⁰ See paragraphs 1 and 2, Article 28 of the Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste: “1. If the competent authorities of dispatch and of destination cannot agree on the classification as regards the distinction between waste and non-waste, the subject matter shall be treated as if it were waste. This shall be without prejudice to the right of the country of destination to deal with the shipped material in accordance with its national legislation, following arrival of the shipped material and where such legislation is in accordance with Community or international law. 2. If the competent authorities of dispatch and of destination cannot agree on the classification of the notified waste as being listed in Annex III, IIIA, IIIB or IV, the waste shall be regarded as listed in Annex IV.”

³¹ For the purpose of the Convention, “disposal” means any operation specified in Annex IV to the Basel Convention (paragraph 4 of Article 2). In order to assist Parties in understanding which operations are covered by the term “disposal” under the Convention, the Conference of the Parties adopted by decision BC13/2 a Glossary of terms (<http://www.basel.int/Implementation/LegalMatters/LegalClarity/Glossaryofterms/tabid/3623/Default.aspx>).

2.2.1.3. Determination of whose conduct resulted in the illegal traffic

34. To activate paragraph 2, 3 or 4 of Article 9, the Parties concerned must determine, as appropriate:

- (a) Who is the generator or exporter of the waste and whether the illegal traffic is the result of his/her conduct (paragraph 2 of Article 9);
- (b) Who is the importer or disposer of the waste and whether the illegal traffic is the result of his/her conduct (paragraph 3 of Article 9);
- (c) Who is the generator, exporter, importer or disposer of the waste and that the responsibility for the illegal traffic cannot be assigned to either of them (paragraph 4 of Article 9).

35. These determinations will need to be based on the gathering of evidence from the movement document or, if unavailable, from a more thorough investigation. This investigation will likely require international cooperation given that some of the stakeholders whose responsibility must be assessed may not be located within the jurisdiction of the State making the determination. It is also important for the purpose of Article 9 that the responsibility of all stakeholders – exporter, generator, importer and disposer – be investigated.

36. Documents that may be used to identify and determine whether the illegal traffic is the result of the conduct of the exporter, generator, importer or disposer of the wastes in the absence of a movement document include for instance contracts, invoices, agreements with suppliers to guarantee shipment quality, and transport documents. The investigation may also take into account additional sources of information (money flows, laboratory reports), including from relevant intermediaries (e.g. transporter, broker).

37. Identifying waste brokers and enforcing legal measures against them can be particularly difficult. Because waste brokers are not necessarily in possession of the wastes they trade and often operate from abroad, they may evade enforcement or not fall under national legislation. It is suggested that Parties include provision in their national legislation to ensure that regulatory and enforcement measures appropriately cover the case of waste brokers. For instance, national legislation may provide that in cases where the responsibility of the broker cannot be established or the broker fails to fulfill his obligations, the obligations for the take-back, if applicable, and the environmentally sound disposal of the wastes can be imposed on other actors involved in the illegal traffic, such as the person who authorized the broker to act on his behalf, e.g. the waste producer.³²

38. In determining the responsibilities for the illegal traffic, compliance with the relevant Party obligations and stakeholder requirements, as appropriate, will need to be analyzed in order to assess the conduct of all involved. In doing so, it is worthwhile recalling that paragraph 5 of Article 6 shifts the obligations set out in paragraphs 1, 3, 4, 6 and 9 of Article 6 in instances where the wastes are only considered hazardous wastes by one of the Parties concerned.

39. The guidance in paragraphs 6 and 7 of the present guidance above may equally assist Parties in determining whose conduct resulted in the illegal traffic.

2.2.2. Actors involved in determining whether paragraph 2, 3 or 4 of Article 9 of the Convention applies

2.2.2.1. Actors at the national level

40. The process of determining whether a transboundary movement of hazardous wastes or other wastes falls within the scope of paragraph 2, 3 or 4 of Article 9, i.e. that the movement is deemed to be illegal traffic as the result of conduct on the part of the exporter, generator, importer or disposer, may fall under the competence of a variety of entities having responsibilities at the national level for the detection and determination of an instance of illegal traffic. As proper and rapid information exchange and coordination of efforts are essential, it is recommended to establish and use a cooperation mechanism at the national level, e.g. an interagency task force. Such a mechanism may be established formally or informally. Cooperation with and awareness-raising among the private sector stakeholders (e.g. generator, exporter, carrier, importer, disposer, brokers, shipping

³² Under European Union legislation, for example, the authorities involved in inspections are entitled to direct their investigations towards the original producer, the licensed new producer or the licensed collector, in case a broker or dealer has been authorized in writing by the original producer, the licensed new producer or the licensed collector to act on his/her behalf as notifier and is responsible for the illegal traffic. If the broker or dealer fails to fulfill its obligation to take back the wastes or dispose of the wastes in an environmentally sound manner, the subsidiary obligation falls on the person who authorized the broker or dealer to act on its behalf. See Article 2 (15) (a) of Regulation (EC) No. 1013/2006.

lines, agents storing wastes) may also facilitate the determination of whether there is an instance of illegal traffic and whose responsibility it is. Such cooperation and awareness-raising may also help to prevent illegal traffic from occurring in the first place.

41. Whatever the domestic institutional framework, it is important that each entity's role and responsibility be clear and known. Given that the Basel Convention assigns to the competent authority the responsibility for receiving the notification of a transboundary movement of hazardous wastes or other wastes, and any information related to it, and for responding to such a notification, it is important to ensure that the relevant competent authority be adequately involved in the national process of determining whether a transboundary movement of hazardous or other wastes falls within the scope of paragraph 2, 3 or 4 of Article 9.

2.2.2.2. Actors at the international level

42. The determination of a case of illegal traffic may also require cooperation between the State of transit or State of import and the State of export. Proper communication channels at the international level are thus equally important. As previously stated, given the responsibilities assigned to the competent authority under the Basel Convention, it is important to ensure that the relevant competent authority be adequately involved in the international process of determining whether a transboundary movement of hazardous or other wastes falls within the scope of paragraph 2, 3 or 4 of Article 9.

43. The list of competent authorities and their contact information as transmitted to the Secretariat by Parties is available on the website of the Convention.³³ In the event a competent authority may not be contacted, it may be possible 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.

44. In line with the Convention, and as previously mentioned, Parties may also contact the Secretariat of the Basel Convention who has the mandate to assist Parties upon request in their identification of cases of illegal traffic.³⁴

45. Once the Parties concerned conclude that there is a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic they should then determine, which of paragraph 2, 3 or 4 of Article 9 applies. If the illegal traffic is a result of the conduct on the part of the exporter or generator, the provision embedded in paragraph 2 of Article 9 may be activated. Once the Parties concerned have concluded that there is a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as a result of the conduct on the part of the importer or disposer, the provision embedded in paragraph 3 of Article 9 applies. Finally, once the Parties concerned or other Parties have concluded that there is a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic and that responsibility for the illegal traffic cannot be assigned either to the exporter or generator or to the importer or disposer, the provision embedded in paragraph 4 of Article 9 applies.

³³ <http://www.basel.int/Countries/CountryContacts/tabid/1342/Default.aspx>.

³⁴ Paragraph 1 (i) of Article 16.

3. STATES AND ENTITIES INVOLVED IN IMPLEMENTING THE REQUIREMENTS SET OUT IN PARAGRAPHS 2, 3 AND 4 OF ARTICLE 9

3.1. STATES INVOLVED

3.1.1. Parties

46. Paragraphs 2, 3 and 4 of Article 9 of the Convention assign responsibilities to the “State of import”, the “State of export”, “States concerned” or “Parties concerned” and “other Parties”. The Convention defines “State of import”, “State of export” and “States concerned” in its Article 2. In particular, “States concerned” means Parties which are States of export or import, or transit States whether or not Parties. The terms “other Parties” is understood as referring to Parties other than the “Parties concerned”, namely Parties that are neither State of export, State of import nor State of transit.

3.1.1.1. Paragraph 2 of Article 9

47. The Basel Convention provides that, when the conditions set out in paragraph 2 of Article 9 are met, namely that a transboundary movement of hazardous wastes or other wastes is deemed to be illegal traffic as result of conduct on the part of the exporter or generator, the State of export shall ensure that the wastes in question are:

- “(a) taken back by the exporter or the generator or, if necessary, by itself into the State of export, or, if impracticable;
- (b) are otherwise disposed of in accordance with the provisions of this Convention, within 30 days from the time the State of export has been informed about the illegal traffic or such other period of time as States concerned may agree.”

48. The State of export therefore has primary responsibility for complying with the take-back procedure, as set out in paragraph 2 (a) of Article 9, or, if impracticable, otherwise disposing of the wastes in accordance with the provisions of this Convention, within the time period specified in paragraph 2 of Article 9.

49. The actions mandated by paragraph 2 of Article 9 will involve at least one other State, and possibly several other States. The illegal shipment may be detected in a State of import or in a transit State. The Convention does not expressly specify the role of those States, besides the general obligation of all “States concerned” to cooperate with one another. As a consequence, the Party that is a State of import as well as any transit State, regardless of whether it is a Party to the Convention or not, may have a role to play to achieve the take-back of the wastes or, if impracticable, its disposal in accordance with the provisions of the Convention.

50. In practical terms, one must emphasize that sending back illegally trafficked wastes without informing and/or without the involvement of the competent authorities of the State of export and any State(s) of transit may lead to improper take-back or even lead to another (illegal) destination of the waste not being within the State of export – for example when the waste is illegally shipped further on to another State outside the view of the competent authorities. It is thus essential that any State of import or transit concerned by an illegal shipment make all efforts to ensure that the State of export and State of transit is informed and that the State of export takes on its responsibility for the take-back of the wastes. In this regard, paragraph 2 of Article 9 provides that the Parties concerned shall not oppose, hinder or prevent the return of those wastes to the States of export.

3.1.1.2. Paragraph 3 of Article 9

51. Under paragraph 3 of Article 9, where a transboundary movement of hazardous wastes or other wastes is deemed to be illegal traffic as result of conduct on the part of the importer or disposer, the State of import 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 within 30 days from the time the illegal traffic has come to the attention of the State of import or such other period of time as the States concerned may agree.

52. Accordingly, the primary responsibility to ensure that the wastes in question are disposed of in an environmentally sound manner lies with the State of import. The State of import may involve the importer or disposer in making arrangements for such disposal of the wastes in question, depending on the situation of such stakeholders and any national requirements in place.

53. Implementing the obligations set out in paragraph 3 of Article 9 may involve two or several States, for example, if the illegal shipment is detected in a transit State. In this regard, paragraph 3 of Article 9 specifies that the Parties concerned shall cooperate, as necessary, in the disposal of the wastes.

3.1.1.3. Paragraph 4 of Article 9

54. In cases where the responsibility for the illegal traffic cannot be assigned to the exporter or generator or to the importer or disposer, the Parties concerned or other Parties, as appropriate, shall cooperate to ensure the disposal of the wastes as soon as possible in an environmentally sound manner, as set out in paragraph 4 of Article 9.³⁵ The Convention does not further define the respective roles of the different States involved in the transboundary movement.

