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**Conference of the Parties to the Basel Convention  
on the Control of Transboundary Movements of  
Hazardous Wastes and Their Disposal  
Fourteenth meeting  
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**Matters related to the implementation of the Convention:  
legal, compliance and governance matters: Committee  
Administering the Mechanism for Promoting  
Implementation and Compliance**

## **Committee Administering the Mechanism for Promoting Implementation and Compliance**

### **Addendum**

### **Guidance to improve the implementation of paragraph 11 of Article 6 of the Basel Convention on insurance, bond and guarantee**

#### **Note by the Secretariat**

As is mentioned in document UNEP/CHW.14/13, the annex to the present note sets out the draft guidance to improve the implementation of paragraph 11 of Article 6 of the Basel Convention on insurance, bond and guarantee prepared by the Committee Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention. The present note, including its annex, has not been formally edited.

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\* UNEP/CHW.14/1.

## **Annex**

### **Guidance to improve the implementation of paragraph 11 of Article 6 of the Basel Convention on insurance, bond and guarantee**

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## Executive Summary

1. The Conference of the Parties, in its decisions BC-12/7 and BC-13/9, mandated the Committee Administering the Mechanism for Promoting Implementation and Compliance with the Basel Convention to develop guidance to improve the implementation of paragraph 11 of Article 6 of the Convention on insurance, bond and guarantee, for consideration by the Conference of the Parties at its fourteenth meeting. In accordance with the mandate of the Conference of the Parties, this guidance has been developed, taking into account the report on the implementation of paragraph 11 of Article 6 prepared by the Committee in the context of its 2014-2015 work programme (hereinafter, "Implementation Report"),<sup>1</sup> and in consultation with the expert working group on environmentally sound management (EWG on ESM) and the Open-ended Working Group. The development of this guidance document was made possible thanks to the financial support provided by the European Union, Japan and Norway.
2. This guidance is based on the following additional sources of information:
  - (a) Responses to the questionnaire distributed on this subject in 2014 (hereinafter, "the Questionnaire"),<sup>2</sup> as well as comments submitted by Parties subsequently to the thirteenth meeting of the Conference of the Parties;<sup>3</sup>
  - (b) Information contained in the draft "Practical manual: insurance and liability" developed by the EWG on ESM<sup>4</sup> and lessons learned from the relevant project activities undertaken by that group;
  - (c) Legal instruments and guidance adopted by the Parties;
  - (d) Decisions and guidance adopted by the Organisation for Economic Co-operation and Development ("OECD");
  - (e) Responses to inquiries directed to Parties and other experts;
  - (f) Other publicly available information.
3. Information derived from these sources indicates that Parties implement paragraph 11 of Article 6 through a wide variety of methods, including differing legal requirements, scope of application, beneficiaries, and means of calculating the amount to be covered by a financial guarantee, bond, or insurance. These sources also evidence that Parties impose requirements in terms of insurance, bond and guarantee that fall outside the scope of paragraph 11 of Article 6. While little difficulty has been reported in the actual operation of the provision, when specifically asked about any challenges to its wider use, Parties most often cited the differing legal requirements between States, especially the differences in methodologies for determining the required amount of coverage.
4. The objectives of the guidance are set out in part I of the document. Part II of the guidance presents background information on the provision, including:
  - (a) The genesis and purpose of paragraph 11 of Article 6, including:
    - (i) The definition and scope of the provision;
    - (ii) The meaning of the terms "insurance", "bond" and "guarantee";
    - (iii) The relationship between the provision and Articles 8, 9 and 14 of the Convention;
    - (iv) The relationship between the provision and the Protocol on Liability and Compensation;
    - (v) The relationship between the financial guarantees under the provision and other insurances required by other international legal instruments for the transport of dangerous goods/hazardous and noxious substances;

<sup>1</sup> UNEP/CHW/CC.11/11.

<sup>2</sup> The Questionnaire, requested by the Committee Administering the Mechanism for Promoting Implementation and Compliance with the Basel Convention (UNEP/CHW/CC.10/14, paragraphs 52-53), sought information on how Parties are implementing the paragraph 11 of Article 6 of the Basel Convention. Responses to the Questionnaire may be found on the Convention's website, and are summarized in the Implementation Report.

<sup>3</sup> These comments are available at:

<http://www.basel.int/Implementation/LegalMatters/Compliance/GeneralIssuesActivities/Activities201819/Insurance,bondandguarantee/tabid/6123/Default.aspx>.

<sup>4</sup> UNEP/CHW/CLI\_EWG.3/INF7.

- (b) Steps taken by Parties to implement and improve the implementation of paragraph 11 of Article 6;
- (c) Recommendations from Parties and other stakeholders on how to further improve the implementation of paragraph 11 of Article 6.
5. Part III of the guidance offers suggestions on how to address specific challenges faced by Parties in their implementation of paragraph 11 of Article 6, and identifies other steps that could improve the implementation of the provision.

## I. Objectives of the guidance

6. This guidance, developed in accordance with the work programme of the Committee Administering the Mechanism for Promoting Implementation and Compliance for the biennium 2016-2017, as approved by the Conference of the Parties in its decision BC-12/7, is intended to improve the implementation of paragraph 11 of Article 6 by helping Parties to formulate requirements for insurance, bond or other guarantee (collectively referred to hereinafter as “financial guarantees”) applicable to the transboundary movement (hereinafter, “TBM”) of hazardous wastes<sup>5</sup> and their disposal. It may also help Parties in understanding the requirement to provide information on relevant insurance requirements and how they are met by the exporter, carrier, importer and disposer, as provided for in Annex VA of the Convention.<sup>6</sup> The guidance recognizes that the paragraph 11 of Article 6 is written in general terms, giving Parties flexibility to determine what type of financial requirements best fit their needs. At the same time, the emergence of differing approaches among Parties can present challenges to implementation of the provision.

7. This guidance is intended to assist in meeting these challenges. It is hoped that the information contained in the guidance, particularly the details on the practices and legal approaches of some Parties, will assist Parties in cooperatively developing and, if so wished, revising measures to implement paragraph 11 of Article 6. Parties could examine the specifications for the various guarantees allowed, including their scope of application, method of calculation, and provisions to ensure that the guarantees may be drawn upon and used in a timely manner.

8. The guidance is non-binding and therefore cannot restrict the Parties’ flexibility under the Convention or be prescriptive in any way. Instead, after summarizing some of the issues associated with financial guarantees and Parties’ methods of implementing the provision, the guidance suggests a number of approaches that Parties may wish to consider in implementing paragraph 11 of Article 6.

9. This guidance is intended to complement guidance adopted by the Conference of the Parties.<sup>7</sup> For guidance on the control regime established under the Convention with respect to TBM, the attention of the reader is directed to the Guide to the control system adopted by the twelfth meeting of the Conference of the Parties.<sup>8</sup> For guidance on how to complete the notification and movement documents to be used in case of a TBM, the attention of the reader is directed to the revised versions of the forms for the notification and movement documents, including the instructions for completing these forms, adopted by the eighth meeting of the Conference of the Parties.<sup>9</sup>

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<sup>5</sup> As used in this guidance, the term, “hazardous wastes” is intended to include “other wastes,” as defined by Article 1.2 of the Basel Convention.

<sup>6</sup> Point 12 of Annex VA requires that notifications contain information relating to insurance, namely information on relevant insurance requirements and how they are met by the exporter, carrier and disposer (See Note 4).

<sup>7</sup> Guidance documents are available at:

<http://basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx>.

<sup>8</sup> Guide to the control system: instruction manual for use by those persons involved in transboundary movements of hazardous wastes (hereinafter, “Guide to the control system”). The Guide was first adopted by the fourth meeting of the Conference of the Parties (1998), and updated by the twelfth meeting of the Conference of Parties (2015). The updated version is annexed to document UNEP/CHW.12/9/Add.3/Rev.1 and is available at: <http://www.basel.int/TheConvention/ConferenceoftheParties/Meetings/COP12/tabid/4248/mctl/ViewDetails/EventModID/8051/EventID/542/xmid/13027/Default.aspx>.

<sup>9</sup> The forms and instructions to complete them are available at:

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

## II. Background information

### A. The genesis and purpose of paragraph 11 of Article 6 of the Basel Convention

#### 1. Definition and scope of paragraph 11 of Article 6

10. Article 6 of the Basel Convention sets forth conditions and procedures applicable to the TBM of hazardous wastes. Paragraph 11 of the Article provides:

“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.”

11. The provision applies when the State of import and/or transit requires that a TBM be covered by a financial guarantee. The importing and transit countries may decide that they need to be assured that funds will be available to cover the costs of actions to remedy problems associated with the TBM and subsequent disposal of hazardous wastes. In cases where a financial guarantee is required, the notification document should certify that the guarantee is or will be in force.<sup>10</sup> The country of export must keep in mind the need for compliance with such importing and transit country requirements.

12. The eighth meeting of the Conference of Parties to the Basel Convention invited Parties to use a standard movement and notification document for TBM of hazardous wastes, reflecting the requirements set out in Annex V of the Convention. The standard notification document provides, in block 17, that “the exporter-notifier/generator-producer certify (*inter alia*) that . . . any applicable insurance or other financial guarantee is or shall be in force covering the transboundary movement.” Block 15 of the standard movement document requires (*inter alia*) that “the exporter-notifier/generator-producer certify . . . that any applicable insurance or other financial guarantee is in force covering the transboundary movement and that all necessary consents have been received from the competent authorities of the countries concerned.”<sup>11</sup>

13. As explained by the updated Guide to the control system adopted by the Conference of the Parties at its twelfth meeting, the exporter/notifier is to “arrange any financial guarantees and insurances for the movement of wastes 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 and 9 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.”<sup>12</sup>

14. Problems associated with TBM and subsequent disposal of hazardous wastes may include, without limitation: improper classification of wastes, improper packaging and labelling of wastes; transport accidents involving the releases or threatened releases of hazardous wastes; unavailability of appropriate facilities for disposal of the wastes in the importing country; and releases or threatened releases of hazardous substances associated with the handling of the wastes prior to disposal. Prevention of damages to and protection of health and the environment may depend on the ready availability of financing to remedy these problems.

#### 2. Meaning of the terms “insurance”, “bond” and “guarantee”

15. The terms, “insurance”, “bond”, and “guarantee” are not defined in the Basel Convention. All are similar in that they denote financial instruments intended to assure the availability of funding for specified activities (e.g. transportation, storage, disposal of wastes) in cases where the TBM and subsequent disposal of hazardous wastes cannot be completed in accordance with the terms of the contract according to Article 8 of the Convention, is illegal traffic according to Article 9 of the Convention or is otherwise not being undertaken in accordance with the terms of the Convention. The terms are often used interchangeably, but may have specific meanings and characteristics under national law.

16. “Insurance” is commonly defined as: “a contract by which one party (usually a company or corporation) undertakes, in consideration of a payment (called a premium) proportioned to the nature of the risk contemplated, to secure the other against pecuniary loss, by payment of a sum of money in

<sup>10</sup> Annex VA of the Convention also requires that information relating to insurance be provided on notification, although no specific reference to paragraph 11 of Article 6 is made.

<sup>11</sup> A link to the standard movement and notification documents may be found at: <http://www.basel.int/procedures/notificationmovementdocuments/tabid/1327/default.aspx>.

<sup>12</sup> Guide to the control system, step 5 page 17.

the event of destruction of or damage to property (as by disaster at sea, fire, or other accident), or of the death or disablement of a person.”<sup>13</sup>

17. “Bond” has many meanings and definitions. In this context it may be defined as: “an insurance agreement pledging surety for financial loss caused to another by the act or default of a third person or by some contingency over which the third person may have no control.”<sup>14</sup>

18. As suggested by the above definition, the type of bond envisioned under the provision appears to be a surety bond, which has been defined as a “written instrument evidencing a contract of suretyship: a bond guaranteeing performance of a contract or obligation.”<sup>15</sup> Perhaps more germane to the subject of this guidance is the definition of “surety bond” used by the United States Environmental Protection Agency with respect to financial assurance for the treatment, storage and disposal of hazardous wastes: “A guarantee which certifies that a surety company will cover the . . . financial assurance requirement on behalf of the owner and operator.”<sup>16</sup>

19. While some surety bonds may share some characteristics of insurance policies, a bond generally provides that the issuer will either: perform the requisite activity in accordance with the plan on behalf of the guaranteed party; or pay out the face value of the bond to a designated fund or authority. With either type of bond, the Surety retains the right to seek reimbursement from the guaranteed party for funds paid on its behalf. Thus, the Surety provides the guaranteed party with its financial backing. In return, the Surety generally receives a premium or fee based on the face value of the bond and on the financial strength of the guaranteed party.<sup>17</sup>

20. A “guarantee” may be defined as “the action of securing, warranting, or guaranteeing; something which secures or guarantees the existence of a thing.”<sup>18</sup> Guarantees are often referred to as “financial guarantees,” “bank guarantees,” or “corporate guarantees.” OECD guidance explains that “[a] financial guarantee may take the form of an insurance policy, bank letters, bonds or other means of compensation, depending on the countries concerned.”<sup>19</sup>

21. There are many similarities and some degree of overlap among these three financial guarantees. Perhaps the principal difference is that insurance policies are based on the principle of spreading risk. They involve the payment of a premium, based on the likelihood of an event occurring that would trigger payment on the policy, and the costs likely to arise from such an event. The cost of an insurance premium is typically far less than the cost arising from the covered events. However, the premium is generally non-refundable. At the same time, the insurer generally does not have recourse against the insured for monies paid out under the insurance policy. By contrast, the issuer of a financial guarantee typically does not intend to assume more than a modest risk in exchange for a premium. Rather, the issuer (or “guarantor”) generally has determined that the guaranteed party has the financial capacity to pay the amount guaranteed. Furthermore, the guarantor has a right of recourse against the guaranteed party in cases where monies are paid under the guarantee. In many cases, the purchaser of the guarantee is required to post collateral to cover the guaranteed amount. The fees for the issuance of guarantees are more dependent on the financial condition of the purchaser, rather than the risk that a particular event will occur; in this case, e.g., an incident making it impossible to complete a TBM of hazardous wastes in accordance with the terms of the contract.

22. Financial guarantees are known by many names, whose meanings and structure may vary from State to State. A meaningful definition of any particular instrument can only be provided with reference to national law. But in the end, the name attached to the guarantee is not important, as far as providing protection against incidents during the TBM of hazardous wastes. What is important is the

<sup>13</sup> See <http://www.oed.com/view/Entry/97268?redirectedFrom=insurance#eid>. (Accessed 17 Oct. 2015).

<sup>14</sup> Merriam Webster Unabridged, <http://unabridged.merriam-webster.com/unabridged/bond>, definition 5(c). (Accessed 17 October 2015).

<sup>15</sup> *Id.*, <http://unabridged.merriam-webster.com/unabridged/surety%20bond>. (Accessed 17 Oct. 2015).

<sup>16</sup> RCRA Orientation Manual 2011 Glossary, [http://ofmpub.epa.gov/sor\\_internet/registry/termreg/searchandretrieve/termsandacronyms/search.do?matchCriteria=Contains&checkedTerm=on&checkedAcronym=on&search=Search&term=surety%20bond](http://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/termsandacronyms/search.do?matchCriteria=Contains&checkedTerm=on&checkedAcronym=on&search=Search&term=surety%20bond). (Accessed 17 October 2015).

<sup>17</sup> U.S. Environmental Protection Agency, “RCRA Subtitle C Financial Assurance Instrument Fact Sheet -- SURETY BOND,” available at [http://www2.epa.gov/sites/production/files/2015-08/documents/sbond-fs\\_0.pdf](http://www2.epa.gov/sites/production/files/2015-08/documents/sbond-fs_0.pdf). (Accessed 25 October 2015).

<sup>18</sup> Oxford English Dictionary (5th Ed, Oxford University Press).

<sup>19</sup> OECD, Guidance Manual For The Implementation Of Council Decision C(2001)107/FINAL, As Amended, On The Control Of Transboundary Movements Of Wastes Destined For Recovery Operations (2009), page 22. See <https://www.oecd.org/env/waste/42262259.pdf>.

protection it provides, and especially how readily available it is, if needed, to finance a timely response to difficulties arising during the TBM of hazardous wastes and its disposal.<sup>20</sup>

### 3. Relationship between paragraph 11 of Article 6 and Articles 8, 9 and 14 of the Basel Convention

23. Article 8 of the Convention prescribes an obligation for the State of export to ensure that the exporter re-imports the wastes in question into the State of export when their TBM cannot be completed in accordance with the terms of the contract between the exporter and the disposer and if alternative arrangements cannot be made for disposal in an environmentally sound manner.

24. Transit and import Parties may, on the basis of paragraph 11 of Article 6, require that an insurance, bond or guarantee cover such instances. It may also be that the State of export, based on its national legal framework, requires that the exporter cover a TBM by insurance, bond or guarantee for the purpose of Article 8 events. Although such requirements fall outside the scope of paragraph 11 of Article 6, they are legally binding on the exporter falling within the jurisdiction of that State by virtue of national law and should therefore also be reflected in the above mentioned block 17 of the notification document and block 15 of the movement document, which requires the notifier to certify that “any applicable insurance or financial guarantee is or shall be in force”.

25. Some Parties also require that financial guarantees cover the costs associated with cases of illegal traffic. Article 9 of the Convention defines “illegal traffic” as follows:

“1. For the purpose of this Convention, any transboundary movement of hazardous wastes or other wastes:

(a) without notification pursuant to the provisions of this Convention to all States concerned; or

(b) without the consent pursuant to the provisions of this Convention of a State concerned; or

(c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or

(d) that does not conform in a material way with the documents; or

(e) that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law, shall be deemed to be illegal traffic.”<sup>21</sup>

26. However, transboundary movements that qualify as illegal traffic pursuant to Article 9.1 of the Convention will, in practice, often not be covered by a financial guarantee, because the actor(s) responsible for the illegal traffic did not comply with their obligation to arrange the required guarantees in the first place. In cases of illegal transboundary movements that are not covered by a financial guarantee, the competent authorities of the States involved will need to obtain the reimbursement of costs (e.g. storage, take-back transport, environmentally sound disposal costs). Some countries will need to take a legal action against the responsible actor(s) to do this. The Guidance on the implementation of the Basel Convention provisions dealing with illegal traffic (paragraphs 2, 3, and 4 of Article 9) includes further information on how to address cases of illegal traffic, including on who should bear the costs for storage, take-back and/or disposal of illegally trafficked wastes, for example, where no financial guarantee is available.<sup>22</sup>

27. An illegal transboundary movement is, for example, unlikely to be covered by a financial guarantee in a situation described in subparagraph (a) of Article 9 paragraph 1, as an exporter who does not notify a proposed TBM is unlikely to comply with other requirements, such as obtaining a financial guarantee. Similarly, if the export occurs without consent of the States concerned, as

<sup>20</sup> As an example, the U.S. Environmental Protection Agency (EPA) allows the use of surety bonds to satisfy financial responsibility requirements. U.S. law allows EPA to direct payment on the bonds (if properly drafted) when specified conditions are met. By contrast, Switzerland does not allow the use of such instruments, because its competent authority would not have direct access to such instruments under Swiss law. Swiss Notification Procedure for the Export of Waste, available at <http://www.bafu.admin.ch/abfall/01508/06061/08962/index.html?lang=en>. (Accessed 25 October 2015).

