insurance and liability manual

**A Practical Manual for Promotion of the Environmentally Sound Management of Wastes**

 Basel
 Convention

**I. Introduction**

To ensure the protection of human health and the environment, the Basel Convention stipulates that any transboundary movement of hazardous wastes or other wastes shall be covered by insurance, bond or other guarantee as may be required by the State of import or any State of transit which is a Party. Insurance, bonds and guarantees are not also related to TBM but also to establishment and facilities in cases of after-care, clean-up, etc. When facilities demonstrate adherence to environmentally sound management (ESM) elements through the use of certification system, environmental and public health risks associated with waste management are likely to be reduced which may in turn reduce insurance premiums.

Insurance, bond or financial guarantees serve as one of the tools of liability.

1. **Purpose of the manual**

The purpose of this manual is to assist Parties in have an overview of establishing and implementing procedures and requirements for insurance and liability related to TBM and facilities and establishments.

The purpose of implementing insurance policies on TBM and holding generators, exporters, importers or disposers of hazardous wastes liable in case of damages is to enhance protection against harm to human health and the environment. In insuring a TBM, the financial obligations of the waste management operators involved are to cover the costs of damage to both human health and the environment. This manual is aimed at all authorities responsible for policy development and compliance assurance with environmental insurance and liability of hazardous wastes and other wastes (competent authorities, legislators) and stakeholders, in particular, persons who are responsible for the TBM and ESM of wastes (waste management operators including generators, exporters, importers or disposers of hazardous wastes).

1. **How to use the manual**

This manual provides basic information on financial guarantees, insurances and bonds related with TBM and establishments and facilities and provides some examples of existing legislation and principles of calculation.

**II. Insurance as a tool of Liability**

1. **Legislation**

**Basel Convention**

Insurance and liability are essential tools for preventing and minimizing potential impacts and damages that can occur in the event of accidents involving hazardous wastes and other wastes or where such wastes are not managed in an environmentally sound manner.

Paragraph 11 of Article 6 of the Basel Convention states: *“Any transboundary movement of hazardous wastes and other wastes shall be covered by insurance, bond or other guarantee as may be required by the State of import or any State of transit which is a Party.”* This may be linked with procedures established by States to govern circumstances when TBM and the ESM of the wastes in question cannot be completed as originally intended. It is the responsibility of the notifier[[1]](#footnote-1) to provide the information on insurance, bond or financial guarantee for the shipment as required by the State of import or transit according to the national law.

Some examples of particular requirements for insurance, bonds or financial guarantees related to TBM or facilities are available in national regulations, which might include damages from accidents, emergency spills, clean-up, and including closure and after-care activities.[[2]](#footnote-2). It should be mentioned that national system for establishing insurance, bonds or financial guarantees usually are established by law, but exact procedures for development of particular related documents (costs, administrative taxes etc.) could be related to private sector requirements.

The responsibilities in regards liability for waste management operators involved in TBM are established and assigned by national law implementing the Basel Convention, while financial guarantees are provided for by administrative procedural systems.

**Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and Their Disposal**

The 1999 Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and Their Disposal, adopted under the auspices of the Basel Convention, is also relevant in this context.

*“Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and Their Disposal”* was adopted at the f[ifth meeting of the Conference of Parties](http://archive.basel.int/meetings/frsetmain.php?meetingId=1&sessionId=2&languagId=1).

The Protocol, which has yet to enter into force, addresses only to damage due to an incident occurring during a TBM of hazardous wastes and other wastes and their disposal. It does not take into account insurance and liability as it relates to ESM of wastes and, more specifically, facility-related aspects.

An *“Instruction Manual for the Implementation of the Basel Protocol on liability and compensation for damages resulting from transboundary movements of hazardous wastes and their disposal”[[3]](#footnote-3)* was also developed and may be a useful reference should be referred to for matters related to the Protocol.

The objective of the Protocol is to provide for a comprehensive regime for liability as well as adequate and prompt compensation for damage resulting from the TBM of hazardous wastes and other wastes, including incidents occurring because of illegal traffic of those wastes. The Protocol addresses who is financially responsible in the event of an incident. Each phase of a TBM, from the point at which the wastes are loaded on the means of transport to their export, international transit, import, and final disposal, is considered.

The key elements of the Protocol are:

1. The Protocol applies to damage due to an incident occurring during a TBM of hazardous wastes and other wastes and their disposal, including illegal traffic, from the point where the wastes are loaded on the means of transport in an area under the national jurisdiction of a State of export until the time at which the notification of the completion of disposal, and or subsequent disposal operations, of the wastes has occurred.[[4]](#footnote-4)
2. The notifier of waste under Article 6 of the Convention is strictly liable for damage until the disposer has taken possession of the waste. Thereafter the disposer is strictly liable for damage.
3. A claim made pursuant to the Protocol must be brought within ten years from the date of the incident, or within five years from the date the claimant knew or ought reasonably to have known of the damage, provided that this is no more than ten years from the date of the incident.
4. Those who are strictly liable under the Protocol, i.e. exporters and disposers, have to establish insurance, bonds or other financial guarantees covering their liability.
5. **Manuals and guides**