3.1.2. Non-Party States

55. The Convention prohibits Parties from permitting hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party³⁶ unless the Party has entered into an agreement or arrangement with the non-Party pursuant to Article 11.

56. In its Article 11, the Convention allows Parties to permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party if such Parties enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes, and provided that such agreements or arrangements do not derogate from the ESM of hazardous wastes and other wastes as required by this Convention. A list of such agreements that have been notified to the Secretariat is available on the website of the Convention.³⁷ Such agreements may provide for the non-Party State of export or the non-Party State of import to take on the responsibilities assigned to the State of export or the State of import, respectively, under paragraphs 2, 3 and 4 of Article 9, but in any case, all such agreements or arrangements shall not derogate from the ESM of hazardous wastes and other wastes as required by the Convention.³⁸

57. If there is no such agreement or arrangement, a State of export or State of import that is not a Party to the Convention will not be under the obligation to implement the take-back or ESM provisions of the Convention, nor will the Party to the Convention be under any reciprocal obligation to the non-Party. In such instances, it is advised that the relevant States cooperate with a view to finding a mutually convenient solution. The only exception to this situation would be in the case of a non-Party State of transit as Parties to the Convention have the obligation under Article 7 to notify in writing, or respectively to require the generator or exporter to notify in writing, such States of a proposed transit transboundary movement.

3.2. ENTITIES INVOLVED

58. The Basel Convention does not specify which entity within the States concerned will, in practice, implement the obligations set out in paragraphs 2, 3 and 4 of Article 9. It was noted above that the detection and investigation of a possible case of illegal traffic may involve a variety of entities at the national level (e.g. port authorities, customs, police, environmental institutions/organizations/agencies/authorities, justice and prosecutors' offices). Given the responsibilities assigned to the competent authority under the Basel Convention, it should be ensured that the relevant competent authorities are adequately involved in the international process of determining whether a transboundary movement of hazardous or other wastes falls within the scope of paragraph 2, 3 or 4 of Article 9.

³⁵ See appendix 5.

³⁶ Paragraph 5 of Article 4 of the Basel Convention.

³⁷ <http://www.basel.int/Countries/Agreements/tabid/1482/Default.aspx>.

³⁸ Work on Article 11 of the Basel Convention was carried out by the Conference of the Parties between its first and seventh meetings (decisions I/9, II/10, III/1, IV/2, V/21, VI/18 and VII/36) at what time the Conference of the Parties "Agree(d) to cease work on the guidance elements for bilateral, multilateral and regional agreements or arrangements". For the latest version of that draft guidance elements for bilateral, multilateral or regional agreements or arrangements, see document UNEP/CHW.6/15.

59. For similar reasons, the competent authorities in the States concerned should equally be given the primary responsibility for implementing the obligations set out in paragraphs 2, 3 and 4 of Article 9. As a consequence, the relevant competent authority of the State of export and the relevant competent authority of the Party that is a State of import or that of any transit State, in which the wastes are located, should be given the responsibility to operationalize these obligations in close cooperation with the entity that detected the illegally trafficked waste.

60. In addition, because the illegal traffic may be deemed to be as a result of the conduct of the exporter or generator, or importer or disposer, these actors, including their possible interactions with one another will, as appropriate, be involved.

3.3. INITIAL CONTACT AND IMMEDIATE MEASURES

61. Early contact between the States concerned (export, import, transit) is advised at the level of the competent authorities so as to, as applicable, facilitate a smooth take-back, ensure that the wastes in question are disposed of in an environmentally sound manner and increase the chances of success of assigning responsibility to, and taking any subsequent legal action against, those responsible for the illegal traffic.

62. Various scenarios may occur, including:

- (a) A State concerned has, prior to the commencement of the transboundary movement of the hazardous or other wastes, become aware that the shipment if allowed to proceed could become a case of illegal traffic. In line with the general obligation on all Parties to take appropriate legal, administrative and other measures to implement and enforce the provisions of the Convention, including measures to prevent and punish conduct in contravention to the Convention,³⁹ the State aware of the matter should rapidly contact the State of export for it to ensure that the illegal shipment does not leave its territory.
- (b) A State concerned has become aware of a possible case of illegal traffic subsequent to the commencement of the transboundary movement of the waste but prior to the waste reaching a State of transit or State of import. Here again, all Parties concerned have the general obligation of taking appropriate legal, administrative and other measures to implement and enforce the provisions of the Convention, including measures to prevent and punish conduct in contravention to the Convention.⁴⁰ In the event a State concerned has information about the route or destination of the wastes (or possible route and destination) the initial contact with the other States concerned should be initiated by that State.
- (c) The waste subject to a possible case of illegal traffic has reached another State (State of transit or State of import). In that case, that State should initiate contact with the State of export as soon as possible during the investigation stage.

63. This initial contact between the State(s) concerned may be a telephone conversation. However, a written communication (preferably through electronic communication like email, or through fax or letter) between the competent authorities of the States concerned is advisable so as to ensure that all States concerned are properly informed through the appropriate channels. To overcome possible language difficulties, it is recommended to use all means available, i.e. through both oral and written communication channels.

64. Such initial contact between all States concerned should be made as soon as possible, meaning immediately following awareness of or detection of the possible case of illegal traffic.

65. As illegal traffic can be detected at various points in the movement chain, safety and protective measures should be taken as soon as possible to secure the wastes in question which will protect human health and the environment. Transport of the wastes from the location of detection to a disposal facility should be done in accordance with applicable national and international requirements, e.g. on transport, packaging and labelling. If temporary storage is required while the investigation is ongoing, again, this should be done in compliance with applicable national requirements. The wastes should be stored in a way that will prevent damage to human health and the environment as a result of the escape/leaking/mixing of the waste, but also to ensure that there is no tampering with evidence. All such immediate measures should be authorized or supervised by the relevant competent authority.

³⁹ Paragraph 4 of Article 4 of the Basel Convention.

⁴⁰ Paragraph 4 of Article 4 of the Basel Convention.

4. ILLEGAL TRAFFIC DEEMED TO BE AS THE RESULT OF CONDUCT ON THE PART OF THE EXPORTER OR GENERATOR (PARAGRAPH 2 OF ARTICLE 9)

4.1. THE TAKE-BACK OF THE WASTES

66. The Basel Convention sets out a detailed control procedure that must be complied with for transboundary movements of hazardous wastes and other wastes to take place, a so-called prior informed consent (PIC) procedure. This procedure aims at ensuring, among other things, that those States concerned by the transit or import of wastes agree to a proposed movement and that the wastes are disposed of in an environmentally sound manner in the State of import. The notification and consent procedure, as well as the use of a movement document are specific tools that operationalize the control procedure.

67. Although similar procedures are not provided for in the case of the take-back, some aspects of the control procedure as operationalized through the PIC procedure and the use of a movement document may contribute to achieving the objectives of the Convention, in particular the ESM of the wastes taken back and the punishment of conduct in contravention of the Convention. Accordingly, this guidance proposes that relevant elements of the control procedure for transboundary movements be used when implementing the take-back provision, namely an adjusted notification document and movement document.⁴¹ The use of standard procedures would harmonize Parties' implementation of the take-back provision while achieving the objectives of the Convention.

68. In most cases, the illegal traffic concerns a transboundary movement of wastes for which there was no notification and no consent. To support a standard procedure of the take-back of the wastes in question it is suggested that two forms be used:⁴²

- (a) A form for the State in which the wastes are located to request the State of export to ensure the take-back of the wastes (see appendix 1, part I);
- (b) A form to be used by the exporter, generator or State of export for the notification of the take-back, bearing in mind that the specific consent of the States concerned is not required (see appendix 1, part II).

A completed movement document should accompany the shipment back to the State of export.

69. In the event the illegal traffic concerns a transboundary movement of wastes for which a notification was issued in accordance with paragraph 1 of Article 6 but no consent has been given by the competent authority in the State of import, it is suggested to use the existing notification form that was used during the initial notification procedure for the take-back. Fields 20 and 21 of the notification form should be completed with the reason(s) for objecting to the initially proposed movement.⁴³ Also in this instance a movement document under the Basel Convention should be used to accompany the shipment back to the State of export.

70. The paragraphs below provide a description of the take-back procedure in cases where the transboundary movement of wastes took place without any notification. A graphic illustration of the suggested take-back procedure is set out in appendix 2.

⁴¹ The notification and movements documents are available at: <http://www.basel.int/Procedures/NotificationMovementDocuments/tabid/1327/Default.aspx>.

⁴² In the event not all the Parties (through their competent authorities) involved in the take back agree on following the approach embedded in this guidance, including the use of the suggested forms, then the Parties could use the standard procedure provided for under Article 6 with the exception of paragraph 2 and paragraph 3 (a), namely there is no need for the State of import taking back the wastes to consent to the proposed movement.

⁴³ See paragraph 31 of the instructions for completing the notification and movement documents, available at: <http://www.basel.int/Procedures/NotificationMovementDocuments/tabid/1327/Default.aspx>.

4.1.1. Request for the take-back

71. In this guidance document, the request for the take-back of the wastes deemed to constitute a case of illegal traffic amounts to the formal initiation of the take-back procedure by the State of transit or State of import in which the wastes are located.

72. The competent authority of the Party that is a State of import or that of any transit State in which the wastes are located will be responsible for requesting the State of export to take-back the wastes.

73. As noted above, it is expected that prior communications between the State of export and the State requesting the take-back will have taken place before the official request for wastes to be taken back is formulated. The request should be sent promptly to the State of export, which means that the steps to be taken to collect the information needed to make this request should also be taken in a timely manner. The Convention does not set any deadlines for these steps,⁴⁴ but delayed action may lead to damage to human health and the environment in the event the containers are leaking; to tampering with evidence if the shipment is not safely stored; to an increase of the costs of storage of the shipment; as well as to hampering a smooth implementation of the take-back procedure; the environmentally sound disposal of the wastes and subsequent legal proceedings against those responsible for the illegal traffic. It is therefore suggested that the request for take-back be sent within 30 days following the detection of the illegal shipment.

74. Because the request is expected to lead to the take-back of the wastes, it should set out the information that led to the determination, by the State making the request, that there are grounds for this procedure to be implemented. Such information includes:

- (a) The reason(s) why the shipment amounts to a deemed case of illegal traffic;
- (b) The date and place of detection of the case of illegal traffic;
- (c) The entities involved (generator, exporter, States, other stakeholders) where these have been identified, and information about the responsibility of each entity involved in the illegal traffic, including with respect to the costs associated with the take-back;
- (d) List of evidence available to support the information set out in the request;
- (e) The description of the wastes (nature and amount);
- (f) The copy of a contract between the exporter and importer/disposer/carrier, if available;⁴⁵
- (g) The location of the wastes from where they will be taken back;
- (h) Steps taken, in particular to ensure that the wastes are safely stored and cannot be tampered with;
- (i) Steps that may need to be taken to ensure that the wastes are properly packaged and labelled in conformity with generally accepted and recognized international rules and standards;
- (j) Costs that are expected to be incurred since the request for take-back has been received by the State of export (storage, packaging, labelling).