<sup>21</sup> See Basel Convention, “Instruction Manual on the Prosecution of Illegal Traffic of Hazardous Wastes and Other Waste, (2012).

<sup>22</sup> The guidance is available at <http://www.basel.int/Implementation/LegalMatters/IllegalTraffic/Guidance/tabid/3423/Default.aspx>.

described in subparagraph (b), compliance with the financial guarantee requirement seems unlikely.<sup>23</sup> In some cases, however, transboundary movements falling under subparagraphs (a) and (b) may be covered by the required financial guarantees, for example, where an exporter complied with its obligation to arrange for the required financial guarantees, but misapplied Article 6.4 of the Basel Convention by assuming tacit consent from a transit State in a situation where the provisions of Article 6.4 actually require written consent. Cases of transboundary movements resulting in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of the Convention and general principles of international law, as envisaged in subparagraph (e), will usually also occur without notification and prior consent and therefore not be covered by a financial guarantee, unless, for example, if exporter has complied with its obligation to arrange for a financial guarantee that covers all costs associated with a case of illegal traffic and the importer then deliberately disposes of the wastes in disregard of its contractual obligations towards the exporter to dispose of it in an environmentally sound manner. For transboundary movements falling under subparagraphs (c)<sup>24</sup> and (d) it seems likely that a guarantee would be available.

28. Unlike financial guarantees that cover the costs of storage, take-back and/or environmentally sound disposal of illegally trafficked wastes, liability insurance policies may explicitly exclude from their coverage certain cases of illegal traffic, such as incidents where wastes are abandoned intentionally or as a result of a violation of statutory obligations (subparagraph (e)).<sup>25</sup>

29. Article 9 prescribes three sets of required procedures for addressing illegal traffic, depending on whether it results from conduct of the generator/exporter (paragraph 2 of Article 9), conduct of the importer/disposer (paragraph 3 of Article 9), or where responsibility cannot be determined (paragraph 4 of Article 9). In the case of illegal traffic caused by the generator or exporter, the State of export must ensure that the wastes are taken back by the exporter, generator, or State of export; or, if that is not practicable, that the wastes are otherwise disposed of in accordance with the provisions of the Convention, within the period of time specified in paragraph 2 of Article 9. If the illegal traffic is caused by the importer or disposer, the State of import must ensure environmentally sound disposal 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. 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 cooperate to ensure the disposal of the wastes as soon as possible in an environmentally sound manner.<sup>26</sup>

30. Financial guarantee requirements are imposed by States of export primarily to help ensure that their responsibilities under the Convention can be discharged. Hence, a financial guarantee, as imposed by the State of export, would appear to be most relevant in the first category (paragraph 2 of Article 9). Such instances however fall outside the scope of paragraph 11 of Article 6. What would fall within the scope of the provision are instances in which the State of import or transit requires the TBM to be covered by a financial guarantee in case the illegal traffic is deemed to have taken place as the result of conduct on the part of the exporter or generator. If the State of export and the State of import or transit each require the exporter to arrange, to the benefit of their own competent authority, for a financial guarantee that covers the exporter's obligations under paragraph 2 of Article 9, the financial guarantee required by the State of import could be used as a complement in addressing the consequences foreseen in paragraph 2 of Article 9.

31. Likewise, the State of import could impose financial guarantee requirements on importers and/or disposers to assure that its obligations under paragraph 3 of Article 9 are covered. In addition, States of import and transit might choose to require that exporters obtain financial guarantees to cover those obligations, as well as the situation described in paragraph 4 of Article 9, where responsibility cannot be assigned.

<sup>23</sup> It is conceivable that consent would be obtained from the country of import, but not the country/ies of transit. In that case, the notifier might supply a financial guarantee required by the country of import.

<sup>24</sup> Even if consent is obtained by misrepresentation or fraud that means that the exporter is purporting to comply with Convention requirements. Thus, the exporter might supply a financial guarantee. This may be distinguished from the situation where there is no notification or consent.

<sup>25</sup> See Study on financial limits of liability under the Protocol, para 2. The study is available on the Basel Convention website at <http://basel.int/TheConvention/Overview/LiabilityProtocol/FurtherResources/tabid/2406/Default.aspx>.

<sup>26</sup> Further information on the implementation of paragraphs 2, 3 and 4 of Article 9 is set out in the Guidance on the implementation of the Basel Convention provisions dealing with illegal traffic (paragraphs 2, 3, and 4 of Article 9) adopted by decision BC-13/9 (document UNEP/CHW.13/9/Add.1/Rev.1) available at: <http://www.basel.int/Implementation/LegalMatters/IllegalTraffic/Guidance/tabid/3423/Default.aspx>.

32. Guarantees that cover incidents caused by actions of third parties may be more difficult or expensive to obtain, such as where the State of import or transit requires the exporter or generator to obtain a financial guarantee that covers the actions of a consignee or the obligations of the importer or disposer under paragraph 3 of Article 9.

33. Finally, paragraph 2 of Article 14 advises Parties to “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.” By decision V/32, the Conference of the Parties enlarged the scope of the Technical Cooperation Trust Fund on an interim basis to allow developing countries and countries with economies in transition to request assistance from the Secretariat in case of an incident occurring during a TBM of hazardous wastes or other wastes.<sup>27</sup> Funding through this mechanism is subsidiary in nature and restricted to developing countries and countries with economies in transition. Emergency assistance can, for example, be sought to prevent or mitigate damage resulting from an illegal waste shipment with no insurance coverage, or to provide emergency funding where the insurance coverage subjects the payment of funds to prior judicial procedures.

#### 4. Relationship between paragraph 11 of Article 6 and the Protocol on Liability and Compensation

34. Paragraph 11 of Article 6 is expressed in broad terms. Its scope of coverage is not delineated. The Guide to the control system explains that “these guarantees are intended to provide for immediate funds for alternative managements of the wastes in cases shipment and disposal cannot be carried out as originally intended”. In addition, financial guarantees can be used to cover the costs resulting from cases of illegal traffic, e.g., where the generator or exporter is required to take back hazardous wastes pursuant to paragraph 2 of Article 9 e.g. because they do not conform in a material way with the documents.<sup>28</sup> The formulation used in the Guide to the control system might also be read to imply that coverage of liability for damages was not contemplated under the provision. The Guide however goes on to say that “guarantees may take the form of an insurance policy, bank letters, bonds *or other promise of compensation for damage*, depending on the countries concerned.”<sup>29</sup> The Guide further notes that some countries “may require separate insurance against damage to third parties, held as appropriate by the exporter, carrier and the disposer.”<sup>30</sup>

35. Some Parties have incorporated liability elements into their implementation of the provision.<sup>31</sup> The “Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and Their Disposal” was adopted in 1999 and has yet to enter into force as of ... September 2018 .<sup>32</sup> 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, including incidents caused by illegal traffic. 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. Those who are deemed strictly liable under the Protocol, i.e. exporters and disposers, have to establish insurance, bonds or other financial guarantees covering their liability. Illegal traffic is covered by provisions on fault-based liability. The Protocol does not specifically cover the costs of completing the TBM and providing for environmentally sound disposal of wastes, although it does cover the costs of “preventive measures,” which could include some of the foregoing, should there be an incident as defined by the Protocol.

<sup>27</sup> Further information about this mechanism is available at <http://basel.int/Implementation/TechnicalAssistance/EmergencyAssistance/History/tabid/2370/Default.aspx>.

<sup>28</sup> See also the checklist for the exporter or generator in chapter 6.2 of the Guide to the control system (step 5), where the guide explicitly refers to insurance covering re-imports pursuant to Article 9 of the Basel Convention: “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 and 9 of the Basel Convention.”

<sup>29</sup> Guide to the control system, para. 44 (Emphasis added).

<sup>30</sup> *Id.* page 22 (step 5).

<sup>31</sup> E.g. Belgium, Central African Republic, Madagascar, New Zealand and Honduras. According to the BCRC Uruguay response to the Questionnaire, financial guarantees employed in Uruguay, Guatemala, and Belize all cover some forms of liability.

<sup>32</sup> As of September 2018, there are 11 Parties to the Protocol (Botswana, Colombia, Congo, Democratic Republic of the Congo, Ethiopia, Ghana, Liberia, Saudi Arabia, Syrian Arab Republic, Togo and Yemen). Pursuant to Article 29 of the Protocol, the Protocol shall enter into force on the ninetieth day after the date of deposit of the twentieth instrument of ratification, acceptance, formal confirmation, approval or accession.

**5. Relationship between the financial guarantees under paragraph 11 of Article 6 and other insurances required by other international legal instruments for the transport of dangerous goods/hazardous and noxious substances**

36. Two adopted, but not yet in force, multilateral international agreements require guarantees or insurance for the transport of dangerous goods/substances. First, paragraph 1 of Article 12 of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS) by Sea, 2010 (hereinafter, “HNS Convention”) requires:

“The owner of a ship registered in a State Party and actually carrying hazardous and noxious substances shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, in the sums fixed by applying the limits of liability prescribed in article 9, paragraph 1, to cover liability for damage under this Convention.”

37. The HNS Convention is not yet in force (as of September 2018).<sup>33</sup> Should it enter into force, its coverage may overlap with the Basel Convention, as there is no exemption in the HNS Convention for hazardous wastes, and no exemption in the Basel Convention for hazardous wastes covered by the HNS Convention.<sup>34</sup> It should be recognized, however, that the HNS Convention’s requirements do not apply to the full period of TBM of hazardous wastes and its disposal. Rather, the HNS Convention’s coverage is limited to “the period from the time when the hazardous and noxious substances enter any part of the ship’s equipment, on loading, to the time they cease to be present in any part of the ship’s equipment, on discharge. If no ship’s equipment is used, the period begins and ends respectively when the hazardous and noxious substances cross the ship’s rail.”<sup>35</sup> Thus, the HNS Convention would not appear to apply to disposal of hazardous wastes in the country of import.

38. Second, the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (1989) (hereinafter, “CRTD Convention”) complements the HNS Convention by covering transportation of dangerous goods on land and inland waterways. That Convention also contains mandatory insurance requirements.<sup>36</sup> The CRTD Convention applies from the beginning of the process of loading the goods onto the vehicle for carriage until the end of the process of unloading the goods. Thus, it would not appear to apply to the disposal of hazardous wastes. In any event, the CRTD Convention has not entered into force as of September 2018.<sup>37</sup>

**B. Steps taken by Parties in implementing and improving the implementation of paragraph 11 of Article 6 of the Basel Convention, and challenges met**

39. The general terms of paragraph 11 of Article 6 allow Parties considerable flexibility to tailor implementing policies and legislation in ways that best suit national needs and circumstances. It is natural that Parties have implemented the provision in different ways. Different forms of guarantee are allowed, along with differences in the timing and scope of application, calculation of the amount required, and other requirements. At the same time, some Parties have identified this variation, as well as complexities associated with the development of effective financial guarantee requirements, as challenges to their own implementation of the provision.

40. Based on input from the Parties and others, it is believed that the following are among the most important variables in implementing paragraph 11 of Article 6:

- (a) Who is required to obtain the financial guarantee?;
- (b) What forms of financial guarantee instruments may be used, and who may issue them?;
- (c) What risks and costs should be covered by the financial guarantee?;
- (d) Temporal scope: During what period of time does the financial guarantee need to be in force?;

<sup>33</sup> As of September 2018, four States have ratified the 2010 HNS Convention (Canada, Denmark, Norway and Turkey). The entry into force of the Convention requires twelve ratifications (or “acceptances”), including at least four States representing a minimum amount of shipping tonnage.

<sup>34</sup> Article 1.4 of the Basel Convention exempts waste derived from the normal operation of a ship, if covered by another Convention. However, hazardous waste carried as cargo would not be subject to that exemption.

<sup>35</sup> HNS Convention, Article 1.9.

<sup>36</sup> CRTD Convention, Article 13.

<sup>37</sup> As of that date, the CRTD Convention has been ratified by one country (Liberia). The entry into force of the Convention requires five ratifications.

- (e) Who should be the beneficiary of the financial guarantee?;
- (f) What amount of funds needs to be guaranteed?;
- (g) What are the prerequisites for requiring disbursement of guaranteed funds?;
- (h) How can compliance with financial guarantee requirements be monitored?;
- (i) Whether and to what extent could or should differences in requirements among the States of export, transit, and import be addressed?

41. A brief summary of how Parties have regulated these aspects and, in some cases, addressed challenges encountered follows. This information is based on national reports submitted for the years 2010 and 2011, as well as responses to the Questionnaire, reference to existing legislation and guidance, and additional inquiries to and responses from Parties and others.

42. Within the European Union (EU), the provisions of paragraph 11 of Article 6 are transposed through Regulation (EC) 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of wastes.<sup>38</sup> The Regulation applies to shipments of wastes among EU member States and between member States and other countries. Article 6 of the Regulation is devoted to the financial guarantee, and requires that a financial guarantee or equivalent insurance is established for any TBM of wastes for which notification is required. In addition to the Regulation, there may be further national law and guidance of EU member States in the relation to the provision.<sup>39</sup> Information about the content of the Regulation and national law and guidance of EU member States and of existing national legislation and guidance in other Parties is provided below.

43. It should also be noted that some Parties have prohibited the import or transit of hazardous wastes, thus decreasing the need for these Parties to develop financial assurance requirements and limiting this need to cases of illegal traffic.<sup>40</sup> In addition, at least one Party has not found it necessary to develop such requirements for other reasons.<sup>41</sup>

## 1. Who is required to obtain the financial guarantee?

44. The exporter, generator or other person who is responsible for notifying the competent authorities concerned of an intent to export hazardous wastes is generally responsible for obtaining the financial guarantee. A few Parties also require that the importer or disposer obtain a guarantee, presumably when they are the State of import.<sup>42</sup> Some Parties also allow a third party to obtain the

<sup>38</sup> Hereinafter, the “European Waste Shipment Regulation” or “the Regulation.”

<sup>39</sup> For example, among the countries with detailed national regulations in addition to the Regulation are Belgium, Finland, Germany, and Portugal. Finland’s regulations are available at [http://www.ymparisto.fi/en-US/Forms\\_permits\\_and\\_environmental\\_impact\\_assessment/Permits\\_notifications\\_and\\_registration/Transfrontier\\_shipments\\_of\\_waste/Forms\\_and\\_document\\_templates](http://www.ymparisto.fi/en-US/Forms_permits_and_environmental_impact_assessment/Permits_notifications_and_registration/Transfrontier_shipments_of_waste/Forms_and_document_templates) (accessed 17 October 2015). In Germany, additional regulations are contained in Section 3.1 of the German Waste Shipment Act, [http://www.gesetze-im-internet.de/abfverbrg\\_2007/](http://www.gesetze-im-internet.de/abfverbrg_2007/) (in German). In addition to its law, Germany has published a considerable body of guidance in this regard as part of the Bund/Länder-Arbeitsgemeinschaft Abfall (LAGA) Communication 25 (hereinafter, “LAGA Communication 25”, see <http://laga-online.de/servlet/is/23874/> (in German)). The information in this guidance is based on the 2007 version of the LAGA Communication 25. Newer English translations are not available, but German government sources have advised that any changes on this issue are marginal. The LAGA Communication 25 is not legally binding. Belgium has additional regulations on a regional basis through the Decree of the Walloon Parliament of 27 June 1996 (art. 23, § 1, 4) and the Order of the Walloon Government of 19 July 2007 (art. 6), as well as the Decree of the Flemish Parliament of 23 December 2011 (art. 14) and the Order of the Flemish Government of 17 February 2012 (art. 6.2.5). Portugal has additional regulations in Decree-Law No. 45/2008 of 11 March (art. 7 and Annex).

<sup>40</sup> E.g., Argentina, response to Questionnaire #1. Madagascar has prohibited the import of hazardous waste until adequate treatment facilities have been installed. Decree No. 2012-753, Ministère de l’Environnement et des Forêts. The Decree applies to wastes listed in Annex I of the Decree or containing constituents listed in Annex II of the Decree. With respect to the import or export of end-of-life products, sources of wastes, and wastes that are harmful to the environment, Madagascar imposes a system of notification that includes information on insurance. Importers are required to provide financial support to the government authority in the accomplishment of its tasks. See Decree 2012-754.

<sup>41</sup> Oman does not report any legislation, but states that notifications are not processed unless environment protection insurance is provided, adding that “most applicants provide adequate finance protection.” Oman, response to Questionnaire #3.

<sup>42</sup> See responses to Questionnaire #5 from Belgium and Central African Republic. In the case of Belgium, the importer is required to obtain a guarantee in cases where no guarantee (or insufficient or inadequate) is foreseen in the exporting country.

financial guarantee on behalf of the notifier,<sup>43</sup> presumably with assurance that the competent authority will have access to the instrument.<sup>44</sup>

## 2. What forms of financial guarantee instruments may be used, and who may issue them?

45. Paragraph 11 of Article 6 employs the general terms, “insurance, bond or guarantee.” As discussed above, there is considerable overlap among these terms, which have precise meaning only under applicable national law.<sup>45</sup> Some Parties allow only the use of certain types of guarantees, or restrict the type of entity who may issue them. The overarching concern is that funds secured by the financial guarantee are readily available when needed. To that end, provisions have been put in place to assure that: banks, insurance companies or other institutions will be willing to issue such guarantees; the guarantee is payable promptly upon demand; the financial guarantee is immune from other claims; and the issuer of the guarantee is financially healthy. These points are briefly discussed below.