Elaboration of manuals and guidelines could also help Parties to implement proper insurance and liability systems. Although specific guidance on the issue of insurance and liability may be difficult to come by, because a general provision has been given by the Convention in article 6 paragraph 11 wide range of national initiatives might be developed to fulfil this requirement. Even then the importance of this issue is underlined in Item 4.4 on *“Financial Guarantees”* of the “*Guide to the Control System- Instruction Manual”[[5]](#footnote-5)*, states that:

*“These guarantees are intended to provide for immediate funds for alternative management of the waste in cases where shipment and disposal cannot be carried out as originally intended. These guarantees may take the form of an insurance policy, bank letters, bonds or other promise of compensation for damage, depending on the countries concerned”.*

The arrangement of financial guarantees and insurance is specifically referred to within the main responsibilities of the exporter, which include provisionsfor the exporter to:

*“[a]rrange the necessary financial guarantees and insurances for the movement of waste required by the national legislation of the countries concerned. Some countries may require the financial guarantee to cover the cost of any necessary re-import and alternative disposal operations should the need arise, including cases referred to in Articles 8[[6]](#footnote-6) and 9[[7]](#footnote-7) of the Basel Convention. Additionally, they may require separate insurance against damage to third parties, held as appropriate by the exporter, carrier and the disposer”.[[8]](#footnote-8)*

In addition, box 17 of the *“Notification document for transboundary movements/shipments of waste”* allows space for the exporter-notifier/generator-producer to certify that insurance or other financial security is or will be in place to cover the TBM. Similar language appears in box 15 of the *“Movement document for transboundary movements / shipments of waste”[[9]](#footnote-9)*. Pursuant to article 6.11, this is to be completed when the State of transit or import requires it.

1. **Regional and National Legislation**

Some examples of how Parties have taken the provision and implemented Article 6.11 through regional and national legislation are listed below.

**Regional legislation**

In order to control shipments of wastes and implement the requirements of the Basel Convention, the European Union (EU) has established regional legislation through Regulation (EC) No [1013/2006](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1013:EN:NOT) of the European Parliament and of the Council of 14 June 2006 on shipments of waste. All Members States are required to implement the requirements of this Regulation.

This Regulation establishes procedures and a control regime for the shipment of waste, depending on the origin, destination and route of the shipment, the type of waste being shipped and the type of treatment to be applied to the waste at its destination. This Regulation applies to shipments of waste between EU Member States and with countries outside of the region.

As set out in Article 6 of this Regulation:

1. All shipments of waste for which 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.

2. The financial guarantee or equivalent insurance is intended to cover costs arising in the context of:

(a) Cases where a shipment or the recovery or disposal cannot be completed as intended, as referred to in Article 22[[10]](#footnote-10); and

(b) Cases where a shipment or the recovery or disposal is illegal as referred to in Article 24[[11]](#footnote-11).

EU Member States have an obligation to establish financial guarantees or equivalent insurance for any TBM of waste for which notification is required. The exact type of financial guarantee and/or equivalent insurance to be established is at the discretion of each Member State. Usually there is no maximum or minimum financial limit, but the cover has to include the criteria mentioned above. The type of the waste might also have an impact on the amount of the guarantee required by the Member State.

As set in Regulation (EC) No [1013/2006](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1013:EN:NOT) of the European Parliament and of the Council of 14 June 2006 on shipments of waste *“The financial guarantee or equivalent insurance shall be established by the notifier or by another natural or legal person on its behalf and shall be effective at the time of the notification or, if the competent authority which approves the financial guarantee or equivalent insurance so allows, at the latest when the shipment starts, and shall apply to the notified shipment at the latest when the shipment starts. <...>The financial guarantee or equivalent insurance shall be valid for and cover a notified shipment and completion of recovery or disposal of the notified waste“.*

**National Legislation**

Examples of national legislation regarding guarantees:

Switzerland

Article 20 on “Financial Guarantee” of Section 2 “Exportation” of the Ordinance RS 814.610 related to the Movement of Wastes (VeVA) of 22 of June 2005 (Amended in accordance with of the Ordinance of 18 December 2013, in force since 1 May 2014), refers to Article 33 and 34, in which a guarantee is supposed to cover the costs in cases of illegal movements or in cases when legal movements couldn’t be completed as intended. In both cases the beneficiary of the guarantee is the Government of Switzerland and the guarantee is only activated when the exporter is incapable of action or bankrupt. The Government of Switzerland fixes the amount and the period of time for which the guarantee has to be provided (para. 3 of Article 20) and the amount of the guarantee depends on the costs of storage, transport and disposal (para. 4 Article 20).

In some countries, the level and type of a financial guarantee as related to the TBM of hazardous and other wastes is not regulated under national law. In such cases, usually an individual assessment may be applied, taking into consideration the type and quantity of waste, the purpose of the shipment (recovery or disposal) and the distance of the transboundary movement.