75. Parties are advised to use part I – Request for the take-back – of the form attached in appendix 1.

76. When the request is sent to the competent authority of the State of export, it is advised to provide at that time some evidence that a case of illegal traffic is deemed to have taken place. Such evidence can be pictures of the waste, copies of documents (receipts, labels, contracts, shipping documents, notification document if available, movement document if available, written statements made during the investigation, record of visual inspection), or results of laboratory analyses of the content of the illegal shipment. These types of evidence are

⁴⁴ Some national legislation, regulations and other measures do specify a deadline for requesting the take-back of wastes in cases of illegal traffic (e.g. in the form of a statute of limitation).

⁴⁵ A contractual arrangement between the carrier (shipping/transport company) and the exporter or between the importer or disposer and the exporter may include information of relevance to the determination of a case of illegal traffic. It may also provide for an avenue for managing illegal shipments in addition to the take-back procedure. In particular, the contract with the carrier may provide for the illegal shipment to be covered by a financial guarantee which may be used to cover the costs of storage, the costs of transport, as well as the costs of recovery or disposal, including any necessary interim operation.

also considered useful during the initial contact; in other words, the step before completing and sending the form for the take-back request.

77. Competent authorities from the involved States should keep in mind that any evidence collected during the investigation could be used in court action(s) related to the illegal traffic. Competent authorities are therefore strongly encouraged to ensure that robust evidence is prepared and documented and to collaborate in sharing their evidence within the existing legal frameworks (for example via mutual legal assistance procedures) upon request.

78. It may be helpful to use the form for confirmed cases of illegal traffic⁴⁶ to accompany information or evidence. Such information will also facilitate the cooperation between the relevant competent authorities. This information could also be shared by the competent authority with the relevant enforcement entities (e.g. customs, port authorities, environmental inspectors, police and prosecutors) within its country. It may also be that such evidence could be of use to the administrative or enforcement authorities in the State of export in order to conduct proceedings against those responsible for the illegal traffic and falling within the jurisdiction of that State.

79. Following the reception of the request for the take-back, the competent authority of the State of export should promptly acknowledge its receipt with the competent authority of the requesting State. This acknowledgement should be in writing (preferably through electronic communication like email or through fax or letter) and its date included in the form requesting the take-back. After its competent authority has reviewed the request, the State of export should confirm its intention to ensure that the wastes are taken back, or if the request is not complete or unclear, seek further information or clarification. In the event the competent authority of the State of export considers that the take back would be impracticable, it should inform the competent authority of the requesting State simultaneously to acknowledging receipt of the request for take back.

80. The 30-day deadline set out in paragraph 2 of Article 9 (or such other period of time as the States concerned may agree upon) for the wastes in question to be taken back runs from the date of receipt of this request by the State of export.

4.1.2. Notification of the take-back

81. After the State of export has acknowledged receipt of the request for take-back, arrangements for the take-back would follow. Although the Basel Convention is silent on this point, best practice suggests that the request for take-back should be followed by a notification of the take-back of the wastes in question, unless all the involved competent authorities agree that this is not necessary, e.g. in case a duly motivated request is made by the competent authority of the initial State of export.

82. The following provisions of the Basel Convention should apply *mutatis mutandis* to the notification of the take-back:

- (a) Paragraph 1 of Article 6, pertaining to the notification by the State of export;
- (b) Paragraph 3 (b) of Article 6, pertaining to the confirmation of a contract specifying ESM of the wastes taken back.

83. Because the take-back is, ultimately, the responsibility of the State of export, it will be up to the State of export of the illegally trafficked wastes to organize the take-back and to notify, or to require the generator or exporter to notify, the State(s) concerned accordingly.

84. It is advised that part II – Notification of take-back – of the form attached in appendix 1 be used, which is a modified version of the notification document for transboundary movements of hazardous wastes with one difference: no written consent to the take-back is required. To reflect this fundamental difference with the standard notification document, the form for the Notification of take-back:

- (a) Omits box 20 (written consent of the movement);
- (b) Omits box 21 (specific conditions on consenting to the movement document or reasons for objecting).

⁴⁶ This form is available at: <http://www.basel.int/Procedures/ReportingonIllegalTraffic/tabid/1544/Default.aspx>.

Another difference concerns box 3, where the option for take-back has been added. It is also noted that it may be possible that some boxes of the notification document cannot be filled in, e.g. the waste generator may not be known.

85. In addition to the information usually set out in the notification document for transboundary movements, the form should set out information on the timeline for the take-back. As noted above, the Convention provides for a 30 day deadline (or such other period of time as States concerned may agree) for the wastes in question to be taken back, and the suggestion is that this deadline will run upon receipt by the State of export of a completed request to take-back the wastes.

86. Because the Convention provides in paragraph 2 of Article 9 that “the Parties concerned shall not oppose, hinder or prevent the return of those wastes to the State of export”, the suggestion is that all Parties have already agreed to consent that illegal shipments of wastes transit through them and that, accordingly, the specific consent of the State(s) concerned (State in which the wastes are located and State of transit if any) not be required before the transboundary movement commences.

87. The take-back should start after the competent authorities concerned have acknowledged the receipt of the notification.

88. A movement document should accompany the wastes and the provisions of paragraph 9 of Article 6 should apply *mutatis mutandis*. The responsibility for ensuring the completion of the movement document would be entrusted to the State of export, which would then send it to the State in which the wastes are located for further use during the take-back.

89. At any time, Parties may, in line with paragraph 1 (i) of Article 16 of the Basel Convention, request the assistance of the Secretariat in their identification of cases of illegal traffic.

4.1.3. Costs related to the take-back

90. Although the Convention is silent on this point, costs related to the take-back (packaging and labelling, transport and disposal) should be borne by the exporter or generator, based on their responsibility, or, if necessary, by the State of export. It would seem appropriate that costs of storage incurred from the date on which the State of export has been properly notified of the illegal shipment should also be borne by the exporter, generator or, if necessary, by the State of export. Authority to claim these and other costs generated by the illegal traffic (e.g. storage prior to notification, investigation) should be specified in the national legal framework of the States concerned and dealt with in the context of existing administrative, civil or criminal procedures established within legislation to prevent and punish illegal traffic.

91. Paragraph 11 of Article 6 of the Convention provides that:

“Any transboundary movement of hazardous wastes or other wastes shall be covered by insurance, bond or guarantee as may be required by the State of import or any State of transit which is a Party.”⁴⁷

92. While the results of a questionnaire conducted by the Committee in the 2014-2015 biennium revealed that Parties were implementing paragraph 11 of Article 6 in a variety of ways due to differing interpretations, some Parties have implemented this provision by requiring a financial guarantee cover certain costs of take-back. In cases where the illegal shipment was covered by a financial guarantee, this guarantee may be used to cover the costs of storage, the costs of transport, as well as the costs of disposal, including any necessary interim operation, depending on the provisions of the relevant national legal frameworks.⁴⁸ However, for the most part, wastes are illegally trafficked without notification to the involved competent authorities and thus no insurance, bond or other guarantee (hereafter referred to as “financial guarantee”) is in place.

⁴⁷ Guidance to improve the implementation of paragraph 11 of Article 6 of the Convention is under development by the Committee Administering the Mechanism for Promoting Implementation and Compliance with the Basel Convention (see the draft in document UNEP/CHW.13/INF/24).

⁴⁸ This is the case in the European Union. Article 6 of the Regulation (EC) No. 1013/2006 on the shipment of wastes provides that all shipments of waste for which a notification is required shall be subject to the requirement of a financial guarantee or equivalent insurance covering: (a) costs of transport; (b) costs of recovery or disposal, including any necessary interim operation; and (c) costs of storage for 90 days. The financial guarantee or equivalent insurance is intended to cover costs arising in the context of: (a) cases where the shipment or the recovery or disposal cannot be completed as intended; and (b) cases where a shipment or the recovery or disposal is illegal.

93. Some Parties have enacted legislation requiring that in case of a take-back of illegally trafficked wastes a financial guarantee be in place to cover the risks of the take-back operation.⁴⁹ In the absence of such a general legal requirement to cover the take-back of the wastes by a financial guarantee embedded in the national legal frameworks of the States concerned, the involved competent authorities may, provided that they have the discretion to do so under national law, decide and agree on a case-by-case basis on whether the take-back of illegally trafficked waste is to be covered by a financial guarantee or not. The financial guarantee could, for instance, serve to cover the costs of storage, transport and/or alternative disposal in case the take-back operation is illegal or cannot be completed as intended.

4.2. IN CASE TAKE-BACK IS IMPRACTICABLE

4.2.1. The disposal of the wastes

94. Paragraph 2 (b) of Article 9 provides that in case the take-back of the illegal shipment is “impracticable”, the State of export shall ensure that the wastes in question are “otherwise disposed of in accordance with the provisions of the Basel Convention”.

95. Examples of situations where a take-back is impracticable include:

- (a) The State of export does not have an adequate facility to dispose of the wastes in question;
- (b) Risks of transport during take-back are high due to damaged or affected packaging, or due to the fact that the wastes have become unstable;
- (c) Cases where the State of import, or the State of transit in which the wastes are located, is a non-Party and is unwilling to cooperate in the take-back.

96. The best outcome may be for the State of export to cooperate with the State of import to ensure the wastes are disposed of in an environmentally sound manner within the State of import. Alternative arrangements for disposal of the wastes within another State would also be viable, as long as the waste is disposed of in an environmentally sound manner and all concerned States agree to the solution.

97. In the event it would be best for the wastes to be disposed of in another State, the PIC procedure, as described in Article 6 of the Convention, applies, with the original Party of import now constituting the Party of export. As it is the State of export’s responsibility to take all the steps necessary towards this goal, the State of export of the illegally trafficked wastes would be responsible for complying with the obligations of the State of export as set out in Article 6 of the Convention, even though the wastes are located in a different State. A graphic illustration in case take-back of the wastes is considered impracticable is set out in appendix 4.

4.2.2. Costs related to the disposal of the wastes

98. Although the Convention is silent on this point, costs related to the disposal should be borne by the exporter or generator, based on their responsibility, or, if necessary, by the State of export. It would seem appropriate that costs of storage incurred from the date on which the State of export has been properly notified of the illegal shipment should also be borne by the exporter, generator or, if necessary, by the State of export. Authority to claim these and other costs generated by the illegal traffic (e.g. storage prior to notification, investigation) should be specified in the national legal framework of the States concerned and dealt with in the context of existing administrative, civil or criminal procedures established within legislation to prevent and punish illegal traffic.

99. In case the illegal shipment was covered by a financial guarantee pursuant to paragraph 11 of Article 6 of the Convention, this guarantee may be used to cover the costs of storage, the costs of transport, as well as the costs of disposal, including any necessary interim operation, depending on the provisions of the relevant national legal frameworks.⁵⁰ However, for the most part, wastes are illegally trafficked without notification to the involved competent authorities and thus no financial guarantee is in place.