46. A bank, insurance company or other financial institution is unlikely to issue a financial guarantee unless it is assured that it will be able to disburse guaranteed funds without fear of recourse from the guaranteed party or others. This concern can be addressed, depending upon national law, by the wording of the financial guarantee. For example, the Finnish financial guarantee template includes the following language:

“For the avoidance of doubt, in the event of a payment being made hereunder by us to the competent authority, then our liability shall be reduced by the amount of any such payment and we shall only be liable to the extent of the residual amount, if any, remaining under this guarantee at that time.”<sup>46</sup>

47. At the same time, if a financial guarantee is to fulfil its function, funds guaranteed must be readily available for response to an incident covered by that guarantee, such as a situation where the TBM of hazardous wastes or their disposal cannot be completed as intended. The competent authority needs to be assured that the funds will be available, for example to ensure tack-back or alternative arrangements for the environmentally sound disposal of the wastes, and that the guarantee cannot be used to satisfy other demands of the guaranteed party or its creditors.

48. Assuring such availability can dictate the type of financial guarantee deemed acceptable, the drafting of the guarantee, and the criteria governing who may issue the guarantee. Required legal proceedings, claims of creditors, and resistance from the guaranteed party can all interfere with the ready availability of funds. As emphasized in the German guidance, in order to assure prompt access to the guarantee by the competent authority:

“It is important to ensure that the bank gives a guarantee of payment as co-principal debtor to the competent authority for the set security amount (waiving the objections of voidability, offsetability and need for preliminary proceedings against the principal debtor).”<sup>47</sup>

49. Presumably for the same reason, the Czech Republic and Cyprus require that the guarantee be “a sum of money available in a bank to which only the competent authority has access.”<sup>48</sup>

50. It should be recalled that a financial guarantee is generally issued by a bank, insurance company or other disinterested third party, based on the financial solvency of the guaranteed party and/or the posting of a deposit or collateral.<sup>49</sup> As noted in German guidance: “it is important to ensure

<sup>43</sup> For example, the European Waste Shipment Regulation (art. 6.3) provides: “The financial guarantee or equivalent insurance shall be established by the notifier or by another natural or legal person on its behalf.”

<sup>44</sup> German guidance provides: “The financial guarantee may also be made by a third party (another natural or legal person acting on its behalf), provided the competent authority has been granted access to this guarantee by the notifier by way of a power of attorney or contractual agreement.” LAGA Communication 25, section 3.1.3.2.

<sup>45</sup> See discussion in Section II A.2. above.

<sup>46</sup> The Finnish financial guarantee template is reproduced in Appendix I.

<sup>47</sup> LAGA Communication 25, section 3.1.3.3.

<sup>48</sup> See the study commissioned by the European Commission, “Assessment and guidance for the implementation of EU waste legislation in Member States,” ENV.G.4/SER/2009/0027: Current Implementation Of Financial Guarantees And Equivalent Insurance In All Member States, Including An Impact Analysis” (D 2.1.4) (17 November 2010), see [http://ec.europa.eu/environment/waste/shipments/pdf/report\\_d-2-1-4.pdf](http://ec.europa.eu/environment/waste/shipments/pdf/report_d-2-1-4.pdf) (hereinafter, “EC Study on Assessment and Guidance document”), Table 2.2.

<sup>49</sup> For Finland, acceptable collateral includes a guarantee, insurance, or a pledged deposit. Finnish Regulation, “Financial Guarantee for Waste Shipments,” available at [http://www.environment.fi/en-US/Forms\\_permits\\_and\\_environmental\\_impact\\_assessment/Permits\\_notifications\\_and\\_registration/Transfrontier](http://www.environment.fi/en-US/Forms_permits_and_environmental_impact_assessment/Permits_notifications_and_registration/Transfrontier)

effective protection from bankruptcy and unconditional access for the recipient in accordance with the envisaged protection purpose.”<sup>50</sup> Similarly, guidance issued by the European Commission cautions of the need to distinguish between a “standard guarantee,” which will be honoured only after legal claims against the guaranteed party have been exhausted, and an *irrevocable unconditional on-demand-guarantee*, where the money can be claimed directly by the beneficiary.<sup>51</sup>

51. Another concern addressed by some Parties relates to the solvency of the guarantor. These Parties, including most members States of the European Union, accept only bank guarantees or insurance policies.<sup>52</sup> Some Parties allow institutions other than banks to issue similar guarantees. In the case of Finland, the issuer of a financial guarantee is limited to “a credit or insurance institution, or another commercial financial institution, domiciled in a European Economic Area member State.”<sup>53</sup> In addition, national banks may not always be willing or able to issue financial guarantees. For example, the Dominican Republic reports that banks located in that country do not offer guarantees in any form. For that reason, exporters provide a guarantee from a foreign institution based abroad to meet the requirements established by the government and the provision.<sup>54</sup>

52. Some Parties suggest or require that a particular or standardized form be used for the financial guarantees. Forms and templates developed by Finland, Portugal, Switzerland, and the United Kingdom, as reported by the Environment Agency and Scottish Environment Protection Agency, are reproduced in Appendices I, II, III and IV, respectively.<sup>55</sup>

53. The form of financial guarantee has also been addressed by guidance to OECD Council Decision C(2001)107/FINAL, concerning the control of TBM of wastes destined for recovery operations:

“A financial guarantee may take the form of an insurance policy, bank letters, bonds or other means of compensation, depending on the countries concerned. Member countries having established such provisions shall make this information available to other member countries through a specific Internet system developed by the OECD Secretariat.”<sup>56</sup>

### 3. What risks and costs should be covered by the financial guarantee?

54. Paragraph 11 of Article 6 states only that a guarantee may be required to “cover” TBM of hazardous wastes. It is up to Parties to decide what types of risks and costs should be covered. Risks and costs may be classified in two broad categories. The first category entails the risk that action will be necessary to ensure that a shipment is completed in an environmentally sound manner. This can include response costs, such as costs of providing for alternative management in a situation where shipment or disposal cannot be carried out as originally intended, or in the case of illegal traffic. The second category includes the risk of damage or injury arising from such shipments, and the cost of remediation and/or compensation for such damage or injury.

#### (a) Response costs

55. Many Parties require that the financial guarantee cover costs arising in cases where a shipment, or the environmentally sound disposal of hazardous wastes cannot be completed as intended, or where

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\_shipments\_of\_waste/Waste\_export\_and\_import\_guidelines/Application\_for\_a\_waste\_transport\_permit/Financial\_guarantee\_for\_waste\_shipments.

<sup>50</sup> LAGA Communication 25, section 3.1.3.3.

<sup>51</sup> See EC Study on Assessment and Guidance document, page 8.

<sup>52</sup> EC Study on Assessment and Guidance document, Table 2-2. The Waste Shipment regulation leaves to member State discretion to define the exact type of financial guarantee to be established.

<sup>53</sup> Finnish Regulation, “Financial Guarantee for Waste Shipments,” note 47, *supra*. Insurance taken out by the company must be submitted to the Finnish Environment Institute in the form of a bank guarantee. The Finnish Environment Institute recommends insuring waste shipments with an on-demand bank guarantee.

<sup>54</sup> BCRC Uruguay, response to Questionnaire, Part IV.

<sup>55</sup> German templates for financial guarantee and insurance may be found in Annexes 5 and 6 to LAGA Communication 25.

<sup>56</sup> OECD, Guidance Manual For The Implementation Of Council Decision C(2001)107/FINAL, as amended, On The Control Of Transboundary Movements Of Wastes Destined For Recovery Operations (2009), page 22, available at <https://www.oecd.org/env/waste/42262259.pdf>.

a shipment or disposal is illegal.<sup>57</sup> Among the costs often covered are usually<sup>58</sup> costs of transport, recovery or final disposal (including any necessary interim operations) in an environmentally sound manner, and storage for 90 days.<sup>59</sup>

56. Some Parties specifically require coverage of costs associated with the take-back of hazardous wastes or other wastes. For example, Swiss law requires that a financial guarantee cover costs of any eventual return and alternative disposal of wastes if the exporter fails to comply with its take-back obligation, in cases of illegal movements or when legal movements could not be completed as intended.<sup>60</sup> Germany also requires coverage of such costs. With respect to the return of wastes, German guidance provides:

“The competent authority having access to the financial guarantee is obliged to reimburse other affected authorities for costs incurred in conjunction with the return, e.g. storage costs for impoundment or resources required for alternative forms of recovery or disposal in the receiving country. Affected authorities should provide receipts or evidence – in the form of invoices or quotes – so that these costs may be requested in writing from the bank or insurance company that has issued the financial guarantee.”<sup>61</sup>

57. Other costs frequently covered include possible alternative treatment methods, and testing for identification, re-packaging, re-labelling, and re-loading of wastes.<sup>62</sup>

58. Coverage of response costs is also addressed by the OECD, which requires (for its members) that, “where applicable, the exporter or the importer shall provide financial guarantees in accordance with national or international law requirements, for alternative recycling, disposal or other means of ESM of the wastes in cases where arrangements for the transboundary movement and the recovery operations cannot be carried out as foreseen.”<sup>63</sup>

**(b) Liability for damages and injury caused by TBM**

59. Some Parties require that liability for damages and injury (e.g. personal injury, property damage, and environmental restoration) caused by TBM of hazardous waste and its subsequent disposal be covered by the financial guarantee.<sup>64</sup> For example, New Zealand requires coverage of: personal injury or death; property loss or damage; environmental damage (e.g. costs of reinstatement or compensation); and remedying any contamination or pollution caused by a sudden and accidental event.<sup>65</sup> Similarly, Belgium requires that, in addition to costs of transport, storage and environmentally sound disposal, the financial guarantee cover “environmental damage, e.g. costs of reinstatement or compensation.”<sup>66</sup>

60. At least two Parties require insurance that covers liability for damages to health, property, and the environment, but have not reported coverage of costs (such as transportation, alternative disposal, etc.) associated with responses to incidents involving TBM of hazardous wastes. For example, Ukraine requires that exporters, importers or persons responsible for utilization/disposal obtain insurance to compensate for damage that may be caused to human health, ownership and environment

<sup>57</sup> See, e.g., European Waste Shipment Regulation, Section 6.2; New Zealand Imports and Exports Restrictions Act 1988.pdf0.37mb. Art. 3BB; Swiss Articles 17f and 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), with reference to Articles 33 and 34. See generally, responses to Questionnaire #10.

<sup>58</sup> Additional costs may pertain to testing, identification, labelling, re-packaging, administrative fee and corrective indicator(s).

<sup>59</sup> See Implementation Report, available in document UNEP/CHW.CC.11.11, Annex, paragraph 21.

<sup>60</sup> Under the Swiss Code of Obligations, the Federal Office of Environment would be able to have direct access to the financial guarantee, but not to a surety. Swiss Notification Procedure for the Export of Waste, available at: <http://www.bafu.admin.ch/abfall/01508/06061/08962/index.html?lang=en>.

<sup>61</sup> LAGA Communication 25, section 3.1.3.6.

<sup>62</sup> See Implementation Report, paragraph 21.

<sup>63</sup> OECD, Decision of the Council concerning the Control of Transboundary Movement of Wastes Destined for Recovery Operations, C(2001)107/FINAL (14 June 2001), Chapter II.D.1.b, available at <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=221&InstrumentPID=217&Lang=en>.

<sup>64</sup> See Implementation Report, paragraph 21.

<sup>65</sup> For calculating the amount of liability insurance required, New Zealand uses the guideline values in the Instruction Manual for the Implementation of the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal. See New Zealand, response to Questionnaire #8.

<sup>66</sup> Belgium, response to Questionnaire #8g.

in the course of TBM of hazardous wastes and the utilization or disposal of hazardous wastes.<sup>67</sup> It has also been reported, in the case of Honduras, that insurance offered by banks in that State cover the following aspects: civil liability for pollution and damage caused by the transport of wastes, as a result of which one or more persons are killed or property belonging to third parties is damaged.<sup>68</sup>

61. On the other hand, some Parties do not include liability within the required ambit of the financial guarantee, although they may impose liability requirements apart from their implementation of the provision. For example, the European Waste Shipment Regulation, separate from its section of financial guarantees, requires that the notification document indicate evidence of insurance against liability for damage to third parties (e.g. a declaration certifying its existence).<sup>69</sup> Consistent with this provision, in its legal framework, the Portuguese competent authority requests the notifier or the carrier to provide an additional financial guarantee or equivalent (for instance, environmental liability insurance) that covers environmental damages in Portuguese territory.<sup>70</sup> In addition, Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage establishes a framework based on the polluter pays principle to prevent and remedy environmental damage.<sup>71</sup>

62. In the United Kingdom, as reported by the Environment Agency and Scottish Environment Protection Agency, financial guarantees “are purely about repatriation of wastes back to the UK if the shipment does not go as planned, or is illegal, and none of the relevant parties involved are willing or able to make the necessary arrangements.”<sup>72</sup> In their response to the Questionnaire, the Environment Agency and Scottish Environment Protection Agency emphasized that loss of life, personal injury, loss of or damage to property, and potentially loss of income, are covered by third party liability insurance (required under European Waste Shipment Regulation, Annex II), not the financial guarantee. For the United Kingdom, damage to the environment is also not covered under a financial guarantee. Rectifying any damage to the environment could only be through an alternative legislative route in the country in question. In addition, costs associated with investigation/enforcement activity would not be covered by a financial guarantee.<sup>73</sup>

#### 4. During what period of time does the financial guarantee need to be in force?

63. Closely associated with the previous points, there is a need for clarity on when the financial guarantee will be in force. The time period of effectiveness (or validity) will help determine which risks and costs are covered. Once it has served its purpose, the financial guarantee can be released (or “liberated”). In the case of guarantees covering only response costs, this would generally be upon completion of environmentally sound disposal.<sup>74</sup> Some variations on this theme are discussed below.

##### (a) Issuance and effectiveness of financial guarantee

64. Paragraph 11 of Article 6 does not specify when the guarantee needs to be issued, thereby allowing for national variations in implementation. The European Waste Shipment Regulation provides that the financial guarantee “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.”<sup>75</sup> German guidance provides that approval or establishment of the financial guarantee – including the form, wording and amount of the cover -- should generally occur prior to or together with forwarding of the notification but no later than the notice issued by the competent authority of dispatch to the State of import. However, if the financial guarantee is to be

<sup>67</sup> “Regulation on the Control of Transboundary Movements of Hazardous Wastes and their Utilization/Disposal,” approved by Ukraine Cabinet’s Decree of July 13, 2000, No. 1120, Paragraphs 7 and 25 (as discussed in Ukraine’s response to the Questionnaire #1, paragraph 17). A similar requirement applies to transit of hazardous waste; the notification for transit must contain (inter alia) guarantees on full compensation for any damage which may be caused to human health and environment in the course of waste transportation via the territory of Ukraine. *Id.*, paragraph 25.

<sup>68</sup> BCRC Uruguay, response to Questionnaire #8.

<sup>69</sup> Annex II of the European Waste Shipment Regulation, paragraph 21. This Regulation does not cover damage to the environment.

<sup>70</sup> Portugal, response to Questionnaire #1, citing Decree-Law No. 147/2008 of 29 July.

<sup>71</sup> See <http://ec.europa.eu/environment/legal/liability/>. The Directive does not require operators to arrange for financial security products.

<sup>72</sup> Environment Agency and Scottish Environment Agency, response to Questionnaire #2.

<sup>73</sup> *Id.*

<sup>74</sup> See Bahrain, response to Questionnaire #9.

<sup>75</sup> European Waste Shipment Regulation, Article 6.3.

submitted after consent has been granted, the consent document should provide that consent will be withdrawn if the financial guarantee is not submitted.<sup>76</sup>

65. In Finland, the guarantee may be obtained after the Finnish Environment Institute has approved the guarantee calculation submitted by the notifier. Finland requires that the financial guarantee be effective on the date of dispatch.<sup>77</sup>

66. Under the European Waste Shipment Regulation, the financial guarantee needs to be valid for and cover a notified shipment and completion of recovery or final disposal of the notified wastes.<sup>78</sup>

**(b) Release of financial guarantee**

67. The Guide to the control system envisions the release of the financial guarantee following submission of the certifications of disposal by the disposer, indicating that the consignments of wastes have been disposed of in an environmentally sound manner.<sup>79</sup> According to the European Waste Shipment Regulation, the financial guarantee is in principal to be released when the competent authority concerned has received the certificate indicating completion of disposal or recovery operations.<sup>80</sup> However, if the wastes are subject to interim recovery or disposal operations and a further recovery or other disposal operation is to take place in the country of destination, the guarantee may be released when the wastes leaves the interim facility and the competent authority has received the required certificate. In such cases, any further shipment to a recovery or disposal facility must be covered by a new financial guarantee unless the competent authority of destination is satisfied that it is not required.<sup>81</sup> Guidance on release of the financial guarantee for EU member States and some subnational authorities within those States is presented in a study commissioned by the European Commission.<sup>82</sup>

68. Finland requires that the financial guarantee cover all shipments to the date of treatment, as specified in the shipping document.<sup>83</sup> Finnish regulations also require the guarantee to be in force for at least 480 days from the last given date of dispatch. The financial guarantee may be refunded after the competent authorities have received “sufficient proof” of the acceptance and treatment of the waste shipment in accordance with the permit.

69. In Germany, guidance provides that where a non-interim recovery or disposal operation follows one or several interim operations, the competent authority of dispatch should in principal release the financial guarantee upon receipt of a certificate confirming completion of the non-interim disposal or recovery operation (as opposed to the previous interim operation).<sup>84</sup> The exception are cases where one or several interim operations do not take place in the state of import, but in a third state. In such a situation the competent authority of dispatch may release the financial guarantee, upon receipt of the consent of the States concerned by the new transboundary movement.<sup>85</sup> Moreover, the competent authority of dispatch may already release the financial guarantee after completion of an interim recovery or disposal operation, if completion of that interim operation has been duly certified and the competent authority of the state of import has confirmed that a new guarantee had been issued for each subsequent movement or that no further guarantee is required for a further movement from the interim disposal facility.<sup>86</sup>

70. New Zealand guidance advises of the “need to be insured for damage to third parties (including the environment) for the whole time you are responsible for the ownership and control of each shipment of wastes.”<sup>87</sup>

71. Switzerland requires that financial guarantees for individual notifications be valid until 360 days after the last movement of wastes.<sup>88</sup>

<sup>76</sup> LAGA Communication 25, sections 3.1.3.2 and 3.1.3.3.