Insurance and financial guarantees are one of the obligator item for permit and licenses for establishments and facilities related to waste management. This insurance and financial guarantee can provide the support to assure ESM of wastes management at national or regional level. Below there is example. (

Netherlands (to complete)

Argentina

The law of Argentina, starting from the top of the legal pyramid (the Constitution) establishes a primary duty to repair any damage to the environment, even though Article 41 of the Constitution prohibits the import to its territory of hazardous wastes. For this reason, putting in place environmental insurance is mandatory in Argentina and the following are examples of resolutions adopted in this regard:

1. Resolution of the Secretariat of Environment and Sustainable Development of the Nation (SESD) 177/2007 (amended by Resolutions 303/2007, 1639/2007 and 481/2011) establishes the rules for obtaining Mandatory Environmental Insurance (MEI), the items included categorization of industries and service activities by Environmental Complexity Level (ECL);
2. Joint Resolution SESD 178/2007 with the Secretariat of Finance established the Environmental Advisory Commission Financial Guarantees;
3. Resolution SADS 1973/2007, together with the Finance Secretariat, regulates the basic guidelines for the contractual conditions of the insurance policies of collective incidence of environmental damage;
4. Resolution SADS 1398/2008, establishes the *“Minimum and Enough Amount of Insurance”* (MEAI); and
5. Resolution of the Superintendent of Insurance of the Nation (SIN) 35168/2010 determines that the approval of environmental insurance policies are subject to the approval of the Environmental Accordance of the SESD.

The insurance available on the market is surety insurance for environmental damage and of collective incidence for ensuring remedial action to restore the environment. In this manner, the risks of costs being incurred by the State are borne by the insurer.

Currently, there are six companies that market surety insurance in Argentina. All regulated companies are enrolled in the Argentina Chamber of Insurance Environmental Risk (CAARA), which is a non-profit legal entity that brings together companies, entrepreneurs, and brokers insurance companies related to MEI.

*[To be further completed with specific country examples]*

**III. Principles of calculating costs of the financial guarantee, bond or insurance**

The principles of calculating costs of the financial guarantee related to TBM of hazardous and other wastes could also act as measure to prevent and minimize inappropriately managed shipments of hazardous wastes, can serve as a step towards ESM, as well as to the implementation of other provisions of the Basel Convention, such as duty to re-import.

An example of possible set of calculating of the financial guarantee, bond or insurance related to TBM is developed below:

1. Transport cost from the generator to the recipient;
2. Disposal or recovery cost per kg;
3. Amount of hazardous wastes[[12]](#footnote-12) carried per kg;
4. Storage cost per day per kg;
5. Costs of testing for identification, re-packaging and re-loading of the wastes.

The date from which the financial guarantee is established and its period of validity are also important variables to be considered.

Some principles of calculating costs of the financial guarantee or insurancerelated to establishments and facilities may include:

1. Type and size of the activity: different processes and service activities;
2. Type of hazardous wastes generated or managed;
3. Specific risks of the activity that may affect the population or the ambient environment;
4. If there is a certified Environmental Management System in place (ISO Standard 14001 or equivalent).
5. **Additional information/References**

[To be completed]

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1. One of the examples of notifier is available in WSR [↑](#footnote-ref-1)
2. Netherlands related to TBM and Argentina regarding facilities. [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. Protocol article 3 paragraph 2 (b) says “In relation to movements destined for the operations specified in D13, D14, D15, R12 orR13 of Annex IV of the Convention, until completion of the subsequent disposal operation specified in D1 to D12 and R1 to R11 of Annex IV to the Convention. [↑](#footnote-ref-4)
5. Adopted by the fourth meeting of the Conference of the Parties and under review by the Committee administering the Mechanism for Promoting Implementation and Compliance (ICC) as part of the work being undertaken in its 2014-2015 Work Programme:

<http://www.basel.int/Implementation/LegalMatters/Compliance/GeneralIssuesActivities/Activities201415/Guidetothecontrolsystem/tabid/3561/Default.aspx>. [↑](#footnote-ref-5)
6. Duty to re-import. [↑](#footnote-ref-6)
7. Illegal traffic. [↑](#footnote-ref-7)
8. Section 5. Detailed Description of the Control Procedure; 5.2 Check list for the exporter (when acting as a notifier); Figure 3: Flow chart of the main responsibilities of the exporter [↑](#footnote-ref-8)
9. Both Notification and Movement documents were approved by Decision VIII/18 *“Harmonization of forms for notification and movement documents and related instructions”* at the eighth meeting of the Conference of the Parties. [↑](#footnote-ref-9)
10. Take-back obligations. [↑](#footnote-ref-10)
11. Take-back when a shipment is illegal. [↑](#footnote-ref-11)
12. The categories of waste to be controlled Annex I of the Basel Convention and the hazardous characteristics of the waste Annex III might also be considered when calculating the financial guarantee (discerned at the national level through national legislation).. [↑](#footnote-ref-12)