⁴⁹ This is the case in the European Union. Article 24 of Regulation (EC) No.1013/2006 requires that the take-back be covered by a new financial guarantee or equivalent, unless the competent authorities agree that a duly reasoned request by the initial competent authority of dispatch is sufficient.

⁵⁰ Guidance to improve the implementation of paragraph 11 of Article 6 of the Convention is under development by the Committee Administering the Mechanism for Promoting Implementation and Compliance with the Basel Convention (see the draft in document UNEP/CHW.13/INF/24).

100. If the disposal of the wastes involves a new transboundary movement to a third state, national legislation of the States concerned by the transboundary movement may require that a financial guarantee be in place. In the absence of a legal requirement to cover the transboundary movement of the wastes by a financial guarantee embedded in the national legal frameworks of the States concerned, the involved competent authorities may, provided that they have the discretion to do so under national law, decide and agree on a case-by-case basis on whether the transboundary movement is to be covered by a financial guarantee or not. Such a financial guarantee could, for instance, serve to cover the costs of storage, transport and/or alternative disposal in case the transboundary movement is illegal or cannot be completed as intended.

4.3. ACTION TO BE TAKEN FOLLOWING THE TAKE-BACK OR DISPOSAL OF THE WASTES

101. Communication between the relevant competent authorities of the States concerned should continue until it is confirmed that the wastes have been disposed of in an environmentally sound manner, in accordance with paragraph 9 of Article 6 of the Convention. In case the illegally trafficked wastes are taken back, the competent authorities of the State(s) concerned are advised to monitor the take-back of the wastes in question to ensure that they arrive in the State of export. The State of export, through its competent authority, should confirm to the States concerned by the illegal traffic reception of the wastes in its country and, in due course, of the completion of disposal as specified in the notification.

102. In case the take back of the wastes is impracticable and the wastes are disposed of in the State of location of the wastes at discovery of the illegal traffic, that State should confirm to the States concerned by the illegal traffic of the completion of disposal in an environmentally sound manner in accordance with the objectives of paragraph 9 of Article 6 of the Convention. If the wastes are disposed of in another State, it is advised that the new disposer confirm the completion of environmentally sound disposal to both the initial State of export, which is responsible for complying with the obligations of Article 6 of the Convention regarding the new transboundary movement, and the new State of export, where the wastes were located at discovery of the illegal traffic.

103. It is also advisable that the States concerned cooperate with regards to subsequent legal proceedings against all relevant stakeholders, so as to ensure that Parties punish conduct in contravention of the Convention, as required by the Convention. Guidance on the prosecution of cases of illegal traffic is set out in the *Instruction Manual on the Prosecution of Illegal Traffic of Hazardous Wastes or Other Wastes*.⁵¹

104. The competent authority is also invited to communicate to the Basel Convention Secretariat and with other Parties and stakeholders its experiences and lessons learned. In due course, the form for confirmed cases of illegal traffic⁵² should also be communicated to the Secretariat.

⁵¹ Approved by decision BC-10/18 of the tenth meeting of the Conference of the Parties. The Instruction Manual on the Prosecution of Illegal Traffic of Hazardous Wastes or Other Wastes is available at: <http://www.basel.int/TheConvention/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

⁵² This form is available at: <http://www.basel.int/Procedures/ReportingonIllegalTraffic/tabid/1544/Default.aspx>.

5. ILLEGAL TRAFFIC DEEMED TO BE AS A RESULT OF CONDUCT ON THE PART OF THE IMPORTER OR DISPOSER (PARAGRAPH 3 OF ARTICLE 9)

105. If the illegal traffic is the result of conduct on the part of the importer or disposer, the State of import 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 within 30 days from the time the illegal traffic has come to the attention of the State of import or such other period of time the States concerned may agree. It is important to recall that in order to implement this provision the State of import should have enacted laws or regulations reflecting it at the national level.⁵³ National frameworks, including legal frameworks, could even go as far as defining procedural issues with respect to identification of the nature of the wastes, communication with other States concerned and coordination between the entities (e.g. competent authority, Customs, port authorities, environmental inspectors, police and prosecutors) and the stakeholders (generator, exporter, importer or disposer) involved. National legal frameworks may also specify actions to be taken in case of non-compliance by the importer or disposer, for example the possibility for enforcement entities to serve notices requiring a person or legal entity to act in accordance with paragraph 3 of Article 9 of the Convention within a specific time. Failing to comply with such a notice, could be an offence in itself.⁵⁴

5.1. THE DISPOSAL OF THE WASTES BY THE IMPORTER OR DISPOSER, OR STATE OF IMPORT

106. As set out in paragraph 3 of Article 9, it is the responsibility of the State of import to ensure that the wastes that were deemed illegal traffic on the part of the importer or disposer are disposed of in an environmentally sound manner by the importer or disposer, or if necessary, by itself. This latter situation could be the case for example when the importer or disposer cannot be identified, went bankrupt or refuses to take responsibility and it is not possible within the national context to force action in a timely manner.

107. Paragraph 3 of Article 9 does not specify where this disposal needs to take place. The State of import should take into account the proximity principle and whether the best solution would be to dispose of the wastes as close as possible to where they are located when the case of illegal traffic is established. If the wastes are located in the State of import, disposal of the wastes in the State of import should be preferred.

108. However, where the State of import does not have the capacity to deal with the wastes concerned, alternative destinations outside the State should be considered.⁵⁵ In this event, the PIC procedure as described in Article 6 of the Convention applies.⁵⁶ If the original importer or disposer takes charge of the disposal, the notifier would be the original importer or disposer of the wastes and the original State of import would become the new State of export. If it is not possible to force action on the importer or disposer, the duty to notify the transboundary movement lies with the original State of import.

109. The Convention does not expressly specify the roles of Parties concerned other than the State of import in ensuring environmentally sound disposal of the wastes. All Parties concerned are, however, subject to a general obligation to cooperate, as necessary, in the disposal of the wastes in an environmentally sound manner pursuant to paragraph 3 of Article 9. If the wastes are located in the State of transit when the case of

⁵³ Based on the 52 responses received from Parties to the questionnaire on the implementation of paragraphs 3 and 4 of Article 9 of the Convention, 19 Parties had not done so while 32 had. (See: <http://www.basel.int/Implementation/LegalMatters/Compliance/GeneralIssuesActivities/Activities201617/IllegalTraffic/tabid/4581/Default.aspx>). In countries with a monist legal system that consider these provisions to be self-executing, paragraphs 3 and 4 of Article 9 of the Convention would be directly applicable at the national level. This can mean that such States would not need to rely on implementing legislation to enforce paragraphs 3 and 4 of Article 9 of the Convention.

⁵⁴ For an example of a national regulation that has laid down these enforcement powers, see: http://www.legislation.gov.uk/uksi/2007/1711/pdfs/uksi_20071711_en.pdf.

⁵⁵ Some respondents to the questionnaire answered that they did not have capacity available to deal with hazardous wastes.

⁵⁶ See <http://www.basel.int/Procedures/NotificationMovementDocuments/tabid/1327/Default.aspx>.

illegal traffic is established, the proximity principle would suggest that the wastes be disposed of in the State of transit, provided that the State of transit has the necessary disposal capacity and agrees thereto. The original State of import would, however, continue to be responsible for ensuring that the wastes are disposed of in an environmentally sound manner, in accordance with its responsibility to take all the steps necessary to ensure environmentally sound disposal of the wastes pursuant to paragraph 3 of Article 9.

5.2. THE COSTS RELATED TO THE DISPOSAL OF THE WASTES

110. While paragraph 3 of Article 9 imposes a general obligation on Parties concerned to cooperate, as necessary, in the disposal of the wastes in an environmentally sound manner, it does not specifically set out their respective responsibilities in covering the costs related to the disposal of the wastes. It is suggested that the costs related to disposal (packaging and labelling, storage, transport and disposal in an environmentally sound manner) be borne by the importer or disposer, based on their responsibility, or, if necessary, by the State of import. Responsibility for these and other costs generated by the illegal traffic should be specified in the national legal framework of the States concerned and dealt with in the context of existing administrative, civil or criminal procedures to prevent and punish illegal traffic.⁵⁷ National legislation may provide that the State of import has the authority to reclaim the costs for disposal of the waste from the responsible importer or disposer.

111. In the case where the illegal shipment was covered by a financial guarantee pursuant to paragraph 11 of Article 6,⁵⁸ this guarantee may be used to cover the costs of storage, the costs of transport, as well as the costs of disposal, including any necessary interim operation, depending on the provisions of the relevant national legal frameworks. However, for the most part, wastes are illegally trafficked without notification to the involved competent authorities and thus no financial guarantee is in place.

112. If the disposal of the wastes involves a new transboundary movement, national legislation of the States concerned by the transboundary movement may require that a financial guarantee be in place. In the absence of a legal requirement to cover the transboundary movement of the wastes by a financial guarantee embedded in the national legal frameworks of the States concerned, the involved competent authorities may, provided that they have the discretion to do so under national law, decide and agree on a case-by-case basis on whether the transboundary movement is to be covered by a financial guarantee or not. Such a financial guarantee could, for instance, serve to cover the costs of storage, transport and/or alternative disposal in case the transboundary movement is illegal or cannot be completed as intended.

5.3. ACTION TO BE TAKEN FOLLOWING DISPOSAL OF THE WASTES

113. Communication between the relevant competent authorities of the States concerned should continue until it is confirmed that the wastes have been disposed of in an environmentally sound manner.

114. In case the waste are disposed of in the State where they were located at discovery of the illegal traffic, that State should, as best practice, confirm to the States concerned by the illegal traffic of the completion of disposal in an environmentally sound manner, in accordance with the objective of paragraph 9 of Article 6 of the Convention.

115. In case the wastes are disposed of in another State than the State of location, because the State of location does not have the capacity to dispose of them in an environmentally sound manner, the disposer located in the new State of import will be required to inform both the new exporter and the competent authority of the new State of export of receipt of the wastes in question and, in due course, of the completion of disposal as specified in the notification document pursuant to paragraph 9 of Article 6 of the Convention. It is suggested that after reception of the confirmation of disposal, the new State of export confirm the disposal of the wastes to all other Parties initially concerned by the illegal traffic.

⁵⁷ An example of the obligation to bear the costs can be found in Article 25 (2) of the European Waste Shipment Regulation: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02006R1013-20160101&qid=1461588990431&from=EN>.

⁵⁸ This is the case in the European Union. Article 6 of the Regulation (EC) No. 1013/2006 on the shipment of wastes provides that all shipments of waste for which a notification is required shall be subject to the requirement of a financial guarantee or equivalent insurance covering: (a) costs of transport; (b) costs of recovery or disposal, including any necessary interim operation; and (c) costs of storage for 90 days. The financial guarantee or equivalent insurance is intended to cover costs arising in the context of: (a) cases where the shipment or the recovery or disposal cannot be completed as intended; and (b) cases where a shipment or the recovery or disposal is illegal.