<sup>77</sup> Finnish Regulation, “Financial Guarantee for Waste Shipments,” note 47, *supra*.

<sup>78</sup> European Waste Shipment Regulation, Article 6.5.

<sup>79</sup> Guide to control system, page 19, step 15.

<sup>80</sup> See European Waste Shipment Regulation, Articles 6.5, 15(e) and 16(e).

<sup>81</sup> See European Waste Shipment Regulation, Article 6.6.

<sup>82</sup> EC Study on Assessment and Guidance document, Table 2-8 (page 28).

<sup>83</sup> Finnish Regulation, “Financial Guarantee for Waste Shipments,” note 47, *supra*.

<sup>84</sup> LAGA Communication 25, section 3.1.3.4.

<sup>85</sup> *Idem*.

<sup>86</sup> *Id.* section 3.1.3.5.

<sup>87</sup> *Id.*, page 5.

<sup>88</sup> National banks may not always be willing or able to issue financial guarantees. For example,

72. The English Environment Agency requires coverage for 3 years from the date of consent, which is intended to allow time for transit and recovery. The competent authority will release the financial guarantee before then if the waste is fully recovered and no further shipments are to be made. This is also the case in Scotland but other termination clauses are foreseen in the Scottish Environment Protection Agency's template, for example coverage for the notification period plus 12 months for a standard notification is permitted, as long as the waste has been treated within this period.<sup>89</sup>

#### 5. Who should be the beneficiary of the financial guarantee?

73. Who should be entitled to demand or receive funds under the financial guarantee? The "beneficiary" is the person or entity with authority to direct payment on the guarantee. In response to the Question 6 of the Questionnaire, most Parties checked the box indicating that the "beneficiary" of the financial guarantee is the State of export, import, or transit. It appears that most Parties, whether as State of export or import, designate their own competent authority as the entity that may make the demand for payment.

74. Without using the term, "beneficiary," the European Waste Shipment Regulation provides: "The financial guarantee must guarantee that the competent authority which approves it shall have access thereto and shall make use of the funding . . ."<sup>90</sup> In implementation of the Regulation, the English Environment Agency has published an application form for approval of financial guarantee or equivalent insurance.<sup>91</sup> The form includes a declaration that "the Environment Agency will have access to the financial guarantee or equivalent insurance in order to meet its obligations under the [European Waste Shipment Regulation]." Similarly, the Finnish template includes a statement that the issuer of the financial guarantee "hereby irrevocably and unconditionally guarantees to pay the Finnish Environment Institute . . . being the competent authority of dispatch . . . any sum or sums not exceeding in aggregate [currency and amount] \* \* \* *on receipt by us of first demand* in writing of the competent authority."<sup>92</sup>

75. Likewise, Switzerland requires that "anyone who exports wastes that are subject to authorisation must urgently provide a financial guarantee (bank or insurance guarantee) to the benefit of the Swiss Federal Office for the Environment."<sup>93</sup>

76. A few Parties designate the exporter or generator as the beneficiary.<sup>94</sup>

#### 6. What amount of funds needs to be guaranteed?

77. A number of Parties have developed formulae aimed at ensuring that the amount of the financial guarantee corresponds to the potential risks and costs involved. In other Parties, for instance Malaysia, the funds/costs for the financial guarantee have been set at a fixed amount. Unlike the approach based on a formula, the latter approach however does not guarantee the funds will be sufficient to cover the costs of alternative arrangements for the transport and disposal of the wastes or the costs associated with illegal traffic.

78. The European Waste Shipment Regulation leaves to the discretion of each member State the methodology for determining the amount of the financial guarantee as long as the following basic elements are included: costs of transport; costs of recovery or disposal, including any necessary interim operation; and costs of storage for 90 days.<sup>95</sup>

79. The formula for the calculation is usually defined by the competent authority of dispatch. The calculation can be based on national/regional market prices and/or fixed average costs for enforceability, such as administrative costs. Calculation of the amount may be based on a "worst case scenario." Some member States do not apply any particular formula and calculate the financial

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the Dominican Republic reports that banks located in that country do not offer guarantees in any form. For that reason, exporters provide a guarantee from a foreign institution based abroad to meet the requirements established by the government and the Provision.

<sup>89</sup> Environment Agency and Scottish Environment Protection Agency, response to Questionnaire #9

<sup>90</sup> European Waste Shipment Regulation, Art. 6.7.

<sup>91</sup> See Appendix IV.

<sup>92</sup> See Appendix I. (Emphasis added.)

<sup>93</sup> Switzerland, Federal Office for the Environment, "Notification Procedure for the Export of Waste," section 2.4. See also template available in Appendix III.

<sup>94</sup> E.g. New Zealand and Bahrain, responses to Questionnaire #6.

<sup>95</sup> European Waste Shipment Regulation, Article 6.1.

guarantee on a case-by-case basis with a view to cover costs of the basic elements required in the Regulation.

80. Most of the member States have developed their own formula for calculating the amount of funds to be guaranteed. The formulae developed by Austria, Belgium, Bulgaria, Croatia, Finland, Germany, Italy, Netherlands, Portugal and the United Kingdom (for England and Wales), as well as the formula used in Switzerland, are set out in Appendix V.<sup>96</sup>

81. In Lithuania, calculation and adjustment of the amount of financial guarantee or equivalent insurance is approved by the Order of the Minister of Environment of the Republic of Lithuania in 2005, December 30 (Order No. D1-663, with latest amendments December, 2011).<sup>97</sup>

82. Under the Finnish regulations, the required amount of the guarantee is determined by the cost of return transport, storage, and alternative treatment. The costs are calculated from the actual figures given by the notifier. The financial guarantee must cover the cost of shipping the waste from the country of destination back to Finland; this cost is mainly calculated from offers. Storage costs are calculated for a 90-day period. It is advised to obtain storage costs from dispatch or destination ports, for example. The costs of alternative treatments are determined on a case-by-case basis. The basis for their calculation is Finnish waste treatment costs, such as disposal fees for landfill or hazardous waste landfill. The usual reference for hazardous waste is the list prices given by nationwide operators. If the waste has a positive value, treatment costs may be omitted from the guarantee calculation, if deemed reasonable. The guarantee for waste exports from Finland may be obtained in part for one or several shipments. The minimum guarantee is EUR 2,000.<sup>98</sup>

83. The German guidance includes a specific formula for determining the amount required for the financial guarantee, based on the anticipated transport costs, recovery or final disposal costs, the distance between the place of waste generation and waste recovery or final disposal, and the amount of waste. Safety factors are also applied with respect to transport, recovery or final disposal, and storage. The formula is accompanied by a detailed explanation of how it is meant to apply.<sup>99</sup> Germany notes that costs can only be ascertained on a case-by-case basis with due regard to the nature and hazardousness of the waste. Safety factors are used to account for unknown variables.

84. Côte d'Ivoire requires that the authorization application dossier include a certificate of insurance for the applicant company or a financial guarantee provided by the applicant company. With respect to shipments of waste from France, the amount is calculated in accordance with the French Decree of July 13, 2011.

85. New Zealand does not set any minimum required level for insurance. New Zealand's Hazardous Waste Application form requires that the policy cover "an amount sufficient for the applicant to be reasonably insured against risks, and/or discharge any liability that might arise in relation to the hazardous waste; and personal injury or damage to property and the cost of remedying any contamination or pollution caused by a sudden or accidental event." The amount required will depend upon the risks involved, and should cover potential liabilities. The copy of the insurance certificate should show that the insurance applies to the countries and areas the shipments are passing through or going to, the value of cover, and that the insurance includes an indemnity to cover the costs of remedying a spillage or other form of pollution.<sup>100</sup> As noted above, for calculating the amount of liability insurance required, New Zealand uses the guideline values in the Instruction Manual for the Implementation of the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal.<sup>101</sup>

86. For Switzerland, the amount of the financial guarantee depends on the costs of storage, transport and disposal.<sup>102</sup> The Federal Office for the Environment (FOEN) decides on the amount of

<sup>96</sup> Further examples of formulae as used in the member States of the European Union are available in a compilation document of the European Union on methods of calculation in the members States of the financial guarantee and equivalent insurance pursuant to Article 6 of Regulation (EC) No 1013/2006 on shipments of waste at <http://ec.europa.eu/environment/waste/shipments/pdf/Calculation%20of%20financial%20guarantee.pdf>.

<sup>97</sup> Lithuania, response to Questionnaire #1.

<sup>98</sup> Finnish Regulation, "Financial Guarantee for Waste Shipments," note 47, *supra*. See also Appendix V, E.

<sup>99</sup> The German formula and explanatory guidance is reproduced in Appendix V, F.

<sup>100</sup> New Zealand Environmental Protection Authority, (Te Mana Rauhi Taiao) "Exporting Hazardous Waste: New Zealand requirements for exporting hazardous waste under the Basel Convention" (July 2011).

<sup>101</sup> See New Zealand, response to Questionnaire, #8.

<sup>102</sup> *Id.*, paragraph 4.

the guarantee based on a suggestion by the exporter. The Swiss instructions for calculating the financial guarantee are reproduced in Appendix V.

87. Some Parties, such as Switzerland, allow a single financial guarantee to cover multiple notifications. Exporters with a high number of notifications per year or exporters who are exporting repeatedly the same type and amount of waste often make use of this option.<sup>103</sup> In general, for the calculation of the amount of funds, the sum of the amount of wastes required for the single notifications are considered. A single guarantee for multiple transactions can avoid the need for overlapping financial guarantees, and thereby reduce costs. In addition, if the waste is shipped to a high number of different disposers, the risk for take-back (e.g. due to failure of the disposer) is estimated to be lower and therefore the amount of funds can be reduced by 10 to 30%. The procedure reduces the administrative burden on the exporter as well as the authorities.

#### 7. What are the prerequisites for disbursement of guaranteed funds?

88. It is important that the financial guarantee clearly express the circumstances under which the guarantor must pay out the funds guaranteed. Responses to the Questionnaire indicate that use of guaranteed funds is most frequently determined by a request from the beneficiary.<sup>104</sup> For example, the European Waste Shipment Regulation provides:

“The competent authority within the Community which has approved the financial guarantee or equivalent insurance shall have access thereto and shall make use of the funding, including for the purpose of payments to other authorities concerned . . . .”<sup>105</sup>

89. Other Parties depend upon a request from the guaranteed party (usually the notifier).<sup>106</sup> A few Parties mention insolvency of the guaranteed party as a factor in resorting to the financial guarantee.<sup>107</sup>

#### 8. How can compliance with financial guarantee requirements be monitored?

90. Monitoring is generally accomplished through inclusion of information relating to the financial guarantee, or a copy of the financial guarantee itself, in the notification and movement documents.<sup>108</sup> Others rely on inspection.<sup>109</sup> Colombia provides that, prior to the granting of the authorization, waste exporters are requested to provide a copy of the financial guarantee pertaining to paragraph 11 of Article 6, in accordance with the conditions laid down by the importing country.<sup>110</sup> Some Parties require that the actual financial guarantee (or a copy) be provided to the competent authority, which would allow that authority to verify that the guarantee is properly drafted.<sup>111</sup>

91. Similarly, an OECD Council Decision addressing the control of TBM of waste destined for recovery operations requires that movement documents for such waste contain a certification that any applicable insurance or other financial guarantee covering the TBM is or shall be in force.<sup>112</sup> “Information provided may *inter alia* include: the types of guarantee (e.g. insurance statement/policy, bank letters, bonds, etc.), the amount of guarantee (minimum and maximum, if any), whether the

<sup>103</sup> Submission from Switzerland on the draft guidance on “illegal traffic” and “insurance, bond and guarantee,” Ref. P371-1517. Switzerland notes that “financial guarantees pertaining to several notifications need to be properly monitored. It must be ensured that amount and type of waste always corresponds the initial calculation base.”

<sup>104</sup> Implementation Report, paragraph 23.

<sup>105</sup> European Waste Shipment Regulation, Article 6.7.

<sup>106</sup> Implementation Report, summary of responses to Questionnaire #11.

<sup>107</sup> Responses to Questionnaire #11 from Bahrain, Germany and Switzerland. It might be more precise to state that insolvency is a reason why notifiers might not fulfil their obligations to respond to a TBM incident. But it is the failure to fulfil those obligations, not the insolvency, which would trigger a demand on the guarantee.

<sup>108</sup> Block 17 of the revised notification document for the control of transboundary movement of hazardous wastes includes a certification that “any applicable insurance or other financial guarantee is or shall be in force covering the transboundary movement”. Block 15 of the revised movement document for the control of transboundary movement of hazardous wastes includes a certification that “any applicable insurance or other financial guarantee is in force covering the transboundary movement and that all necessary consents have been received from the competent authorities of the countries concerned.” See UNEP/CHW.12.9/Add.3/Rev.1.

<sup>109</sup> Implementation Report, paragraph 25. Among the Parties that rely on inspection are Belgium, Finland, Germany, Madagascar, New Zealand, Slovakia, and Peru.

<sup>110</sup> Colombia, response to Questionnaire #3.

<sup>111</sup> See e.g. LAGA Communication 25, section 3.1.3.1.

<sup>112</sup> OECD Council Decision C(2001)107/FINAL, Appendix 8, paragraph 12.

guarantee varies according to amount and/or hazardousness of the waste, the damages to be covered.”<sup>113</sup>

## 9. How to address differences in requirements among the States of export, transit, and import?

92. While the provision requires only that TBM comply with financial guarantee requirements imposed by the States of import and transit, States of export have adopted their own requirements as well. Given that a TBM of hazardous waste will involve at least two Parties, an inconsistency in requirements could cause uncertainty and might require that multiple or adjusted guarantees be obtained. Obtaining two or three separate guarantees could be burdensome for many exporters. Some Parties have provided a certain degree of flexibility in this area.

93. For example, in Switzerland, the competent authority in the State of import may request amendments or a separate increase of the financial guarantee. In this case, two financial guarantees may be required. However, the Federal Environment Office will endeavour to find an acceptable solution with the competent authorities to avoid such double guarantees.<sup>114</sup>

94. Similarly, under the European Waste Shipment Regulation, it is up to the notifier to establish a financial guarantee or equivalent insurance, which has to be approved by the competent authority of dispatch. The notifier thus has to arrange for only one guarantee if the transboundary movement takes place within the Community. For exports outside the Community, however, it is possible that the State of import or transit requires the notifier to arrange for a separate guarantee, which is stipulated to benefit the competent authority of that State.<sup>115</sup> In cases of import into the Community, the competent authority of destination in the Community is to review the amount of coverage and may approve an additional financial guarantee or equivalent insurance, if it considers it necessary.<sup>116</sup> EU member States implement this last provision in slightly different ways.

95. For example, Finland considers a guarantee assigned to the competent authority of the country of dispatch to be sufficient, in the case of waste shipments taking place wholly within the European Economic Area. However, with respect to imports of hazardous waste into Finland from outside the European Economic Area, the guarantee must usually be assigned to the Finnish Environment Institute, even if the competent authority of the country of dispatch has already demanded a guarantee.<sup>117</sup>

96. In Germany, with respect to imports of hazardous waste into the EU, “if the competent authority requires additional financial guarantees, leading to an increase in the financial guarantee already established by an authority in another country (i.e. the State of export or transit), in the case of foreign bank guarantees, measures may also be taken to ensure that the competent German authority of destination can access these additional financial guarantees.”<sup>118</sup> With respect to payment of response costs, the German guidance provides that “the competent authority which has access to the financial guarantee is obliged to reimburse the other affected authorities for the costs incurred . . . .”<sup>119</sup>

## C. Recommendations from Parties and other stakeholders on how to address these issues and otherwise improve the implementation of paragraph 11 of Article 6 of the Basel Convention

97. Parties responding to the Questionnaire identified the main challenges to implementation of the provision as:

- (a) Clarifying legal requirements between Parties;
- (b) Establishing the scope of the guarantee – clarifying what activities it covers;
- (c) Lack of a common method of calculating the financial guarantee between Parties;

<sup>113</sup> *Id.*, Appendix 7, paragraph 13.

<sup>114</sup> Swiss Notification Procedure for the Export of Waste, section 2.4, available at [www.bafu.admin.ch/abfall/01508/06061/08962/index.html?lang=en](http://www.bafu.admin.ch/abfall/01508/06061/08962/index.html?lang=en) (accessed 12 November 2015).

<sup>115</sup> However, Article 6.7 envisions payments to “other authorities concerned.”

<sup>116</sup> European Waste Shipment Regulation, Article 6.4.

<sup>117</sup> Finnish Regulation, “Financial Guarantee for Waste Shipments,” note 47, *supra*.

<sup>118</sup> LAGA Communication 25, section 3.1.3.3.

<sup>119</sup> *Id.*, section 3.1.3.6. The guidance envisions that affected authorities would provide the competent authority having access to the financial guarantee with invoices or quotes so that these costs may be requested in writing from the bank or insurance company on the basis of the financial guarantee.

(d) Calculation of the amount of the coverage (taking into account difficulties in predicting and evaluating potential environmental damage).

98. As summarized in the Implementation Report, recommendations from Parties and other stakeholders<sup>120</sup> included issuance of guidance; development of legislation; and information exchange between Parties on their respective legal requirements. The Report noted the complexity of assessing the potential costs for longer term environmental damage and the difficulty that this creates in setting a value for the insurance or guarantee. One suggestion was made that fixed reference rates to calculate the costs would be of assistance. Other suggestions included:

(a) Improving internal regulations of the country in order to improve compliance and monitoring of this topic (Panama);

(b) Carefully reviewing the phrase in which the beneficiary of the guarantee is explicit, particularly, if the hired entity is a foreign one (Uruguay);

(c) Developing and disseminating methodological guidelines for contractual issues of bond, insurance and/or policies (Guatemala);

(d) The competent authorities should design and adopt systems to manage information concerning notifications and movement documents, linked to the information systems of the focal point, other competent authorities, customs and other stakeholders. Moreover, it is important to strengthen the identification of hazardous wastes and their risks, in order to ensure their proper disposal. For those Parties that do not have the infrastructure necessary for the disposal of hazardous waste and require the financial guarantee, the need to properly dispose of hazardous waste by exporting it would generate a greater demand for companies that provide the financial guarantee for export (Peru).

### III. Guidance on how to improve implementation of paragraph 11 of Article 6 of the Basel Convention

99. As noted above (Part II, Section B) many Parties consider differing methodologies and other national requirements to be challenges to the implementation of paragraph 11 of Article 6. The provision's general nature leaves each Party free to specify its own scope of coverage, permissible types of financial guarantees, methods of calculating the required amount, and other parameters. In addition, and although the notification document requires the exporter or generator or producer, in his/her capacity as notifier to certify that "any applicable insurance or other financial guarantee is or shall be in force covering the transboundary movement",<sup>121</sup> Parties, generators or exporters may not be aware of the requirements of a State of import or of a State of transit in relation to coverage of a transboundary movement by insurance, bond and guarantee. States of import and transit with such requirements are therefore encouraged to make such information available to all Parties, through the Secretariat, either in their national reports or otherwise.<sup>122</sup>

100. This guidance cannot restrict Parties' choices, and in any case, achieving complete uniformity among Parties might not be a desirable goal, given the different conditions and traditions that prevail around the world. While not required by the Convention, harmonization of some aspects could however facilitate the issuance of financial guarantees covering TBM of hazardous wastes.<sup>123</sup> To the extent that Parties are able and willing to adopt similar requirements, the overall likelihood of compliance by the regulated community and ease of administration would likely increase. The remainder of this document recapitulates the issues discussed in Part II, Section B, and attempts to

<sup>120</sup> It should be noted that no recommendations were received from the insurance industry.

<sup>121</sup> See the Revised notification and movement documents for the control of transboundary movement of hazardous wastes and instructions for completing these documents adopted by the eighth meeting of the Conference of the Parties and available at:

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

<sup>122</sup> Although not specifically addressed by the revised reporting format, Parties may make such requirements publicly available in their answers to questions 3 (d), 3 (e) and 3 (f) of their reports. Questions 3 (d) and 3 (e) pertains to any restrictions on the import of hazardous wastes and other wastes for final disposal (Annex IV A) or recovery (Annex IVB), while question 3 (f) pertains to any restrictions on the transit of hazardous wastes and other wastes.

<sup>123</sup> Harmonized requirements can facilitate international trade, and financial institutions may be more likely to be in a position to issue financial guarantees that are consistent with harmonized requirements. This being said, this guidance is not intended to suggest that financial guarantees are necessary in all cases. Some Parties who have prohibited the import or transit of hazardous wastes in their territory have not seen the need for financial guarantees.

identify some potential approaches that could result in a less fragmented and more effective system of financial assurance for TBM.

#### **A. Who may obtain the financial guarantee?**

101. The updated Guide to the control system adopted by the Conference of the Parties at its twelfth meeting, specifies that the exporter, or the generator, responsible for notifying the State of export of an intent to export hazardous waste is to arrange any financial guarantees for the movement of wastes required by the national legislation of the countries concerned. It is therefore typically the exporter or generator who takes out the financial guarantee to cover the costs of a take-back or alternative environmentally sound disposal of the wastes in case the TBM or disposal cannot be completed as planned or in case of illegal traffic. The guarantee would then essentially be a contract between the exporter or generator and the institution issuing or approving the financial guarantee. The exporter or generator should not be allowed to commission a third legal or natural person to obtain the financial guarantee on its behalf, unless national legislation provides otherwise,<sup>124</sup> presumably with assurance that the competent authority will have access to the instrument.<sup>125</sup> To ensure that the interposition of a third person does not affect the availability of the funds, the financial guarantee must be immune from any claims against the guaranteed person. Section B below includes guidance on the importance of protecting the financial guarantee against such claim.

102. In addition to a guarantee covering response costs taken out by the exporter, the State of import could impose financial guarantee requirements on importers and/or disposers, in particular to assure coverage of costs resulting from their obligations to dispose of hazardous wastes in an environmentally sound manner in cases of illegal traffic that result of their conduct.<sup>126</sup> Such would, for example, be the case, where the importer deliberately dumps hazardous wastes in contravention of general principles of international law and in disregard of the contract with the exporter stipulating the obligation of environmentally sound disposal of the wastes.<sup>127</sup>

103. Moreover, the importer or disposer will usually be responsible for arranging for any required financial guarantee, where the wastes proposed for a transboundary movement are 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. In this case, the obligation to notify the TBM pertains to the importer or disposer. Accordingly, the importer or disposer should also arrange for any financial guarantees required by the national legislation of the State of import, or any State of transit that legally defines or considers the wastes to be hazardous.

104. Special considerations apply where one or several States concerned require insurance against damage to third parties, since the generator or exporter's third-party liability insurance will not usually cover damages caused by a subcontractor or a third party, such as the carrier or the disposer. Every actor involved in the transboundary movement may have to obtain their own liability insurance.<sup>128</sup>

#### **B. What forms of financial guarantee instruments are available to be used and who issues them?**

105. The form and content of a financial guarantee instrument, as well as the financial soundness of its issuer, are important elements in ensuring that guaranteed funds are available in a timely manner. By any name, a financial guarantee can be effective only if the funds guaranteed are readily available to respond, for example, to a situation where a TBM or disposal of hazardous wastes cannot be completed as intended, a case of illegal traffic, or an accident. Assuring such availability can dictate the type of guarantee deemed acceptable, the drafting of the guarantee, and the criteria governing who may issue the guarantee. Required legal proceedings, claims of creditors, and resistance from the

<sup>124</sup> For example, the European Waste Shipment Regulation (Art. 6.3) provides: "The financial guarantee or equivalent insurance shall be established by the notifier or by another natural or legal person on its behalf.

<sup>125</sup> German guidance provides: "The financial guarantee may also be made by a third party (another natural or legal person acting on its behalf), provided the competent authority has been granted access to this guarantee by the notifier by way of a power of attorney or contractual agreement." LAGA Communication 25, section 3.1.3.2.

<sup>126</sup> See Article 9.3 of the Basel Convention.

<sup>127</sup> See Article 9.1.e of the Basel Convention.

<sup>128</sup> The Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and Their Disposal (not yet to enter into force as at September 2018) imposes strict liability on the notifier of a transboundary movement pursuant to Article 6 of the Basel Convention and the disposer. Pursuant to paragraph 1 of Article 4 of the Protocol, the notifier shall be liable for damage until the disposer has taken possession of the hazardous wastes or other wastes. Article 14 of the Protocol provides that both the notifier and the disposer must establish insurance, bonds or other financial guarantees covering their liability.

guaranteed party can interfere with the need to promptly disburse funds necessary to respond to a case covered by the financial guarantee, in particular where time may be of the essence e.g. for avoiding harm to health, property, and the environment. For that reason, it is important that permissible financial guarantees can be drafted so that the guaranteed funds are immune from claims from third parties (and for that matter, the guarantor) under national law, especially the law of bankruptcy. Otherwise, should the guaranteed party become insolvent or bankrupt, creditors might be able to pursue the guaranteed funds. As expressed in a study commissioned by the European Commission, the financial guarantee needs to be an *irrevocable unconditional on-demand-guarantee*, where the money can be claimed directly by the beneficiary.<sup>129</sup>

106. At the same time, in order to issue a financial guarantee, especially one that is irrevocable, unconditional, and payable on demand, the bank, the insurance company or other issuer needs to be assured that it will be able to disburse guaranteed funds on such demand without fear of recourse from the guaranteed party or others. This important concern can be addressed, depending upon national law, by careful wording of the financial guarantee.<sup>130</sup>

107. In terms of certainty, a guarantee backed by a bank deposit and blocked account (also known in some countries as an “escrow account”) would appear to provide maximum assurance of the availability of funds, assuming that: (i) the guarantee ensures that the bank will unconditionally make the funds available in a timely fashion upon demand by the beneficiary; (ii) the blocked account cannot be accessed by anyone other than the beneficiary, including creditors in bankruptcy; and (iii) the bank remains solvent. However, this approach, which requires the freezing of funds until the guarantee is released (a process which can consume several years<sup>131</sup>), can impose a significant financial hardship on the notifier – depending, of course, on the amount at stake.

108. Another widely used type of guarantee is a bank guarantee,<sup>132</sup> under which a bank<sup>133</sup> agrees to disburse funds upon the occurrence of a specified event. A bank guarantee imposes a lower burden on the purchaser, as compared to a deposit/blocked account. Estimates for bank guarantees are said to fall within the range of approximately 2 % of the guaranteed amount.<sup>134</sup> Parties may also wish to accept similar guarantees issued by financially sound institutions other than banks.

109. Insurance policies may also be used to guarantee the availability of funds. Depending on national law, the funds guaranteed by insurance policies might not be as readily accessible as some other financial guarantee mechanisms. Insurance contracts are highly standardized and may not accommodate the need for swift action when there is need to make use of the funds for a case covered by the insurance. Insurance contracts may also be subject to complex regulation at the national or subnational level. However, Parties that allow insurance are said to be generally satisfied that the policies can work as well as financial guarantees.<sup>135</sup> Furthermore, insurance policies are often used to cover the risk of damage and injury caused by a TBM of hazardous or other waste in Parties requiring both a financial guarantee for response costs and a separate guarantee for liability for damage.

110. Beyond protecting the financial guarantee against the insolvency of the guaranteed party, it is also important to protect against the insolvency of the issuer of the financial guarantee. Criteria regarding the financial strength of the guarantor – whether it be a bank, insurance company or other entity – may be appropriate. In addition, the posting of collateral by the guaranteed party will provide such protection, assuming that such collateral is immune to the claims of creditors of both the guarantor and the guaranteed party. All this is to say that the effectiveness and reliability of a financial guarantee is primarily a function of how the instrument is treated under domestic law. The most effective instruments will be those that allow for expeditious payment on demand to the beneficiary and are insulated from creditors of the guaranteed party.<sup>136</sup> It is not clear whether this is an area in

<sup>129</sup> See EC Study on Assessment and Guidance document, page 8.

<sup>130</sup> See, e.g., Finnish template, reproduced in Appendix I.

<sup>131</sup> According to the EU Waste Shipment Regulation the process usually takes up to two years.

<sup>132</sup> This guarantee may also be referred to as a pledge, surety, security, bond, bail, or guarantee. EC Study on Assessment and Guidance document, footnote 1.

<sup>133</sup> It may be desirable to define the term “bank” and perhaps include some criteria regarding the bank’s location, financial condition, etc.

<sup>134</sup> EC Study on Assessment and Guidance document, page 31.

<sup>135</sup> EC Study on Assessment and Guidance document, page 14.

<sup>136</sup> Given the potential need for urgent action to respond to a case covered by the financial guarantee, it may also be desirable to require that the financial guarantee be payable in a freely convertible currency. For example, Switzerland requires that the guarantees be payable in Swiss francs.

which much harmonization among Parties is desirable or even possible, given the different legal status of various financial mechanisms in different countries.

### **C. What risks and costs should be covered by the financial guarantee?**

111. In keeping with the goal paragraph 11 of Article 6 of assuring the availability of immediate funds for ESM of the waste in cases where shipment and disposal cannot be carried out as originally intended, including contract failure, illegal traffic, or an accident, and consistent with the practice of a number of Parties who implement the provision, it is suggested that the following costs be covered:

- (a) Costs of ensuring that transportation of the waste can be safely completed, including, as appropriate, transport to the waste's original destination, an alternate destination where environmentally sound recovery or final disposal can take place, or re-import to the State of export;
- (b) Costs of recovery or final disposal in an environmentally sound manner;
- (c) Costs of storage or other necessary interim measures;
- (d) Costs of identification, re-labelling, re-packaging and re-loading the wastes.

112. The above costs may be classified as "response costs," in that they are incurred in responding to and rectifying a situation where the TBM or disposal cannot be carried out as originally planned or amounts to a case of illegal traffic. These responses are designed to avoid or limit future injuries and damages. Parties may also wish to consider inclusion of costs arising from liability for damage caused by the TBM, as several Parties have already done.<sup>137</sup> However there are reasons for keeping the two categories separate, as some other Parties have done.<sup>138</sup> Financial guarantees are most effective if they are payable on the demand of a competent authority for immediate use to rectify a situation where the TBM or disposal cannot proceed as planned. Claims for personal injury, property damage, or environmental harm are not generally susceptible to that sort of immediate payment, and may be subject to lengthy judicial procedures. Moreover, such claims can dwarf the financial resources required to ensure that TBM of hazardous wastes and their disposal is carried out in an environmentally sound manner.<sup>139</sup>

### **D. During what period of time does the financial guarantee need to be in force?**

#### **1. Issuance of financial guarantee**

113. The financial guarantee must, at a minimum, be in force when the TBM commences, in order to comply with the requirement of paragraph 11 of Article 6 of the Basel Convention. However, the national legal framework can require that a financial guarantee in the form of a bank guarantee already be effective at the time of the notification, to allow the competent authority/ies an opportunity to review the actual instrument and determine whether it meets applicable requirements. If insurance coverage is required, the insurance policy should be included in the submission of the notification documents, with the possibility to allow the effectiveness of the insurance to coincide with the first shipment of hazardous waste.

#### **2. Period of effectiveness and release of financial guarantee**

114. Tailoring the required effective period to the time period in which the financial guarantee is actually needed would presumably decrease costs and perhaps stimulate the market in such guarantees. Assuming that the guarantee is to cover the entire TBM, including environmentally sound disposal of the waste, it follows that the guarantee needs to be effective from the time TBM begins until environmentally sound disposal has occurred. As discussed in Section II. B.4.b above, there are different ways to determine when that disposal has occurred. One method of making that determination is by reference to the issuance of an appropriate certificate by the State of import. Another approach is to rely on the certification of disposal sent by the disposer, indicating that the consignments of waste covered by the financial guarantee have been disposed of in an

<sup>137</sup> See discussion in Part II, Section B.3b, *supra*.

<sup>138</sup> For example, the European Waste Regulation has separate requirements regarding the establishment of insurance policies for liability to third parties. EC Regulation 1013/2006, Annex II. See discussion in Part II, Section B.3b, *supra*.

<sup>139</sup> As Honduras has pointed out in its response to the Questionnaire (Part IV, "additional observations"), applying any regulatory mechanism (such as the requirement of a financial guarantee for TBMs of hazardous and other wastes) in a developing country requires consideration not only of the potential risk of contamination, but also of the need to avoid the formation of illegal trafficking networks in response to the regulatory mechanism. If the costs for obtaining a financial guarantee is high, exporters may seek for alternative ways to export wastes that do not comply with the legal requirements.

environmentally sound manner in accordance to paragraph 9 of Article 6.<sup>140</sup> Alternatively, Parties might consider providing for an automatic release procedure based on a specified time after the notification period expires; or a specified time period after the last date of shipment of the hazardous waste covered by the guarantee. Use of such an automatic approach, perhaps with some safeguard to allow input from the State of import, might facilitate the issuance of financial guarantees.

115. Once it has served its purpose, the financial guarantee can be released (or “liberated”). The time of release depends in part on the financial guarantee’s scope of coverage. A guarantee covering only response costs has served its purpose once the waste involved is disposed of in an environmentally sound manner. On the other hand, if the guarantee covers liability for personal injury, property damage or harm to the environment, claims may be possible for an indeterminate length of time. This is another reason why such liability is more likely to be covered under a continuing insurance policy, rather than a financial guarantee.

## **E. Who should be the beneficiary of the financial guarantee?**

116. The results of the Questionnaire as well as a review of numerous laws, regulations, guidance and other documents illustrate that financial guarantees implementing the provision are designed for situations where a shipment and subsequent disposal of hazardous wastes cannot be completed as intended; a shipment or subsequent disposal is illegal; or there has been an accident. In the first two instances, where the exporter/notifier is unable or unwilling to promptly rectify the situation, the funds guaranteed by the financial guarantee need to be readily available. Such availability depends upon a number of factors, including whether there is an unconditional commitment to pay on demand the “beneficiary”, the person or entity to whom the guaranteed funds are to be paid when needed. The identity of the beneficiary can determine how readily the funds secured by the guarantee can be put to use in assuring that the TBM is completed and the wastes are disposed of in an environmentally sound manner.

117. As discussed above, where a financial guarantee is issued with respect to the export of hazardous waste, the beneficiary is generally the competent authority of the State of export, which has responsibility for re-import. However, the financial guarantee envisioned under Article 6 paragraph 11 is intended for the benefit of the States through and to which the waste will move. Presumably, the competent authority of the State of export would be expected to direct expenditure of funds in the locations where such expenditures are necessary.<sup>141</sup>

118. It is possible that a State of import or transit might not wish to rely on the competent authority of the State of export to pay for response actions undertaken in the importing or transit country. That State could enact its own laws implementing the provision, requiring, as a condition of import, that the exporter obtain a financial guarantee that designates the importing State’s competent authority as the beneficiary. In such a case, complementarity of regulation by the State of export could require that the requirements of the State of import and/or State of transit be met, including designation of that State’s competent authority as the beneficiary of a financial guarantee.<sup>142</sup>

119. Some Parties allow the financial guarantee to designate the exporter or generator as the beneficiary.<sup>143</sup>

## **F. What amount of funds needs to be guaranteed?**

120. A financial guarantee will generally need to cover, at a minimum, costs to rectify a situation where TBM and disposal of hazardous waste cannot be carried out as intended, as well as costs associated with illegal traffic. These costs can differ according to a variety of factors, including:

<sup>140</sup> Guide to Control System, page 19, step 15. Most EU Member States appear to follow this practice, although there are some who require documentation from the State of import. See EC Study on Assessment and Guidance document, page 15.

<sup>141</sup> German guidance is explicit on this point, stating: “In the event of the return of waste \* \* \*, the competent authority which has access to the financial guarantee is obliged to reimburse the other affected authorities for the costs incurred in conjunction with the return (e.g. storage costs for impoundment \* \* \* or if, for example, an alternative form of recovery or disposal in the receiving country has been specified by the affected authorities \* \* \*, the resources required for this purpose).

The guidance calls on affected authorities to provide receipts or evidence – in the form of invoices or quotes – so that these costs may be requested in writing from the bank or insurance company that has issued the financial guarantee. LAGA Communication 25, section 3.1.3.6.

<sup>142</sup> This could also be true in the case of transit States enacting similar requirements.

<sup>143</sup> New Zealand and Bahrain, responses to the Questionnaire.