116. It is further advisable that the States concerned cooperate with regards to subsequent legal proceedings against all relevant stakeholders, so as to ensure that Parties punish conduct in contravention of the Convention, as required by the Convention. Guidance on the prosecution of cases of illegal traffic is set out in the *Instruction Manual on the Prosecution of Illegal Traffic of Hazardous Wastes or Other Wastes*.⁵⁹

117. The competent authority is also invited to communicate to the Basel Convention Secretariat and with other Parties and stakeholders its experiences and lessons learned. In due course, the form for confirmed cases of illegal traffic⁶⁰ should also be communicated to the Secretariat.

⁵⁹ Approved by decision BC-10/18 of the tenth meeting of the Conference of the Parties. The Instruction Manual on the Prosecution of Illegal Traffic of Hazardous Wastes or Other Wastes is available at: <http://www.basel.int/TheConvention/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

⁶⁰ This form is available at: <http://www.basel.int/Procedures/ReportingonIllegalTraffic/tabid/1544/Default.aspx>.

6. WHERE RESPONSIBILITY FOR THE ILLEGAL TRAFFIC CANNOT BE ASSIGNED (PARAGRAPH 4 OF ARTICLE 9)

118. In cases where the 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 ensure through cooperation, that the wastes in question are disposed of as soon as possible in an environmentally sound manner either in the State of export or the State of import or elsewhere as appropriate, in accordance with paragraph 4 of Article 9. Appendix 6 provides a graphic illustration of the implementation of the duty to cooperate where the responsibility for the illegal traffic cannot be assigned (paragraph 4 of Article 9). Appendix 7 includes a case study of the implementation of the duty to cooperate where the responsibility for the illegal traffic could not be assigned (paragraph 4 of Article 9).

6.1. THE DISPOSAL OF THE WASTES

119. The responsibility to dispose of the wastes in accordance with the provisions of the Basel Convention belongs to the “Parties concerned” or “other Parties”, as appropriate. The “Parties concerned” include the State of import, any State of transit and the State of export. “Other Parties” refers to Parties other than those. Through cooperation, Parties shall ensure that the wastes in question are disposed of as soon as possible in an environmentally sound manner.

120. Paragraph 4 of Article 9 of the Convention does not provide specific guidance on where the wastes should be disposed. The wording of the provision suggests, however, that the primary responsibility for the disposal lies with the Parties concerned. Other provisions of the Convention, in particular the general obligations enshrined in its Article 4, are also of relevance to guide the process for identifying the location of the disposal. Accordingly, priority should be given to identifying adequate capacity for ESM of the wastes in the State where the wastes are located.

121. As specified in paragraph 4 of Article 9, the disposal of the wastes may also involve other States than the Parties concerned, for example, if none of the Parties concerned has the capacity to dispose of the wastes in an environmentally sound manner. In this regard, paragraph 4 of Article 9 specifies that “other Parties” shall, as appropriate, cooperate to ensure environmentally sound disposal of the wastes. Here again, the principle of proximity enshrined in Article 4 would suggest that the wastes be disposed of as close as possible to the place where they are located. In case a transboundary movement is to take place, the relevant Basel Convention provisions apply. The State of location of the wastes (previously the State of import or State of transit) becomes the new State of export and will be required to notify the transboundary movement pursuant to Article 6 of the Convention.

122. The case study included in appendix 5 provides a practical example of cooperation between the State of export and the respective States of import in ensuring environmentally sound disposal of illegal shipments of hazardous wastes where the responsibility for the illegal traffic could not be assigned.

6.2. THE COSTS RELATED TO THE DISPOSAL OF THE WASTES

123. The Convention is silent on who should bear the costs related to disposal (packaging and labelling, storage, transport and disposal in an environmentally sound manner). Responsibility for such costs can be specified in the national legal framework of the States involved, but if not, or if their provisions are not mutually compatible, the States concerned or other States will need to find a mutually agreeable arrangement.

124. In case the illegal shipment was covered by a financial guarantee pursuant to paragraph 11 of Article 6, this guarantee may be used to cover the costs of storage, the costs of transport, as well as the costs of disposal, including any necessary interim operation, depending on the provisions of the relevant national legal frameworks.⁶¹ However, for the most part, wastes are illegally trafficked without notification to the involved competent authorities and thus no financial guarantee is in place.

⁶¹ This is the case in the European Union. Article 6 of the Regulation (EC) No. 1013/2006 on the shipment of wastes provides that all

125. If the disposal of the wastes involves a new transboundary movement, national legislation of the States concerned by the transboundary movement may require that a financial guarantee be in place. In the absence of a legal requirement to cover the transboundary movement of the wastes by a financial guarantee embedded in the national legal frameworks of the States concerned, the involved competent authorities may, provided that they have the discretion to do so under national law, decide and agree on a case-by-case basis on whether the transboundary movement is to be covered by a financial guarantee or not. Such a financial guarantee could, for instance, serve to cover the costs of storage, transport and/or alternative disposal in case the transboundary movement is illegal or cannot be completed as intended.

6.3. ACTION TO BE TAKEN FOLLOWING DISPOSAL OF THE WASTES

126. Communication between the relevant competent authorities of the States concerned should continue until it is confirmed that the wastes have been disposed of in an environmentally sound manner.

127. In case the wastes are disposed of in the State where they were located at discovery of the illegal traffic, that State should, as best practice, confirm to the State concerned by the illegal traffic of the completion of disposal in an environmentally sound manner, in accordance with the objective of paragraph 9 of Article 6 of the Convention.

128. In case the wastes are disposed of in another State, the disposer located in the new State of import will be required to inform both the new exporter and the competent authority of the new State of export of receipt by the new disposer of the wastes in question and, in due course, of the completion of disposal as specified in the newly issued notification document pursuant to paragraph 9 of Article 6 of the Convention. It is suggested that after reception of the confirmation of disposal, the new State of export confirm the disposal of the wastes to all other Parties initially concerned by the illegal traffic.

129. The original State of import should also maintain communications and cooperation with the competent authorities in the original State of export in case there are criminal or civil proceedings in either State as well as to help prevent any future cases of illegal traffic.

shipments of waste for which a notification is required shall be subject to the requirement of a financial guarantee or equivalent insurance covering: (a) costs of transport; (b) costs of recovery or disposal, including any necessary interim operation; and (c) costs of storage for 90 days. The financial guarantee or equivalent insurance is intended to cover costs arising in the context of: (a) cases where the shipment or the recovery or disposal cannot be completed as intended; and (b) cases where a shipment or the recovery or disposal is illegal. It is noted that under EU legislation, the term "recovery" covers the operations included in Annex IVB of the Convention and the term "disposal" covers the operations included in annex IVA of the Convention.

7. PROCEDURES AND MECHANISMS IN CASE OF DISAGREEMENT BETWEEN THE PARTIES

130. In those cases, where Parties cannot agree or where coordination is not possible, Parties may contact the Secretariat of the Basel Convention who has the mandate to assist Parties upon request in their identification of cases of illegal traffic.⁶² Alternatively, one or both Parties concerned may make a submission to the Committee. Paragraph 9 of the terms of reference of the Committee⁶³ specifies who may make submissions to the Committee. In accordance with paragraph 19 of the terms of reference of the mechanism for promoting implementation and compliance, the Committee shall consider any submission made to it in accordance with paragraph 9 with a view to determining the facts and root causes of the matter of concern and, assist in its resolution. Paragraph 19 also specifies the kind of advice, non-binding recommendations and information that the Committee may provide a Party with as part of the facilitation procedure. Paragraph 20 specifies the kind of additional measures that the Committee may recommend that the Conference of the Parties decide upon. Finally, a third option is for Parties to make use of the dispute settlement provisions embedded in Article 20 of the Convention.

8. EMERGENCIES AND LIABILITY FOR DAMAGE

131. It may arise that hazardous wastes illegally trafficked cause damage, for instance contamination of the cargo, physical damage or damage to the environment. One possible cause for the occurrence of damage may be that there was inadequate packaging or labelling of the wastes. Paragraph 7 (b) of Article 4 of the Convention provides that each Party shall require that “hazardous wastes and other wastes that are to be the subject of a transboundary movement be packaged, labelled, and transported in conformity with generally accepted and recognized international rules and standards in the field of packaging, labelling, and transport, and that due account is taken of relevant internationally recognized practices”.

132. Two provisions of the Convention are of relevance to the issue of damages arising in the context of transboundary movements of hazardous wastes and other wastes: Article 12 and Article 14.

133. Article 12 of the Convention provides that “the Parties shall cooperate with a view to adopting, as soon as practicable, a protocol, setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.”

134. At its fifth meeting in 1999, the Conference of the Parties adopted the Basel Protocol on Liability and Compensation for Damage resulting from the Transboundary Movements of Hazardous Wastes and their Disposal, with the objective to provide a comprehensive regime for liability as well as adequate and prompt compensation for damage resulting from transboundary movement of hazardous wastes and other wastes, including incidents occurring because of illegal traffic in those wastes.⁶⁴ The Protocol has not yet entered into force.⁶⁵ As with the Convention itself, only Parties ratifying the Protocol would be bound by the Protocol after its entry into force.

135. Paragraph 2 of Article 14 provides that “the Parties shall consider the establishment of a revolving fund to assist on an interim basis in case of emergency situations to minimize damage from accidents arising from transboundary movements of hazardous wastes and other wastes or during the disposal of those wastes.”

136. By decision V/32, the Conference of the Parties decided on an interim basis to enlarge the scope of the Technical Cooperation Trust Fund and that the Secretariat, upon request, could use funds contributed to the Trust Fund, in accordance with paragraphs 2, 3 and 4 of the decision, to assist developing country Parties and Parties with economies in transition in cases of incidents occurring during a transboundary movement of hazardous wastes and other wastes covered by the Basel Convention.⁶⁶

⁶² Paragraph 1 (i) of Article 16.

⁶³ See <http://www.basel.int/TheConvention/ImplementationComplianceCommittee/Mandate/tabid/2296/Default.aspx>.

⁶⁴ For more information please refer to: <http://www.basel.int/TheConvention/Overview/LiabilityProtocol/tabid/2399/Default.aspx>.

⁶⁵ As of 5 May 2017, there were eleven ratifications of the Protocol bearing in mind that for its entry into force, twenty expressions of consent to be bound must be notified to the Depository.

⁶⁶ For more information please refer to: <http://www.basel.int/Implementation/TechnicalAssistance/EmergencyAssistance/Overview/tabid/4764/Default.aspx>.