- (a) The amount and nature of the hazardous waste: The costs of storage in the context of a take-back procedure may vary depending on whether the wastes is solid or liquid, its intrinsic characteristics of hazardousness, or whether it should be stored indoors or outdoors, among others;
- (b) The distance required to re-import/take back the waste or otherwise send it to an appropriate facility for ESM: If the distance back to the State of export or, if applicable, to another State with an appropriate disposal facility is far, the costs for re-import/take-back increase;
- (c) The means of transport: The prices for transport usually differ depending on whether the hazardous waste is transported by rail, road or water and whether intermodal transport is required;
- (d) The cost of disposal in an environmentally sound manner, not only at the original destination, but at other destinations to which the waste might need to be sent: The costs for environmentally sound disposal in the State of export, for example, depend on applicable market prices in that state.

121. While estimation of costs that may need to be covered by the financial guarantee is subject to many variables and uncertainties, some Parties have developed formulae based on actual or estimated costs, to be applied on a case-by-case basis.<sup>144</sup> In most cases, the formula is based on the following variables:

- (a) Tonnage of waste to be shipped;
- (b) Cost of transportation to disposal site;
- (c) Cost of storage;
- (d) Cost of environmentally sound disposal (including interim operations).

122. Some Parties consider the amount of waste or number of shipments that are in transit or waiting to be disposed of. This amount corresponds to the risk to take back exported waste. In Switzerland, the period for delivering the certificates of disposal as stated in the contract between the exporter and the disposer is taken into consideration (Appendix V, J). A similar concept is applied by the UK (Appendix V, K). This may help to reduce the amount of funds that needs to be guaranteed. On the other hand, monitoring of the number of active shipments by the authorities is required.

123. Another approach that can reduce the amount of funds to be guaranteed is to allow a single financial guarantee to cover multiple notifications. The procedure would also reduce the administrative burden on the exporter as well the authorities. In addition, use of a single financial guarantee can avoid the phenomenon of overlapping financial guarantees, thereby decreasing costs. Use of this approach may require careful monitoring to ensure that the amount and type of waste always corresponds the initial calculation base.<sup>145</sup>

124. In addition, safety factors (multipliers) between 1.2 and 1.5 are often applied, as are administrative costs.

125. Some Parties have adopted more simplified approaches, applying fixed factors or sums for transport, storage, and/or disposal.<sup>146</sup> Other Parties simply require that a fixed sum be guaranteed by all financial guarantees without specification of the various component costs.<sup>147</sup>

126. The multiplicity of formulae for calculating the required amount of coverage has been cited as one of the principal challenges to implementation of paragraph 11 of Article 6. Parties may wish to give consideration to the development of a more standardized system of determining the amount which a financial guarantee should cover. A simple formula to be considered for calculating the amount of a financial guarantee for an individual waste shipment might be the sum of the following costs (A + B + C + D), estimated on the basis of fixed rates, price lists and/or offers from the hazardous waste management industry:

A: Estimated cost of transporting the hazardous wastes back to the exporter or to an appropriate disposal facility for ESM (taking into account various locations where such wastes might

<sup>144</sup> See, e.g., Appendix V (formulae of Austria, Belgium, Germany, Italy, Portugal, Switzerland and the United Kingdom).

<sup>145</sup> Submission from Switzerland on the draft guidance on “illegal traffic” and “insurance, bond and guarantee”, Ref: P371-1517.

<sup>146</sup> See EC Study on Assessment and Guidance document, page 14. In some cases, deviation is allowed for specific waste codes.

<sup>147</sup> E.g., Greece requires 1 million euros. *Id.* Canadian law on liability insurance sets a minimum amount of C\$5,000,000 for hazardous waste and C\$1,000,000 for hazardous recycling material. Canada, “Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations,” SOR/2005-149.

be disposed of), including possible costs of an operation to stabilize the wastes during transport (e.g. rescue of a cargo ship at sea);

B: Estimated cost of disposing of the wastes in an environmentally sound manner (taking into account various locations where such wastes might be disposed);

C: Estimated cost of storing the wastes for 90 days;

D: Estimated costs of identification, re-labelling, re-packaging and re-loading the wastes;

A more complex formula could, for example, multiply the total sum or each individual cost element with a fixed or variable safety factor to account for existing uncertainties, such as inaccurate description of the wastes involved.<sup>148</sup>

127. To the extent that the financial guarantee covers liability for damages, the amount of funds to be guaranteed can depend on the type of damages to be covered (e.g., property damage, personal injury; environmental harm), as well as any statutory limits on the amount to be covered.

128. A common approach on the type of costs to include may be an important step toward facilitating the use of financial guarantees, but accurate estimation of those costs is difficult.<sup>149</sup> Parties might wish to consider the use of fixed reference rates for transport, storage and/or disposal costs, for example according to applicable Basel codes,<sup>150</sup> the physical state of the wastes and the method of transport. Also, safety factors could be used to increase the likelihood that the estimated costs will be sufficient.<sup>151</sup>

## **G. What are the prerequisites to requiring disbursement of guaranteed funds?**

129. It is important that the financial guarantee clearly delineate the circumstances under which the issuer must disburse the funds guaranteed. Normally, payment will be triggered by a decision by a competent authority that such payment is necessary in order to respond to a case covered by the financial guarantee. It may be desirable to specify the grounds for such a decision, as well as any procedural prerequisites. Otherwise, the funds could be paid out prematurely. Conversely, funds might be withheld when needed. If the financial guarantee is to be useful, the beneficiary must have the authority to draw upon it in a timely manner, when it is determined that a response is necessary to address a case covered by the financial guarantee. This means, as many Parties already require, that the guarantee must be drafted so as to require direct payment to the beneficiary on demand, subject to as few conditions or prerequisites as possible.<sup>152</sup> In particular, payment should not be subject to objections such as voidability, offsetability or the need for preliminary proceedings against the guaranteed party.<sup>153</sup> At the same time, it may be desirable to prescribe criteria governing the beneficiary's exercise of that authority, particularly if the beneficiary is the State of import.<sup>154</sup>

130. In prescribing requirements for financial guarantees to cover TBM of hazardous waste, it is important to consider national bankruptcy regimes. In cases where the guaranteed party becomes insolvent or bankrupt, financial guarantees may be relied upon only if they cannot be used to satisfy claims of that person's creditors. Careful drafting and consultation with experts in the field is required in order to craft a financial guarantee that is immune to such claims.

<sup>148</sup> The formula used by the German competent authority, for example, multiplies each the cost for return transportation, the cost for recovery or disposal and the cost for storage for 90 days by variable safety margin of e.g. 10-30%. The formula is reproduced in Appendix V, F.

<sup>149</sup> The Environment Agencies from the United Kingdom expressed the view that: "It is totally impractical (without excessive cost) for competent authorities to establish a robust value to be covered. Markets vary considerably; companies will have their own commercial rates they have negotiated. In addition, any situation when funds need to be called in will involve an unquantifiable element as the waste is unlikely to be as described. E.g. metal could be contaminated with anything from plastic to clinical waste to radioactive waste and costs would vary considerably. Expectations on the extent of checking financial provision need to be pragmatic and factor in the frequency they are called on." Response to Questionnaire, Part IV.

<sup>150</sup> See Appendix V, Section H (Netherlands) for an example of a formula that uses fixed reference rates according to Basel codes.

<sup>151</sup> Use of a guarantee that applies only to particular parts of a general notification may be another means of reducing financial burden. See European Waste Shipment Regulation, Article 6.8.

<sup>152</sup> It might be desirable to allow a limited time, where possible, for the guaranteed party to remedy the situation without resort to the financial guarantee.

<sup>153</sup> See LAGA Communication, section 3.1.3.3.

<sup>154</sup> In the absence of meaningful constraints on the beneficiary's ability to draw on the guarantee, it could be more difficult or expensive to obtain one, as the guarantor might assume that the guarantee would inevitably be used.

## **H. How can compliance with financial guarantee requirements be monitored?**

131. Monitoring compliance with the financial guarantee requirement can be accomplished in several ways. First, the competent authority of the State of export has the opportunity to review the guarantee prior to consenting to an export where this is required on export. Second, the State of import has the same opportunity, prior to consenting to the TBM. Finally, the financial guarantee should be referenced, in the movement/notification documents that accompany each shipment of waste. When it comes to financial guarantees, the details matter, and competent authorities may wish to undertake a close review of some instruments in order to be assured that they meet all prescribed requirements.

## **I. How could differences in requirements among the States of export, transit, and import be addressed?**

132. Paragraph 11 of Article 6 addresses financial guarantee requirements of States of transit and import. It is conceivable that different or conflicting requirements among those States could raise concerns, although none have been reported. More likely to arise is a conflict or overlap between requirements of the States of export on one hand, and the State of import on the other hand, especially where the State of import requires that the generator/exporter (as opposed to the importer/disposer) obtain a financial guarantee. While there could be many differences in the two States' requirements, perhaps the most prominent is likely to be a difference in who must be designated as the beneficiary. Each State is likely to favour its own competent authorities. There could also be differences in terms of the type of financial guarantee required, amount to be guaranteed, and other issues. This could result in a burdensome situation whereby the notifier may be required to obtain two or more separate financial guarantees.<sup>155</sup>

133. The use of financial guarantees could be facilitated if States of import, export, and transit were to agree to mutual recognition of financial guarantee requirements, or agree on a coordinated approach to the expenditure of guaranteed funds, so that exporters/notifiers would not be obliged to obtain multiple financial guarantees. In particular, States involved in a TBM could agree to a common guarantee template, which could indicate who should be designated as beneficiary. In the absence of a common approach, exporting States might wish to consider deferring to the requirements of the States of import and transit, given that the provision requires satisfaction of those requirements in any case.

## **IV. Conclusion**

134. A considerable amount of information submitted by the Parties and others demonstrates a wide variety of application and methods that have been used to implement paragraph 11 of Article 6, including differing ways of calculating the value of an insurance, bond or guarantee, and what is covered. Many Parties and stakeholders have indicated difficulties in application of the provision due to the differing approaches and methodologies. While Parties will continue to implement the provision in different ways depending upon their unique needs and circumstances, harmonizing those approaches could facilitate utilization of insurance, bonds, or guarantees, including monitoring compliance. This guidance suggests a number of common features and other considerations that could be considered for national implementation schemes. However, more analysis of financial guarantees that have actually been issued, as well as further dialogue with the financial/insurance industry, is necessary to ensure that improvements can be identified for the implementation of the provision.

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<sup>155</sup> The Swiss Notification Procedure recognizes that where the competent authority in the States of export and import impose separate financial guarantee requirements, it may be required to provide two financial guarantees. However, the Swiss Federal Environment Agency states that it "will endeavour to find an acceptable solution with the competent authorities to avoid such double guarantees." Swiss Notification Procedure for the Export of Waste, 2.4.

## Appendix I

### Template for preparing a financial guarantee in Finland

Template for on-demand bank guarantee – General guarantee  
<http://www.ymparisto.fi/en-US>

[NAME AND ADDRESS OF BANK]

To: Finnish Environment Institute [Date]  
P.O. Box 140  
FIN-00251 Helsinki, Finland

Guarantee No. [xxxxxxxxxx]

Re: Transfrontier shipments of waste

We refer to Regulation (EC) No 1013/2006 of the European Parliament and of the Council on shipments of waste (hereinafter called "the Regulation").

On behalf of our principal, [name and address of the principal or the notifier], and in order to cover all liabilities under the Regulation, in so far as they relate to transfrontier shipments of waste from [country of export] to [country of import] in relation to [name of the notifier / type of waste], we, the [name and address of the bank], hereby irrevocably and unconditionally guarantee to pay the Finnish Environment Institute, P.O. Box 140, FIN-00251 Helsinki, Finland, being the competent authority of dispatch (such body being hereinafter referred to as the "competent authority"), any sum or sums not exceeding in aggregate [currency and amount] (say: [currency and amount in words]) –on receipt by us of first demand in writing of the competent authority.

This is to allow the competent authority to meet its obligations under articles 22, 23, 24 and 25 of the Regulation, to ensure that where an agreed consignment can not be disposed of or recovered as planned, alternative environmentally sound disposal or recovery arrangements can be made by the competent authorities.

For the avoidance of doubt, in the event of a payment being made hereunder by us to the competent authority, then our liability shall be reduced by the amount of any such payment and we shall only be liable to the extent of the residual amount, if any, remaining under this guarantee at that time.

This guarantee shall be terminated upon receipt by us of confirmation from the competent authority that all relevant documents have been received by it in accordance with article 6 of the Regulation in respect of the notification(s) concerned, and accordingly there are no liabilities thereunder, however not later than [last day of validity = expiry date of the notification + 480 days], by which date all claims based upon this guarantee must be presented to us in writing in order to be taken into consideration, after which date no claims can be presented and this guarantee shall automatically become null and void whether returned to us or not.

This guarantee is subject to the 'Uniform Rules for Demand Guarantees 2010 Revision, ICC Publication URDG 758'.

Any written communication shall be delivered by [means of communication] to [name and address of the bank].

Date and place

[name and signatures of the bank]

## Appendix II

### Template for preparing a financial guarantee in Portugal

#### TEMPLATE FOR FINANCIAL GUARANTEE [NON OFFICAL TRANSLATION]

Bank \_\_\_\_\_, with registered office at \_\_\_\_\_, with a fully paid-up share capital of \_\_\_\_\_, tax ID No \_\_\_\_\_, registered at the Registo Comercial de Lisboa under No \_\_\_\_\_, represented by \_\_\_\_\_, provides, on request of the beneficiary \_\_\_\_\_, with registered office at \_\_\_\_\_ a bank guarantee "*on first demand*", waiving all rights of objection or claims, to the benefit of the AGÊNCIA PORTUGUESA DO AMBIENTE, with registered office at Rua da Murgueira, 9/9A - Zambujal Ap. 7585, 2611-865 Amadora-Portugal, up to an amount of EUR \_\_\_\_\_ (\_\_\_\_\_ euros).

This financial guarantee is aimed at covering the costs of transport, recovery or disposal ('select the intended operation'), including any intermediate operations, and of storage for 90 days of the wastes, relating to the notified transfer procedure of waste No PT \_\_\_\_\_, in accordance with Article 7 of Decree-Law No 45/2008, of 11 March, and Article 6 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council, of 14 June, and by it, the bank guarantees the irrevocable commitment to pay, on first demand and waiving all rights of objection or claims, and up to the guaranteed amount, any sum that the beneficiary may require.

This guarantee is valid for a period of \_\_\_\_\_ months after its issue (or «*valid until* \_\_\_\_\_»), and nothing else can be demanded from the guaranteeing bank after that date.

## Appendix III

### Template for preparing a financial guarantee in Switzerland

Logo of bank XXX or of insurance company XXX

Federal Office for the Environment FOEN  
Waste and Resources Division      Address of bank XXX or  
CH 3003 Bern of insurance company XXX  
Tel.: +41 58 462 93 80  
Fax: +41 58 462 59 32

#### **Bank or insurance guarantee no XXX**

This bank guarantee (or insurance guarantee) was concluded by the company XXX, XXX street XX, postal code, place, in favour of the Federal Office for the Environment, Waste and Raw Materials Division, CH 3003 Bern. Its purpose is to guarantee payment of disposal costs in the sense of Article 20 of the Ordinance of 22 June 2005 concerning movements of wastes (VeVA, SR number: 814.610). If the wastes cannot be accepted or disposed of by the receiver as planned, the present bank guarantee (or insurance guarantee) ensures that the costs of take-back and disposal of the waste are covered. This does not apply to waste that has been illegally shipped by the receiver.

XXX bank (or XXX insurance company) hereby makes an irrevocable undertaking to the Federal Office for the Environment that upon its first demand it will, irrespective of the validity and legal effects of the aforementioned contract, and waiving all rights of objection and defence arising therefrom, pay all aforementioned costs concerning notification CH000XXXX up to a maximum amount of CHF XXXXX.

This bank guarantee (or insurance guarantee) is valid from the date of the first shipment until 360 days after the last shipment of waste relating to notification CH000XXXX. This corresponds to validity from XX.XX.20XX to XX.XX.20XX.

XXX bank (or XXX insurance company) makes a commitment to transfer the amount mentioned after receipt of a written request from the Federal Office for the Environment according to its instructions.

In contrast to the take-back obligations according to article 2 (15)(a) of Regulation (EC) No 1013/2006 on the shipment of Waste, the guarantor cannot, according to articles 20 and 33 OMW in conjunction with article 2(15)(b) of Regulation (EC) No 1013/2006, invoke a secondary liability of other companies or private persons involved in the shipment. Only the exporter is obliged to take back the waste.

This guarantee is governed by Swiss law, and the place of jurisdiction is Bern.

Date:

Signature of bank (or insurance company)

## Appendix IV

# Application for approval of financial guarantee or equivalent insurance, in England

Form WMT2: Application for approval of financial guarantee or equivalent insurance

## Application for approval of financial guarantee or equivalent insurance



Regulation (EC) 1013/2006 – The Waste Shipments Regulation

### Please read through this form and the guidance notes that came with it. Please write clearly in the answer spaces.

The notifier must put a financial guarantee or equivalent insurance ('financial provision') in place for all notified waste shipments to and from England or Wales. This is to provide the competent authorities with guaranteed money to take action if things go wrong with a notified shipment, including, for example, arranging and paying for the return of the waste to the country of origin.

For some types of notified waste shipments to and from England or Wales you must obtain our prior approval of the financial arrangements you have made and/or the amount of cover put in place before you ship any waste. You must complete this form to seek that approval. This is in addition to the consents you need from the concerned competent authorities to the notification you are submitting or have submitted to the competent authority of dispatch for the proposed notified waste shipments.

#### Do I need to make an application?

You must complete and submit this application if you are submitting a notification under the Waste Shipments Regulation ('WSR') to the Environment Agency for:

- an export of waste from England or Wales, including a shipment to another EU member state – in this case please complete sections 1–11 and provide any additional information requested in the application (this will depend on your response to certain sections on the application). You must obtain our approval of the financial guarantee or equivalent insurance ('financial provision') arrangements you have made, including the amount of cover and the form and wording of the arrangement made, before you make any shipments on the notification.
- an import of waste to England or Wales where the waste originates outside the EU – in this case you only have to

complete sections 1–2 and 8–11. You must obtain our approval for the amount of cover provided under the financial provision arrangements made. If we are not satisfied with the amount of cover provided you must put additional financial provision in place and obtain our approval for those additional arrangements before you make any shipments on the notification.

Do not complete this application if you are submitting a notification for an import to England or Wales from another EU member state. Financial provision arrangements meeting the requirements of the WSR must be in place for this type of notification, but the competent authority in the EU member state of dispatch is responsible for assessing and approving the arrangements made.

For further information on international notified waste movements, please see 'Moving notified waste between countries – A guide', which includes information on the financial provision requirements set down in the WSR.

#### Contents

- 1 Notification number
  - 2 For the above notification, are you the:
  - 3 Type of financial guarantee
  - 4 Name and contact details of the financial institution or insurance company
  - 5 Address to which claims must be made
  - 6 Date of financial guarantee or insurance policy
  - 7 Financial guarantee reference number or insurance policy number
  - 8 Amount of cover provided
  - 9 Number of active shipments covered
  - 10 Calculation
  - 11 Declaration
  - 12 The Data Protection Act 1998
- Annex A  
Annex B  
Annex C

### 1 Notification number

Please provide the notification number to which this application relates. You must make a separate application for each notification.

### 2 For the above notification, are you the:

Notifier

or

Consignee

If you are the consignee, you should only complete this application if it relates to an import of waste to England or Wales from a country outside the EU and you have written authorisation from the notifier to make this application. You must provide a copy of the written authorisation from the notifier with the completed application.

### Details about the financial guarantee or equivalent insurance policy

#### 3 Type of financial guarantee

Check block 3 of the notification form to find out which type of notification you have submitted. We have produced standard templates for a financial guarantee to cover:

- An individual shipment – see Annex A or;
- Multiple shipments for a 'general' notification – see Annex B, or;
- Single/multiple shipments pertaining to several notifications – see Annex C.

If you confirm the financial guarantee you have set up is in accordance with the appropriate standard template we will not normally need to see a copy of the guarantee.

**3 Type of financial guarantee, continued**

We will usually be able to give our approval quickly, provided the organisation providing the guarantee is acceptable and the amount of cover provided is appropriate.

If you have set up a guarantee in any other format you must provide a copy of the guarantee with this application. You must make sure the arrangements you have made meet the requirements specified in the WSR before sending your application to us for approval. If you chose to use a format that does not follow our template, we may need further information from you and it may take longer to approve your application.

If you have set up equivalent insurance, you must provide a copy of the insurance policy with your application. We are not aware of any policy currently in existence that meets our requirements (correct as of 14 December 2010). If you wish to support your application with an insurance policy rather than a financial guarantee, we suggest you contact us first for further guidance.

Any financial guarantee or equivalent insurance policy set up in relation to an export from England or Wales must be in English and subject to and in accordance with English law. We will not accept translated documents or guarantees or insurance policies subject to and in accordance with the law of any other jurisdiction.

Indicate the type of financial guarantee or equivalent insurance you have in place to cover the waste notified.

Financial guarantee in accordance with the Environment Agency's standard template titled 'A single shipment pertaining to one notification' – see Annex A.

Financial guarantee in accordance with the Environment Agency's standard template titled 'Multiple shipments pertaining to one notification' – see Annex B.

Financial Guarantee in accordance with the Environment Agency's standard template titled 'Blanket guarantee – single/multiple shipments pertaining to several notifications' – see Annex C.

Financial guarantee not in accordance with the Environment Agency's standard templates - your application must be accompanied by a copy of the guarantee made.

Equivalent policy of insurance – your application must be accompanied by a copy of the insurance policy.

**4 Name and contact details of the financial institution or insurance company**

For exports of waste from England and Wales, we would expect your financial provider to be a high street bank or recognised financial institution. Please provide contact details of the person we may contact at the financial institution or insurance company if we have any questions regarding the financial guarantee or equivalent insurance.

Contact name

Title (Mr, Mrs, Miss and so on) \_\_\_\_\_

First name \_\_\_\_\_

Last name \_\_\_\_\_

Name of financial institution or insurance company

\_\_\_\_\_

**4 Name and contact details of the financial institution or insurance company, continued**

Address

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Postcode \_\_\_\_\_

Contact numbers, including the area code

Phone \_\_\_\_\_

Fax \_\_\_\_\_

Mobile \_\_\_\_\_

Email \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**5 Address to which claims on the guarantee or policy must be made if different from that given above**

Where you have a financial guarantee that is in accordance with our standard templates, this is the address of 'the Bank' specified in paragraph 1 of the guarantee; it may be that this is the same as the details provided in block 4.

Name

\_\_\_\_\_

Address

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Postcode \_\_\_\_\_

Contact numbers, including the area code

Phone \_\_\_\_\_

Fax \_\_\_\_\_

Mobile \_\_\_\_\_

Email \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**6 Date of financial guarantee or insurance policy**

Date (DD/MM/YYYY)

\_\_\_\_\_

**7 Financial guarantee reference number or insurance policy number**

\_\_\_\_\_

**8 Amount of cover provided**

If you have set up a financial guarantee in accordance with one of our specified standard templates, this is the figure that appears in paragraph 2 of the guarantee. If you are using an insurance policy, please specify any financial limits on the amounts we can claim under the policy.

£ \_\_\_\_\_

**9 Number of active shipments covered**

You only need to complete this section if the application relates to a notification for multiple shipments. Where you are applying in relation to a notification for multiple shipments, the amount of cover provided can be limited to the total maximum number of shipments that will be in transit and/or waiting to be recovered/disposed of at any one point in time rather than the total number of shipments to be made during the time the notification is valid.

Number  
\_\_\_\_\_

**10 Calculation**

Please set out how you have calculated the amount of cover required, as specified in block 8 above. The amount of cover of any particular financial provision arrangement will vary from case to case, depending on a wide range of factors such as distance to be travelled, route, mode(s) of transport, the nature and quantity of waste and the process for which it is destined.

We recommend you use the following approach when calculating the amount of cover required:

Size of guarantee = [(A + B + C) × the number of active shipments] + D; where,

A = the cost of shipment;

B = the cost of disposal or recovery;

C = the cost of storage for 90 days; and

D = administrative costs (including legal fees and charges).

This amount should be £595 (correct as of 14 December 2010).

We will look for an amount of cover that has been worked out on a 'worse case scenario' basis. For example, the cost of disposal or recovery should take account of the possibility that the waste might not be described properly and could contain contaminants which the consignee (person receiving the waste) cannot deal with in an environmentally sound manner.

If you use any other approach to calculate the amount of cover required, this could delay your application being approved.

Here's how we suggest you work it out:

(a) cost of shipment:

£ \_\_\_\_\_

(b) cost of recovery or disposal, including any interim operation:

£ \_\_\_\_\_

(c) cost of storage for 90 days:

£ \_\_\_\_\_

multiplied by number of active shipments:

\_\_\_\_\_

**10 Calculation, continued**

(d) administrative costs: £595

Total amount:

£ \_\_\_\_\_

Any further information should be attached as a separate additional sheet.

**11 Declaration**

I declare that:

- the financial guarantee or equivalent insurance, as detailed in this form, is in place to cover the waste to be shipped on the notification detailed in block 1, meets the requirements of the WSR and will remain in place until the Environment Agency returns this application indicating that the financial guarantee or equivalent insurance can be released;
- the Environment Agency will have access to the financial guarantee or equivalent insurance in order to meet its obligations under the WSR;
- the information in this application is true to the best of my knowledge and belief. I understand that this approval may be refused or withdrawn if I give false or incomplete information.

I also allow the Environment Agency to contact the financial institution or insurance company listed on this application form directly if they have any questions or if they need to call upon the financial guarantee or equivalent insurance.

Signature

\_\_\_\_\_

Name

Title (Mr, Mrs, Miss and so on) \_\_\_\_\_

First name \_\_\_\_\_

Last name \_\_\_\_\_

Position

\_\_\_\_\_

Company

\_\_\_\_\_

Today's date (DD/MM/YYYY)

\_\_\_\_\_

**Summary of approval criteria**

- This application must be completed and all required additional information must be provided.
- We must be satisfied that the form and wording of the financial provision arrangements meet the requirements of the WSR.
- We must be satisfied that the amount of cover provided is enough to cover the costs of any action we or other competent authorities may be required to undertake if things go wrong with the notified shipments.
- We must be satisfied that your financial provision arrangement will be in place until all the waste has been recovered or disposed of.
- We must be satisfied that we will be able to access funds on demand if we need to.

**11 Declaration, continued**

**Determination**

We will make our decision 20 working days from the date we receive a complete application. We will give you our decision by returning a stamped copy of the application. If we refuse your application, we will tell you why and you will be entitled to make a second application.

We may request further information, including requesting a copy of the financial provision arrangement before we make our decision, so that we are satisfied that the provision meets the requirements of the WSR.

**Additional sheets**

Where you are attaching additional information, please make sure that you label each sheet clearly with:

- the notification number;
- the section on the form it applies to;
- the number of the sheet, for example 3 of 5.

**Help and advice**

Please contact us if you need any advice on how to give the information we need. If you send in a form with missing or incomplete information, we will not be able to process and approve your application.

Contact: International Waste Shipments Team, Environment Agency

Tel: +44 1925 542265

Email: [shipments@environment-agency.gov.uk](mailto:shipments@environment-agency.gov.uk)

**Keeping a copy**

The WSR says that you must keep a copy of this form and any additional sheets and supporting information that you submit for three years from the date when the shipment starts. We may ask to see the copies when we monitor your performance.

**11 Declaration, continued**

**Where to send your application**

Send it to  
 IWS  
 Environment Agency  
 Richard Fairclough House  
 Knutsford Road  
 Latchford  
 Warrington  
 Cheshire  
 WA4 1HT  
 UK

Tel: +44 1925 542265

Fax: +44 1925 542105

Email: [shipments@environment-agency.gov.uk](mailto:shipments@environment-agency.gov.uk)

**12 The Data Protection Act 1998**

We, the Environment Agency, will process the information you provide so that we can deal with your application, make sure you keep to the conditions of the licence, permit or registration, process renewals and keep the public registers up to date.

We may also process or release the information to:

- offer you documents or services relating to environmental matters;
- consult the public, public organisations and other organisations (for example, the Health and Safety Executive, local authorities, the emergency services, the Department for Environment, Food and Rural Affairs) on environmental issues;
- carry out research and development work on environmental issues;
- provide information from the public register to anyone who asks;
- prevent anyone from breaking environmental law, investigate cases where environmental law may have been broken, and take any action that is needed;
- assess whether customers are satisfied with our service, and to improve our service; and
- respond to requests for information under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 (if the Data Protection Act allows).

We may pass the information on to our agents or representatives to do these things for us.

**For Environment Agency use only**

Date received as complete (DD/MM/YYYY)

Office stamp

Approved?

No

Yes  Date (DD/MM/YYYY)

Financial guarantee released?

No

Yes  Date (DD/MM/YYYY)

Application form released?

No

Yes  Date (DD/MM/YYYY)

## Annex A – A single shipment pertaining to one notification

**Addressed to:**

The Environment Agency whose principal office is at Horizon House, Deanery Road, Bristol, BS1 5AH and whose address for service is Richard Fairclough House, Knutsford Road, Warrington, WA4 1HT.

**Titled:**

Council Regulation (EC) No. 1013/2006 ('the EC Regulation')  
The Transfrontier Shipment of Waste Regulations 2007  
No. 1711 (together 'the Regulations')

**TFS Notification Number**

\_\_\_\_\_

('the Notification')

**Financial Guarantee Reference Number**

\_\_\_\_\_

**1. We, [Name and address of Bank],**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

('the Bank') refer to the duties placed on our client, [Name of Client],

\_\_\_\_\_

('the Client') as notifier/consignee\* in respect of the Notification under the terms of Article 6 of the EC Regulation to provide a financial guarantee or equivalent insurance covering the costs of transport, costs of recovery or disposal including any necessary interim operation and costs of storage for 90 days.

**2. In order to cover obligations under the Notification and the Regulations, the Bank hereby unconditionally and irrevocably undertakes to pay forthwith and without any deduction to a competent authority in relation to the Notification ('a Competent Authority') on receipt of a written demand (and notwithstanding any objections by or instructions to the contrary from the Client) the sum (or sums) so demanded up to a maximum amount of**

£ \_\_\_\_\_ Sterling, whether

demanded in a single sum or by more than one demand made.

**3. Any demand under this guarantee must be received by the Bank at the above address signed by an authorised officer of a Competent Authority and must incorporate a declaration as follows:**

'We certify that the sum demanded is due by reason of the [notifier] and/or [consignee] having failed to fulfil their obligations under the Notification and/or the Regulations'.

**4. For the purposes of this guarantee, a written demand shall be conclusive evidence that the [notifier] and/or [consignee] has/have failed to fulfil their obligations under the Notification and/or the Regulations and that they are indebted to a Competent Authority for the sum demanded.**

**5. This guarantee will expire on the earlier of the following:**

- a) payment of the aggregate amount of this guarantee; or
- b) receipt by the Bank of written confirmation from the Environment Agency that the Bank is released from all liability under this guarantee; or
- c) [three/five\*] years from the date of authorisation as shown in Block 20 of the Notification

and any demand hereunder must be received by the Bank before the expiry of this guarantee, when this guarantee will become of no effect whatsoever whether or not it is returned to the Bank.

**6. The benefit of this guarantee shall not be assignable or transferable by the Environment Agency.**

**7. This guarantee shall be subject to and construed in accordance with English law, and subject to the jurisdiction of the courts of England and Wales.**

IN WITNESS of which this guarantee has been duly executed and delivered as a Deed on \_\_\_\_\_ day of \_\_\_\_\_

THE COMMON SEAL of

\_\_\_\_\_

BANK PLC was hereunto affixed in the presence of:

\_\_\_\_\_

[or as particular bank prefers to use e.g. under hand or by Power of Attorney]

[In the case of companies, to be executed in accordance with the provisions of ss36 and 36A of the Companies Act 1985].

\* delete as appropriate

## Annex B – Multiple shipments pertaining to one notification (general notification procedure)

Addressed to:  
The Environment Agency whose principal office is at Horizon House, Deanery Road, Bristol, BS1 5AH and whose address for service is Richard Fairclough House, Knutsford Road, Warrington, WA4 1HT.

Titled:  
Council Regulation (EC) No. 1013/2006 ('the EC Regulation')  
The Transfrontier Shipment of Waste Regulations 2007  
No. 1711 (together 'the Regulations')

TFS Notification Number

\_\_\_\_\_

('the Notification')

Financial Guarantee Reference Number

\_\_\_\_\_

1. We, [Name and address of Bank],

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

('the Bank') refer to the duties placed on our client, [Name of Client],

\_\_\_\_\_

('the Client') as notifier/consignee\* in respect of the Notification under the terms of Article 6 of the EC Regulation to provide a financial guarantee or equivalent insurance covering the costs of transport, costs of recovery or disposal including any necessary interim operation and costs of storage for 90 days.

[This Guarantee covers the movement of a maximum of [insert number] \_\_\_\_\_ shipments in transit or in storage awaiting disposal/recovery\* at any one time].

2. In order to cover obligations under the Notification and the Regulations, the Bank hereby unconditionally and irrevocably undertakes to pay forthwith and without any deduction to a competent authority in relation to the Notification ('a Competent Authority') on receipt of a written demand (and notwithstanding any objections by or instructions to the contrary from the Client) the sum (or sums) so demanded up to a maximum amount of

£ \_\_\_\_\_ Sterling, whether demanded in a single sum or by more than one demand made.

3. Any demand under this guarantee must be received by the Bank at the above address signed by an authorised officer of a Competent Authority and must incorporate a declaration as follows:

'We certify that the sum demanded is due by reason of the [notifier] and/or [consignee] having failed to fulfil their obligations under the Notification and/or the Regulations'.

4. For the purposes of this guarantee, a written demand shall be conclusive evidence that the [notifier] and/or [consignee] has/have failed to fulfil their obligations under the Notification and/or the Regulations and that they are indebted to a Competent Authority for the sum demanded.

5. This guarantee will expire on the earlier of the following:

- a) payment of the aggregate amount of this guarantee; or
- b) receipt by the Bank of written confirmation from the Environment Agency that the Bank is released from all liability under this guarantee; or
- c) [three/five\*] years from the date of authorisation as shown in Block 20 of the Notification

and any demand hereunder must be received by the Bank before the expiry of this guarantee, when this guarantee will become of no effect whatsoever whether or not it is returned to the Bank.

6. The benefit of this guarantee shall not be assignable or transferable by the Environment Agency.

7. This guarantee shall be subject to and construed in accordance with English law, and subject to the jurisdiction of the courts of England and Wales.

IN WITNESS of which this guarantee has been duly executed and delivered as a Deed on \_\_\_\_\_ day of \_\_\_\_\_

THE COMMON SEAL of

\_\_\_\_\_

BANK PLC was hereunto affixed in the presence of:

\_\_\_\_\_

[or as particular bank prefers to use e.g. under hand or by Power of Attorney]

[In the case of companies, to be executed in accordance with the provisions of ss36 and 36A of the Companies Act 1985].

\* delete as appropriate

## Annex C – Blanket guarantee – Single/multiple shipments pertaining to several notifications (inc. General Notification Procedure)

Addressed to:  
The Environment Agency whose principal office is at Horizon House, Deanery Road, Bristol, BS1 5AH and whose address for service is Richard Fairclough House, Knutsford Road, Warrington, WA4 1HT.

Titled:  
Regulation (EC) No. 1013/2006 ('the EC Regulation') The Transfrontier Shipment of Waste Regulations 2007 No. 1711 (together 'the Regulations')

Financial Guarantee Reference Number

\_\_\_\_\_

1. We, [Name and address of Bank],

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

('the Bank') are informed by our client, [Name of Client],

\_\_\_\_\_

('the Client') that, under the Regulations, upon shipments of waste which are notified to the competent authorities of dispatch and destination (hereafter 'the Relevant Competent Authorities') the notifier or consignee (as defined in the EC Regulation) is obliged to provide a financial guarantee.

2. The Bank has issued this guarantee in order to cover the Client's obligation to provide a financial guarantee under the Regulations upon any shipments of waste notified to the Relevant Competent Authorities where the Client is notifier or consignee.

3. The Bank hereby unconditionally and irrevocably undertakes to pay forthwith and without any deduction to any of the Relevant Competent Authorities on receipt of a written demand (and notwithstanding any objections by or instructions to the contrary from the Client) the sum (or sums) so demanded up to a maximum amount of

£ \_\_\_\_\_ Sterling, whether

demanded in a single sum or by more than one demand made.