6. Information on the illegal shipment

Detection place:

Detected date:

Detected by:

Job title:

Department:

Institution:

Country:

Address:

Contact person:

Email:

Tel:

Fax:

Steps taken to safely store the wastes:

Current location of the wastes:

7. Entities involved in the illegal shipment

Waste generator Name:

Contact person:

Job title:

Department

Institution:

Country:

Address:

Email:

Tel:

Fax:

Waste exporter Name:

Contact person:

Job title:

Department

Institution:

Country

Address:

Email:

Tel:

Fax

Other entity Name:

Contact person:

Job title:

Department

Institution:

Country

Address:

Email:

Tel:

Fax:

8. Evidence attached to the request

Evidence collected:

Evidence collected by:

Job title:

Department:

Institution:

Country:

Address:

Contact person:

Email:

Tel:

Fax:

**9. Costs expected to be covered by the generator or exporter or State of export
(unless otherwise specified, the amounts are presumed to be in USD)**

Costs of storage:

Costs of packaging and
labelling:

Costs of transport:

Costs of disposal/recovery:

Other costs:

Specify the nature of the
costs:

10. Disposal facility (2): <input type="checkbox"/> or recovery facility (2): <input type="checkbox"/> Registration No: Name: Job title: Department:		(iii) EC list of wastes: (iv) National code in country of export: (v) National code in country of import: (vi) Other (specify): (vii) Y-code:		
Institution: Country: Address: Contact person: Tel: Fax: E-mail: Actual site of disposal/recovery:		(viii) H-code (5): (ix) UN class (5): (x) UN Number: (xi) UN Shipping name: (xii) Customs code(s) (HS):		
15. (a) Countries/States concerned, (b) Code no. of competent authorities where applicable, (c) Specific points of exit or entry (border crossing or port)				
State of export - dispatch	State(s) of transit (entry and exit)			State of import - destination
(a)				
(b)				
(c)				
16. Customs offices of entry and/or exit and/or export (European Community):				
Entry:		Exit:		Export:
17. Exporter's - notifier's / generator's - producer's (1) declaration: I certify that the information is complete and correct to my best knowledge. I also certify that legally enforceable written contractual obligations have been entered into and that, <input type="checkbox"/> If requested by any of the involved Parties, that any applicable insurance or other financial guarantee is or shall be in force covering the transboundary movement <i>(please tick box if a form of financial guarantee is required and in force).</i>				
Exporter's - notifier's name:		Date:	Signature:	
Generator's - producer's name:		Date:	Signature:	
				18. Number of annexes attached
FOR USE BY COMPETENT AUTHORITIES				
19. Acknowledgement from the relevant competent authority of countries of import - destination / transit (1) / export - dispatch (9):				
Country:		Name of competent authority:		
Notification received on:		Stamp and/or signature:		
Acknowledgement sent on:				
(1) Required by the Basel Convention (2) In the case of an R12/R13 or D13-D15 operation, also attach corresponding information on any subsequent R12/R13 or D13-D15 facilities and on the subsequent R1-R11 or D1-D12 facilit(y)ies when required (3) To be completed for movements within the OECD area and only if B(ii) applies		(4) Attach detailed list if multiple shipments (5) See list of abbreviations and codes on the next page (6) Attach details if necessary (7) Attach list if more than one (8) If required by national legislation (9) If applicable under the OECD Decision		

List of abbreviations and codes used in the notification document

DISPOSAL OPERATIONS (block 11)

- D1 Deposit into or onto land, (e.g., landfill, etc.)
- D2 Land treatment, (e.g., biodegradation of liquid or sludgy discards in soils, etc.)
- D3 Deep injection, (e.g., injection of pumpable discards into wells, salt domes or naturally occurring repositories, etc.)
- D4 Surface impoundment, (e.g., placement of liquid or sludge discards into pits, ponds or lagoons, etc.)
- D5 Specially engineered landfill, (e.g., placement into lined discrete cells which are capped and isolated from one another and the environment, etc.)
- D6 Release into a water body except seas/oceans
- D7 Release into seas/oceans including sea-bed insertion
- D8 Biological treatment not specified elsewhere in this list which results in final compounds or mixtures which are discarded by means of any of the operations in this list
- D9 Physico-chemical treatment not specified elsewhere in this list which results in final compounds or mixtures which are discarded by means of any of the operations in this list (e.g., evaporation, drying, calcination, etc.)
- D10 Incineration on land
- D11 Incineration at sea
- D12 Permanent storage, (e.g., emplacement of containers in a mine, etc.)
- D13 Blending or mixing prior to submission to any of the operations in this list
- D14 Repackaging prior to submission to any of the operations in this list
- D15 Storage pending any of the operations in this list

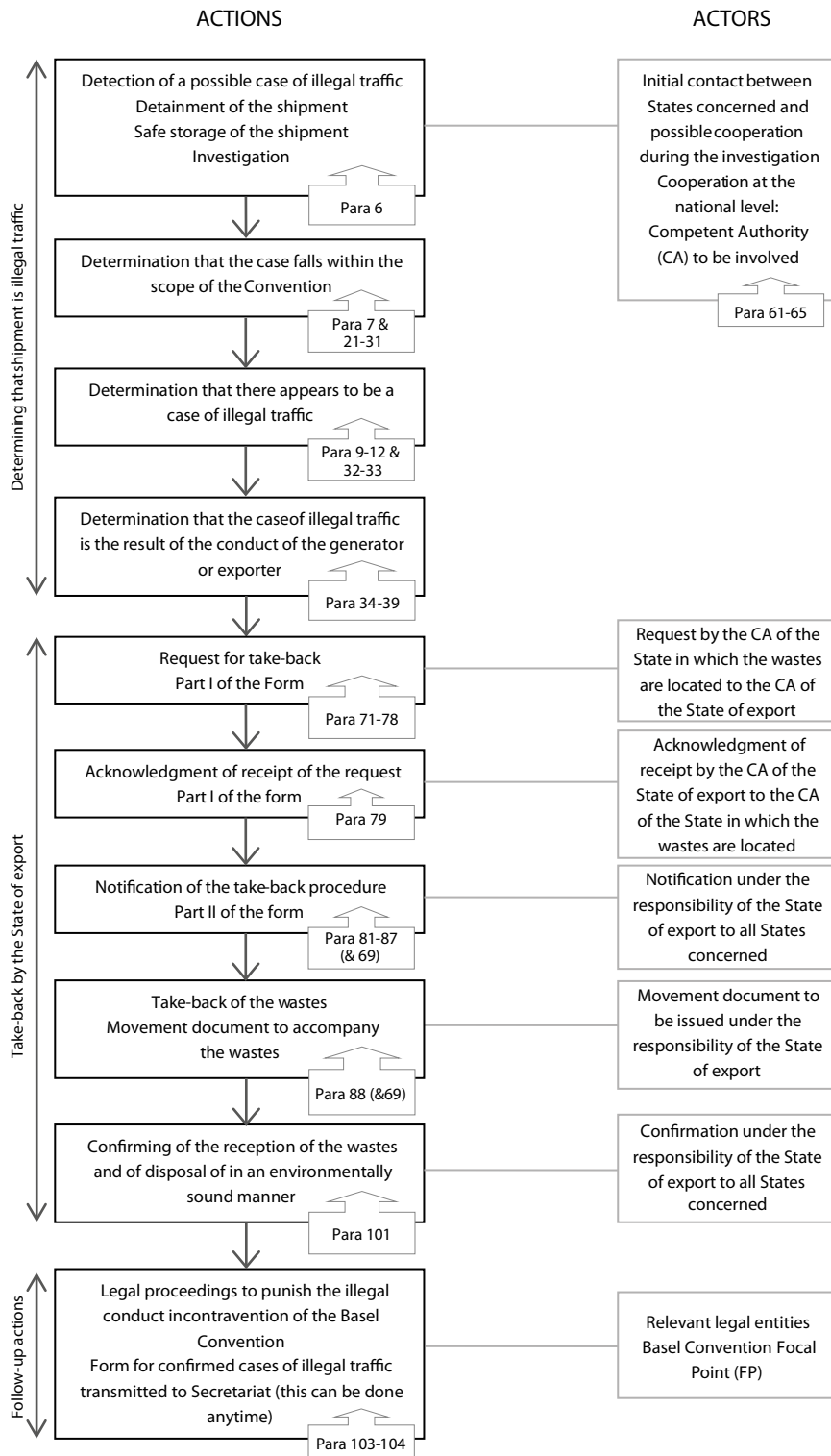
RECOVERY OPERATIONS (block 11)

- R1 Use as a fuel (other than in direct incineration) or other means to generate energy (Basel/OECD) -
Use principally as a fuel or other means to generate energy (EU)
- R2 Solvent reclamation/regeneration
- R3 Recycling/reclamation of organic substances which are not used as solvents
- R4 Recycling/reclamation of metals and metal compounds
- R5 Recycling/reclamation of other inorganic materials
- R6 Regeneration of acids or bases
- R7 Recovery of components used for pollution abatement
- R8 Recovery of components from catalysts
- R9 Used oil re-refining or other reuses of previously used oil
- R10 Land treatment resulting in benefit to agriculture or ecological improvement
- R11 Uses of residual materials obtained from any of the operations numbered R1-R10
- R12 Exchange of wastes for submission to any of the operations numbered R1-R11
- R13 Accumulation of material intended for any operation in this list.

PACKAGING TYPES (block 7)	H-CODE AND UN CLASS (block 14)		
	UN Class	H-code	Characteristics
1. Drum	1	H1	Explosive
2. Wooden barrel	3	H3	Flammable liquids
3. Jerrican	4.1	H4.1	Flammable solids
4. Box	4.2	H4.2	Substances or wastes liable to spontaneous combustion
5. Bag	4.3	H4.3	Substances or wastes which, in contact with water, emit flammable gases
6. Composite packaging			
7. Pressure receptacle			
8. Bulk			
9. Other (specify)			
MEANS OF TRANSPORT (block 8)			
R = Road	5.1	H5.1	Oxidizing
T = Train/rail	5.2	H5.2	Organic peroxides
S = Sea	6.1	H6.1	Poisonous (acute)
A = Air	6.2	H6.2	Infectious substances
W = Inland waterways	8	H8	Corrosives
	9	H10	Liberation of toxic gases in contact with air or water
	9	H11	Toxic (delayed or chronic)
	9	H12	Ecotoxic
	9	H13	Capable, by any means, after disposal of yielding another material, e. g., leachate, which possesses any of the characteristics listed above
PHYSICAL CHARACTERISTICS (block 13)			
1. Powdery/powder			
2. Solid			
3. Viscous/paste			
4. Sludgy			
5. Liquid			
6. Gaseous			
7. Other (specify)			

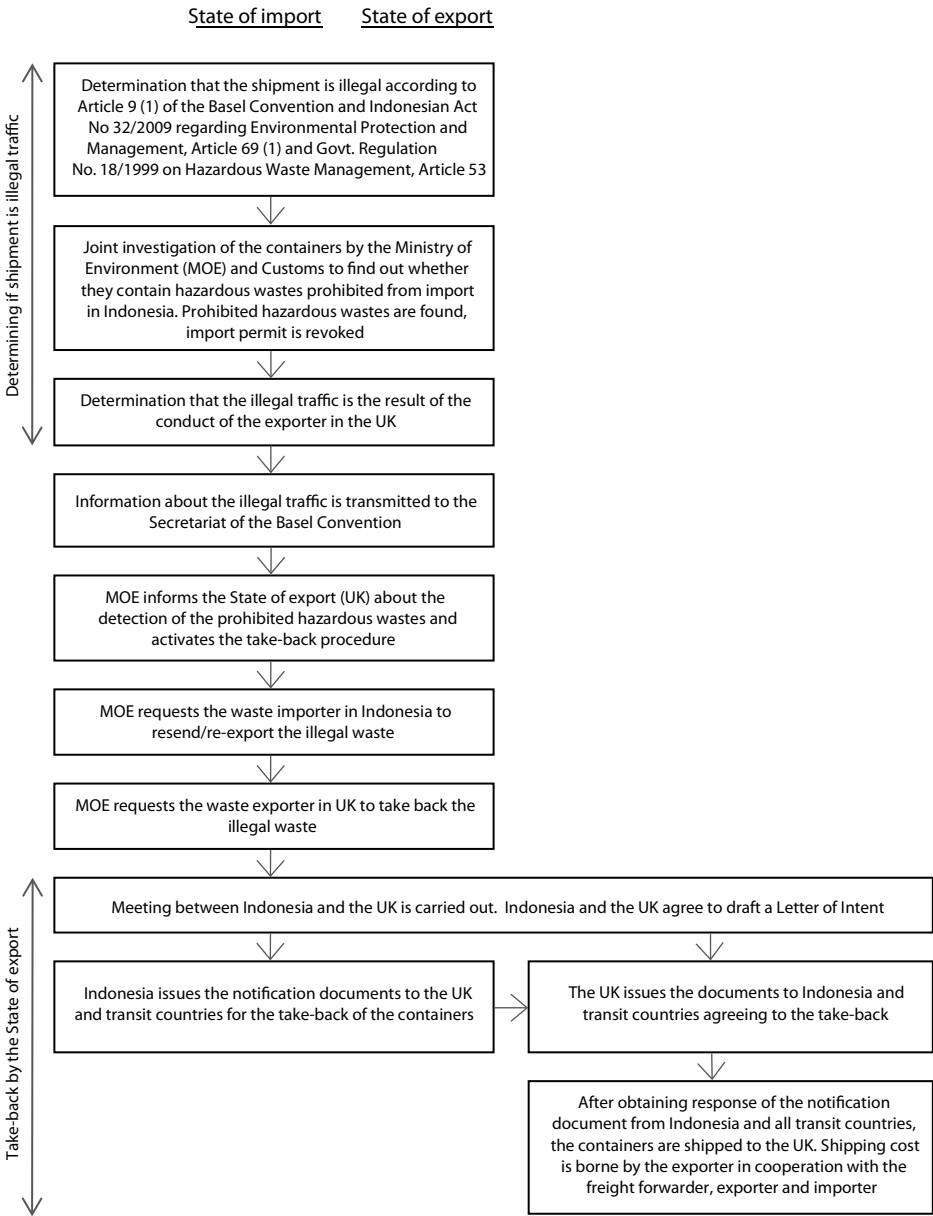
Further information, in particular related to waste identification (block 14), i.e. on Basel Annexes VIII and IX codes, OECD codes and Y-codes, can be found in a Guidance/Instruction Manual available from the OECD and the Secretariat of the Basel Convention

APPENDIX 2: GRAPHIC ILLUSTRATION OF THE SUGGESTED TAKE-BACK PROCEDURE (PARAGRAPH 2 OF ARTICLE 9)

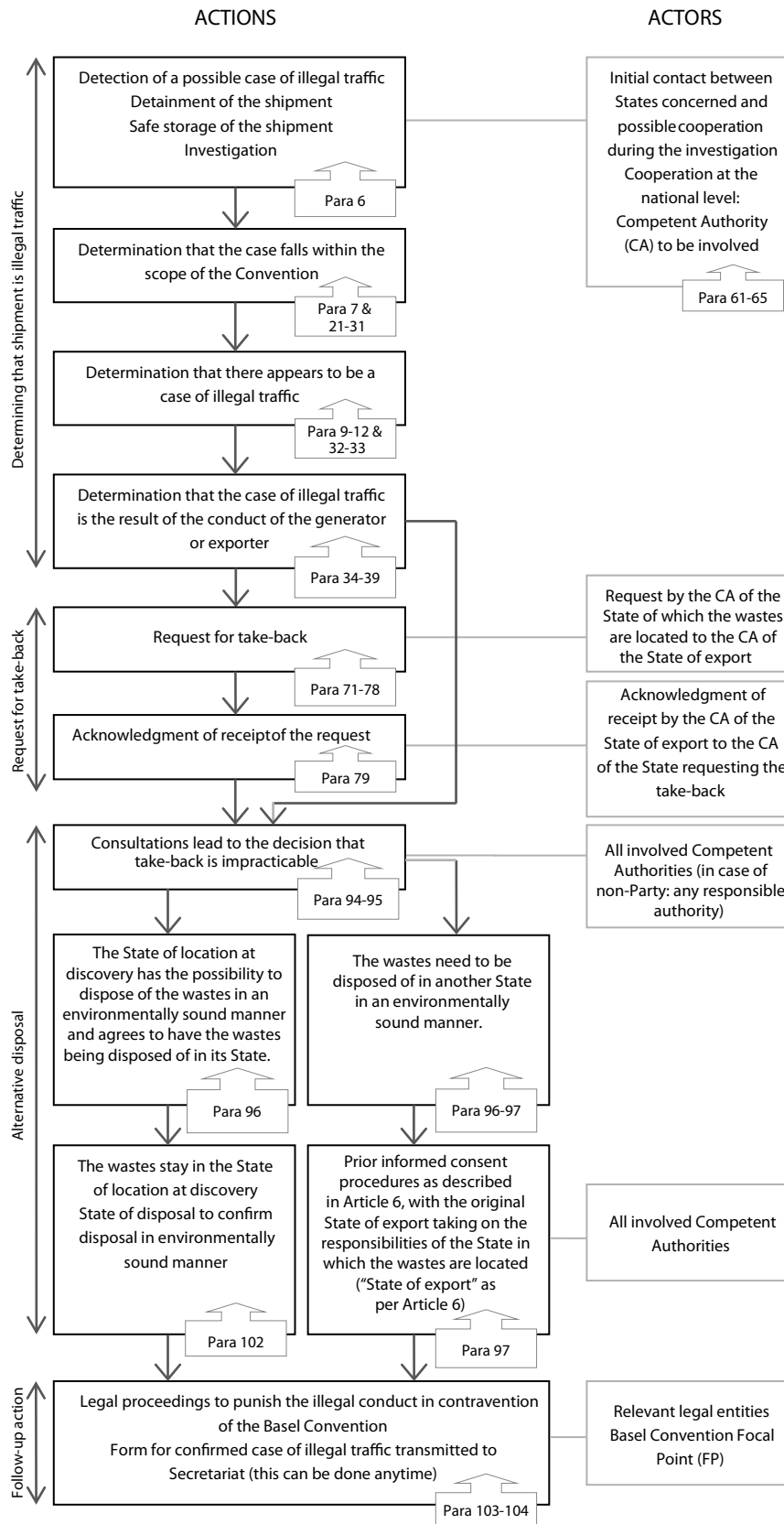


APPENDIX 3: CASE STUDY ON THE IMPLEMENTATION OF THE TAKE-BACK PROCEDURE (PARAGRAPH 2 OF ARTICLE 9)

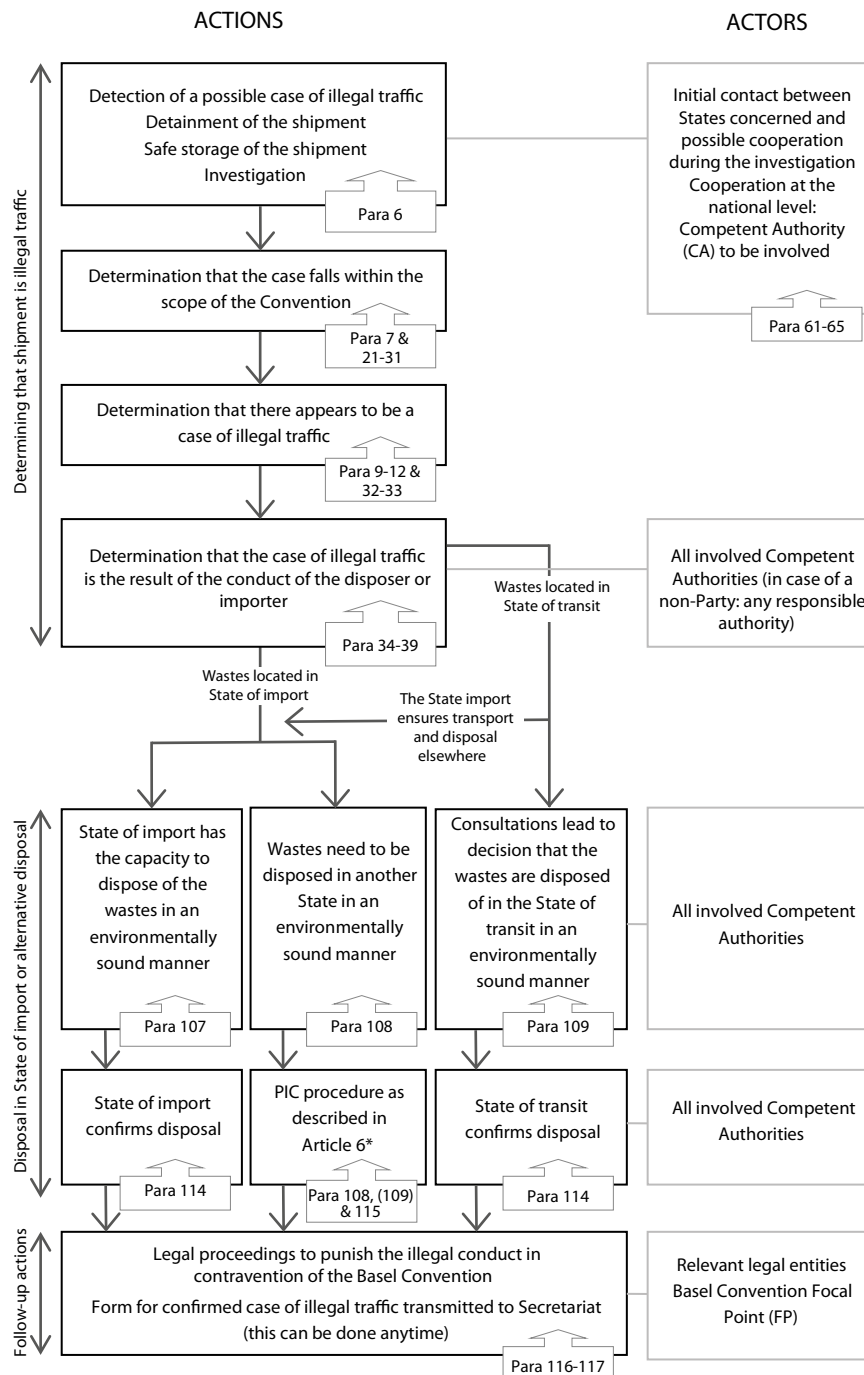
The diagram shown below is of the take-back procedures as implemented during an export case from the United Kingdom of Great Britain and Northern Ireland to Indonesia in January 2012, as submitted by Indonesia. Scrap metals exported to Indonesia were detained after it was detected that the movement contained wastes prohibited from import into Indonesia.



APPENDIX 4: GRAPHIC ILLUSTRATION IN CASE TAKE-BACK OF THE WASTES IS CONSIDERED IMPRACTICABLE (PARAGRAPH 2 OF ARTICLE 9)

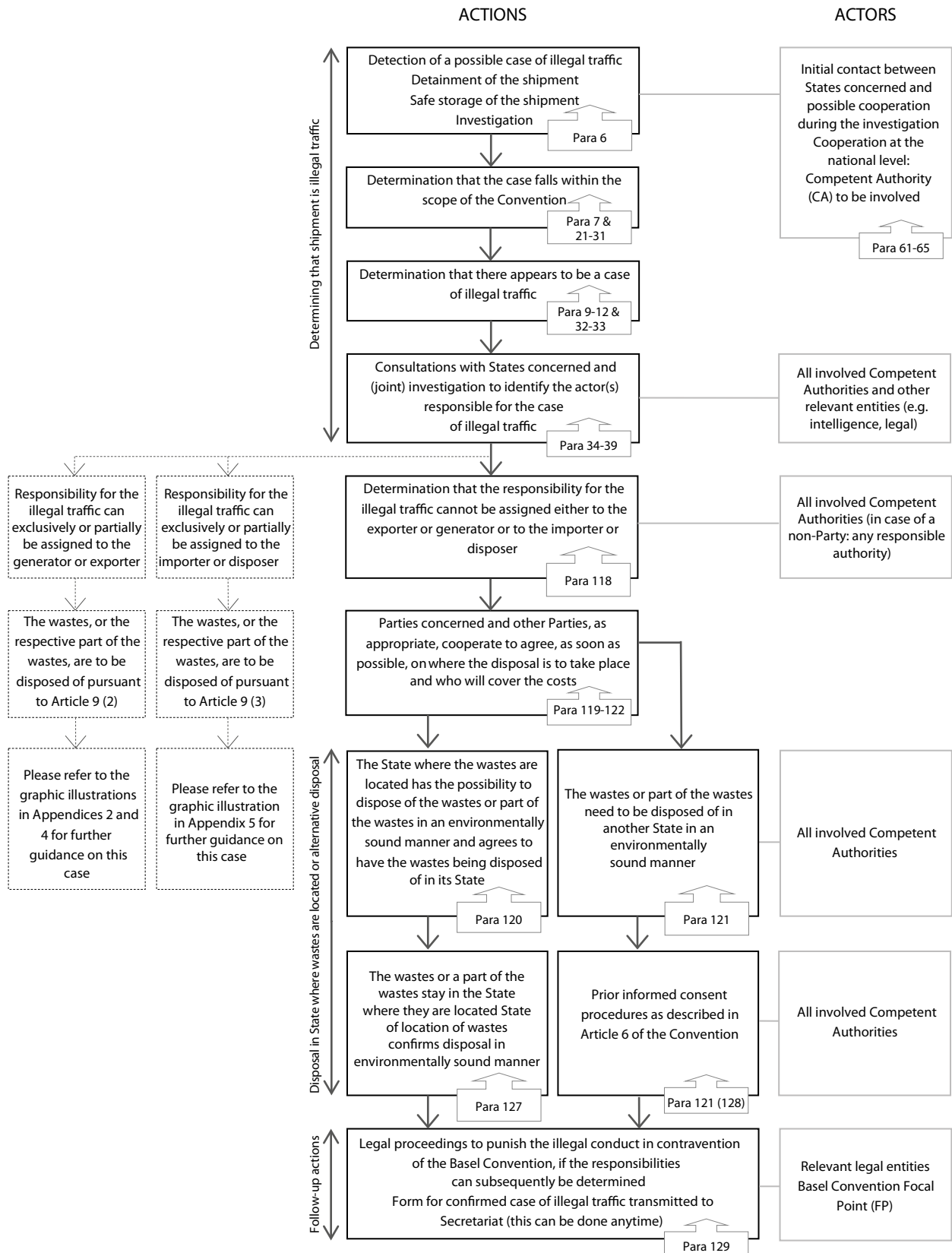


APPENDIX 5: GRAPHIC ILLUSTRATION IN CASE THE ILLEGAL TRAFFIC DEEMED TO BE AS A RESULT OF CONDUCT ON THE PART OF THE IMPORTER OR DISPOSER (PARAGRAPH 3 OF ARTICLE 9)



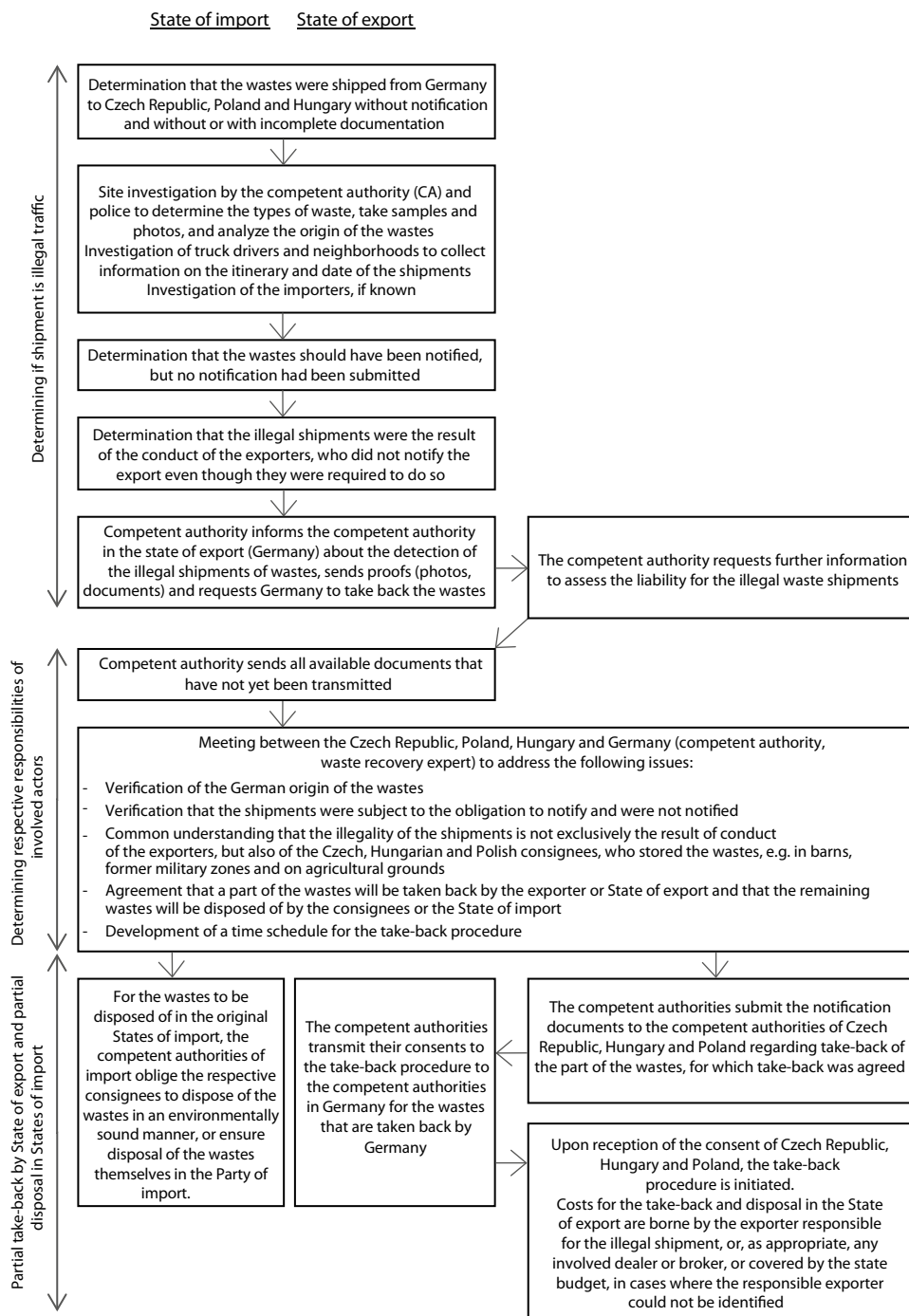
* If the wastes are located in a State of transit, the original State of import takes the responsibilities of the State of transit ("State of export" as per Article 6).

APPENDIX 6: GRAPHIC ILLUSTRATION OF THE IMPLEMENTATION OF THE DUTY TO COOPERATE WHERE THE RESPONSIBILITY FOR THE ILLEGAL TRAFFIC CANNOT BE ASSIGNED (PARAGRAPH 4 OF ARTICLE 9)



APPENDIX 7: CASE STUDY ON THE IMPLEMENTATION OF THE DUTY TO COOPERATE WHERE THE RESPONSIBILITY FOR THE ILLEGAL TRAFFIC COULD NOT BE ASSIGNED (PARAGRAPH 4 OF ARTICLE 9)

The diagram below illustrates a case of cooperation regarding illegal shipments of wastes from Germany to Poland, Czech Republic and Hungary, as submitted by Germany. The exporters were known for some waste shipments, and unknown for others. In the case of the waste shipments to Czech Republic and Hungary, the German origin of the wastes could be established, but the exporter could not be identified because the consignees did not record the shipments as foreseen by the European Waste Shipment Regulation. After negotiations with the States concerned, Germany agreed to take back a part of those wastes, for which the responsibility of the exporter, even if unknown, could be established. The remaining wastes were disposed of in the respective State of import, either by the consignee or by the State of import itself.



TECHNICAL SERIES PUBLICATION N°	TITLE	DATE OF PUBLICATION
1	Guidance on the implementation of the Basel Convention provisions dealing with illegal traffic (paragraphs 2, 3 and 4 of Article 9)	October 2019
2	Guide for the development of national legal frameworks to implement the Basel Convention	October 2019
3	Revised guidance document on improving national reporting by Parties to the Basel Convention	October 2019
4	Benchmark report aimed at facilitating reporting under paragraph 3 of Article 13 of the Basel Convention - <i>Examples reflecting Parties' good practices</i>	October 2019

www.basel.int

Secretariat of the Basel Convention

Office address:

United Nations Environment Programme (UNEP)
International Environment House 1
11-13 Chemin des Anémones
CH-1219 Châtelaine GE
Switzerland

Postal address :

Palais des Nations
Avenue de la Paix 8-14
CH-1211 Genève 10
Switzerland

Tel: +41 22 917 82 71

Fax: +41 22 917 80 98

Email: brs@brsmeas.org