4. Any demand under this guarantee must be accompanied by a certified copy of a form from the Client addressed to the Agency which confirms that the shipment of waste (identified by its notification number) which gave rise to the demand is covered by this guarantee and shall be received by the Bank at the above address signed by an authorized officer of any of the Relevant Competent Authorities and must incorporate a declaration as follows: 'We certify that the sum demanded is due by reason of the [notifier] and/or [consignee] having failed to fulfil their obligations under the Regulations'.

5. For the purposes of this guarantee, a written demand shall be conclusive evidence that the [notifier] and/or

[consignee] has/have failed to fulfil their obligations under the Regulations and that they are indebted to one of the Relevant Competent Authorities for the sum demanded.

6. The Bank's obligations under this guarantee shall come into effect immediately upon the Relevant Competent Authorities giving consent for the first transfrontier shipment of waste which is covered by this guarantee.
7. The benefit of this guarantee shall not be assignable or transferable by the Agency.
8. This guarantee shall be subject to and construed in accordance with English law and subject to the jurisdiction of the courts of England and Wales.
9. The obligations under this guarantee are continuing obligations and shall remain in force subject to the Bank giving [455] days notice in writing of termination to the Agency which shall become effective on the day falling [455] days following the date of such notice provided that, as at such date, there are not in transit consignments of waste to which this guarantee applies and all certificates of [disposal/recovery] in respect of all consignments of waste covered by this guarantee have been received by the Relevant Competent Authorities. In the event that there are consignments of waste in transit and/or all certificates of [disposal/recovery] have not been received, this guarantee shall continue until all certificates of [disposal/recovery] in respect of all consignments of waste covered by this guarantee have been received by the Relevant Competent Authorities.

IN WITNESS of which this guarantee has been duly executed and delivered as a Deed on \_\_\_\_\_ day of \_\_\_\_\_

THE COMMON SEAL of

\_\_\_\_\_

BANK PLC was hereunto affixed in the presence of:

\_\_\_\_\_

[or as particular bank prefers to use e.g. under hand or by Power of Attorney]

[In the case of companies, to be executed in accordance with the provisions of ss36 and 36A of the Companies Act 1985].

\* delete as appropriate

## Appendix V

### Formulae for calculating the amount of financial guarantee – Austria, Belgium, Bulgaria, Croatia, Finland, Germany, Italy, Netherlands, Portugal, Switzerland, the United Kingdom (England and Wales)

This Appendix compiles a selection of different methods for the calculation of financial guarantees to cover so-called response costs, i.e. costs arising in cases where disposal cannot be completed as intended, in cases of illegal traffic. The selection includes the formulae used in the following countries:

- A. Austria
- B. Belgium
- C. Bulgaria
- D. Croatia
- E. Finland
- F. Germany
- G. Italy
- H. Netherlands
- I. Portugal
- J. Switzerland
- K. United Kingdom (England and Wales)

An often used formula to calculate the amount of the guarantee is to sum up transport costs per ton, recovery/final disposal costs per ton and storage costs for 90 days per ton, and multiply the total sum with the quantity of wastes notified (e.g. Finland), with the possibility to fix a minimum amount to be guaranteed per ton of waste (e.g. Bulgaria). Some Parties use different fixed reference rates to calculate the transport, disposal and/or storage costs, for example, according to the hazardous or non-hazardous nature of the wastes (e.g. Austria), according to the disposal operation combined with the hazardous or non-hazardous nature of the wastes (e.g. Italy), or according to the applicable Basel Convention waste code, the physical state of the waste (solid, liquid) and the method of transport (e.g. Netherlands).

Another approach consists in multiplying the sum of the transport, disposal and storage costs with a safety factor (e.g. Croatia), or to multiply each element of the formula – transport costs, disposal costs and storage costs – with an individual safety factor (e.g. Germany).

Finally, some Parties allow a single financial guarantee to cover several shipments. This can be reflected in the calculation formula, for example, by multiplying the sum of the transport, disposal and storage costs with a factor accounting for the number of active shipments (e.g. Portugal or United Kingdom (England and Wales)) or the maximum duration of treatment divided by the maximum duration between two shipments (e.g. Belgium (Wallonia)).

Further examples of formulae as used in the member States of the European Union are available in a compilation document on methods of calculation in the members States of the financial guarantee and equivalent insurance pursuant to Article 6 of Regulation (EC) No 1013/2006 on shipments of waste at <http://ec.europa.eu/environment/waste/shipments/pdf/Calculation%20of%20financial%20guarantee.pdf>.

#### A. AUSTRIA<sup>1</sup>

For Austria, the formula for the determination of the financial guarantee (FG) or equivalent is:

$$FG = (\text{trans} + \text{treat} + \text{store}) \times \text{quantity}$$

trans:	transport costs per ton + VAT
treat:	treatment costs (typically of intended treatment) per ton + VAT
store:	storage costs for 90 days per to + VAT
quantity:	total quantity of waste notified

<sup>1</sup> Presentation of Mr. Andreas Moser, Federal Ministry of Agriculture, Forestry, Environment and Water management, Austria on “Possible methods for calculation of the financial guarantee in the EU”, delivered during the Multicountry Training Workshop on Transboundary Movement of Hazardous Wastes, Bratislava, Slovakia, 9-10 December 2015. (<http://www.sazp.sk/bcrc/script/detaily/workshop-11-2015.php>)

VAT: value added tax of the respective country, where the financial guarantee is laid down.

**Storage costs (for 90 days):** The following values shall be used, or alternatively an individual offer may be made at a price valid for the Ministry of the Environment.

Non hazardous wastes: € 40/t

Hazardous wastes: € 150/t

**Transport costs:** (one way) in km in accordance with the notification: As a rough estimate, the figure of 0,10 €/ton/km are used. Alternatively, the transport costs can be made through a presentation of an offer.

**Treatment costs:** In general, the costs for waste recovery or disposal depend on the specific waste stream and are calculated on the basis of price lists of Austrian waste treatment facilities. When the waste being shipped has a positive net value, meaning that it could be sold for treatment with a net profit, the treatment costs in the calculation can be set to zero.

**Interim operation:** A supplementary guarantee could cover the final treatment costs and the transport costs from pre-treatment to the final treatment installation. If no supplementary financial guarantee is provided, the financial guarantee shall cover the costs of the alternative final treatment (including the pre-treatment costs) and the transport costs from the location of the sender of the wastes to the consignee, carrying out the final recovery or disposal operation.

The guarantee can be reduced to ¼ provided that

- a) all notifications of transport – receive – disposal are made in electronic form
- b) the number of “shipments alive” (notification of transport but no notification of disposal) never exceeds 25% of the total amount.

## B. BELGIUM

1. For Flanders Region, the formula for the determination of the financial guarantee (FG) or equivalent is:

**FG = Total requested tonnage x 4 x 2 Euro (minimum 1,200 euro) x 2 if exported to non-EU or EEA-countries.**

2. For Wallonia, the formula for the determination of the financial guarantee (FG) is:

**FG = [A + B + C] x D x [(E / F) + 1] x 1.2 ; or [A + B + C] x D x 1.2 (for single shipment)**

where:

A = cost of treatment (replacement or if no alternative real cost);

B = cost of transport;

C = cost of storage (according following tariff: dangerous wastes indoor 140 €/t, dangerous wastes outdoor 70 €/t, non-dangerous wastes indoor 70 €/t, non-dangerous wastes outdoor 35 €/t);

D = maximal quantities per transport;

E = maximal duration of treatment (from departure to certification);

F = minimal duration between two shipments.<sup>2</sup>

## C. BULGARIA

According to [the Ordinance on the procedure and order for calculating the amount of financial guarantee or equivalent insurance and the submission of annual records for transboundary shipments of waste, Prom. S.G. 59/18.07.2014], the amount covered by the financial guarantee is to be calculated on the basis of the following calculation formula, however this cannot be less than 2000 BGN (equal 1000 Euro) per ton:

**FG = Costs (Transport) + Costs (Treatment depending on the type of waste and the kind of treatment) + Costs (Storage for 90 days) x Total Waste Quantity >= 1000 Euro/ton**

<sup>2</sup> *Id.*, #12b.

**D. CROATIA**

$$FG = N * (C_T + C_{DR} + C_S) * 1,2$$

Where:

FG = Financial Guarantee (bank guarantee or an equivalent insurance)

N = Amount of waste shipped (T),

C<sub>T</sub> = Cost for transport per tonne,

C<sub>DR</sub> = Cost for disposal or recovery (including interim storage) per tonne

C<sub>S</sub> = Cost for storage over a period of 90 days per tonne

1,2 = Safety factor for the take-back transport costs, the treatment operation, the storage

**E. FINLAND**

$$A = (b + c + d) * e$$

Where:

A = Amount of Guarantee (EUR)

b = Cost for transport, one way (€/t): The transport costs are based on the information from the notifiers; the offers that they have received from the transport companies.

c = Costs for 90 days storage (€/t): Storage costs are based on harbour storage either in or outside of IMO-fields.

d = Costs for alternative treatment of the waste (€/t): The cost of the alternative treatment is decided case by case based on the costs of proper waste treatment in Finland e.g. landfill, hazardous waste treatment plant. The cost for alternative treatment can be ignored if the waste referred has high positive value.

e = Quantity of waste (t): Quantity of waste can either be the whole quantity notified or a part of it.

Usually the guarantee covers only part of the quantity notified. The notifier has to decide how much waste is shipped at one time (till the certificate of recovery/disposal is given) and has to cover the amount of waste by a financial guarantee.

A guarantee may also cover several notifications. In the decision to the notification or in the separate Certificate of Satisfaction we tell the maximum amount of waste in tonnes which under this or any other notification connected to this financial guarantee is allowed to be shipped at any one time. Compliance with the coverage conditions of the guarantee is followed-up promptly via the pre-notifications and certificates of recovery or disposal using our electronic register for transfrontier shipments of waste. If the quantity covered by the guarantee is exceeded, a pre-notified shipment will be stopped.

**F. GERMANY<sup>3</sup>**Amount of the financial guarantee:

The competent authority shall determine the amount of the financial guarantee at its own discretion, with recourse to past values. For this purpose, the following calculation method is recommended, which uses what are termed specific costs for transport, recovery or disposal, and storage:

$$FG = (CT * D * ST + CRD * SRD + CS * SS) * M$$

FG	=	Amount of the bank guarantee or equivalent insurance [€]
CT	=	Return transport costs per km, per tonne [€/km * t]
CRD	=	Recovery or disposal costs per tonne [€/t]
CS	=	Costs of storage for 90 days per tonne [€/t]
D	=	Distance [km]
M	=	Quantity of waste [t]
ST	=	Safety factor for return transport (1.0 to 1.3)

<sup>3</sup> reproduced from LAGA Communication 25, section 3.1.3.1 according to the compilation document available at <http://ec.europa.eu/environment/waste/shipments/pdf/Calculation%20of%20financial%20guarantee.pdf>.

SRD	=	Safety factor for recovery/disposal (1.0 to 1.3)
SS	=	Safety factor for storage (1.0 to 1.3)

The actual costs can only be ascertained on a case-by-case basis with due regard for the nature and hazardousness of the waste, particularly for the event of an illegal shipment.

For this reason, the waste which is the subject of a shipment notification is generally used as the starting point for the calculation. Experience has shown that the aforementioned safety factors (ST, SRD, SS) for the respective costs generally cover such unknown variables – cf. in particular nature and hazardousness. Average specific costs may also be used for the calculation purposes, to avoid having to re-examine the costs for every subsequent or new notification concerning similar waste.

Please note that a quote – in relation to the recovery or disposal costs – in which the recovery or disposal operation is offered at a price significantly below the average costs can only be accepted as a basis subject to the submission of a binding declaration. In this declaration, the recovery or disposal company should undertake to guarantee the quoted prices and acceptance of the specified quantity until such time as the financial guarantee is released.

Below, we provide tips for calculating the relevant costs.

#### Transport costs ( $C_T$ ) and safety factor ( $S_T$ ):

The cost of return shipment per kilometre, per tonne can only be calculated with due regard for the waste type and the transport conditions required. For example, the calculation could be based on the transport costs for outward transport, plus a safety factor of 10-30 %. Alternatively, the average costs per tonne for return transport may be used; this is probably the most common case, so that the distance (D) may be omitted from the above calculation formula.

#### Distance (D):

If the distance has not already been taken into account in the aforementioned transport costs per tonne, and if no concrete information regarding the distance is available, then the approximate distance should be used, where applicable with a safety factor.

#### Recovery or disposal costs ( $C_{RD}$ ) and safety factor ( $S_{RD}$ ):

The cost of the non-interim recovery or disposal should be ascertained with due regard for the waste type and constituents as well as the required recovery or disposal operation. These are subject to market-related variations, and often characterised by numerous premiums (e.g. low calorific value or special constituents).

The costs of “any necessary interim operation” cited under the recovery or disposal costs should be confined to those costs which are necessary for proper recovery or disposal, including any required repackaging etc. These costs may be covered by calculating a safety premium of up to 30 %. Farther-reaching measures are impossible to calculate in practice, since these must be known in advance, i.e. when calculating the financial guarantee. Generally, the goal should be to aspire towards return with direct recovery or disposal.

#### Storage costs for 90 days ( $C_S$ ) and safety margin ( $S_S$ ):

In accordance with Articles 22 and 24, the waste must be returned within 90 or 30 days of notification, respectively, or within another period of time to be unanimously specified by the authorities.

The storage costs can likewise only be ascertained with due regard for the nature and hazardousness of the waste.

When calculating the financial guarantee, it is sufficient to use as a basis the average costs of interim storage in relation to the notified waste and the maximum period of 90 days, plus a safety premium of up to 30 %.

The storage costs determined in this way, including the safety factor, should cover the storage costs for the cases pursuant to Article 22 (9) and Article 24 (7) from the date on which the competent authority of dispatch was informed through to the date of return (cf. Article 23 (1) and Article 25 (1)).

#### Quantity of waste (M):

The total quantity of waste is derived from the notification document. In the case of general notifications, in accordance with Article 6 paragraph 8, sub-quantities may be used as a basis for calculation rather than the total quantity. The competent authority determines the sub-quantities in consultation with the notifier. However, this method requires the certificate of recovery or disposal to be available for every sub-quantity shipped, so that the financial guarantee may be transferred to the next sub-quantity.

The hitherto common practice in Germany of partial financial guarantees (specification of a single partial financial guarantee with the proviso that waste may only be shipped within the context of the difference between the sub-quantity covered by the partial financial guarantee and the sum total of quantities already shipped for which recovery or disposal certificates are not yet available) is also consistent with Article 6 paragraph 8.

For further information in German, see Section 3.1.3.1 under:

[http://www.laga-online.de/servlet/is/23874/M25\\_VH\\_Abfallverbringung.pdf?command=downloadContent&filena me=M25\\_VH\\_Abfallverbringung.pdf](http://www.laga-online.de/servlet/is/23874/M25_VH_Abfallverbringung.pdf?command=downloadContent&filena me=M25_VH_Abfallverbringung.pdf)

**G. ITALY<sup>4</sup>**

The formula for the determination of the financial guarantee (FG) or equivalent is:

$$\mathbf{FG = T (Transport) + S (Disposal / Recovery + Storage)}$$

T = Transport Costs in € = Km x Tonnes x 0,15

S = Disposal /Recovery /Storage = Tonnes x K2

K2:

Recovery of any type of waste € 1.003/t

Disposal of non hazardous waste € 1.003/t

Disposal of hazardous waste € 2.006/t

Disposal of hazardous wastes containing more than 5.000 ppm halogenated solvents € 4.012/t

**H. NETHERLANDS**

The financial guarantee has to cover the amount of waste that is shipped at one time and not yet processed. That means that at least one shipment has to be covered by the financial guarantee. If the notifier wants to do more shipments at one time – which implies that the waste of the shipments is not yet processed – he has to set a financial guarantee that covers the amount of waste transported with these shipments at the same time up to the moment the consignee provides the certificate of disposal/recovery for the waste. The financial guarantee (or a part of the financial guarantee) for a shipment becomes available again for other shipments at the moment the certificate of disposal/recovery is given by the consignee. So the notifier may but is not obliged to set a financial guarantee that covers the total amount of waste mentioned in block 5 of the notification. The notifier has to decide how much waste is shipped at one time (till the certificate of recovery/disposal is given) and has to cover that amount of waste by a financial guarantee.

Example: A notifier wants to ship waste under code Y46. The fixed rate for Y46 is 125 euro per ton for treatment. The waste is solid, thus 15 euro per ton for storage. The waste is shipped 200 km by truck from the notifier to the facility of disposal/recovery: 200 km x 0.105 euro = 21 euro for transport costs. That makes a financial guarantee of 161 euro per ton.

The notifier ships for example 20 tons in one shipment: 161 euro x 20 ton = 3220 euro. The minimal financial guarantee has to be 3220 euro. But then only one shipment of max. 20 tons is covered by the financial guarantee.

If the notifier wants to do more shipments in a period and the certificate of recovery/disposal is not given yet, a higher financial guarantee is needed.

Say the notification is for 120 shipments (10 shipments per months) and the notifier and the consignee indicate that the certificate of disposal/recovery is provided within two months then the financial guarantee needs to cover 20 shipments. But we leave it at the responsibility of the notifier to provide a financial guarantee that is sufficient for the amount of waste not yet processed. [...]

The standard financial guarantee per tonne is €450 (total costs of recovery or disposal, storage and transport). For the notifier it is possible to request a lower financial guarantee<sup>3</sup>. The notifier needs to prove why a lower financial guarantee is reasonable. The Ministry can decide for a lower financial guarantee. In exceptional cases the Ministry can decide for a higher financial guarantee.

[However, t]he amount of the financial guarantee (FG) of a number of Basel codes is lower or even higher than €450 per tonne. [In this case,] the financial guarantee can be calculated as follows and it is not possible to request a lower financial guarantee:

$$\mathbf{FG = A + B + C}$$

<sup>4</sup> Presentation of Mr. Andreas Moser, Federal Ministry of Agriculture, Forestry, Environment and Water management, Austria on "Possible methods for calculation of the financial guarantee in the EU", delivered during the Multicounty Training Workshop on Transboundary Movement of Hazardous Wastes, Bratislava, Slovakia, 9-10 December 2015. (<http://www.sazp.sk/bcrc/script/detaily/workshop-11-2015.php>)

Where A , B, and C are shown in the following tables:

Fixed/flat rate for recovery or disposal = A

Basel code	Fixed rate in €	Basel code	Fixed rate in €
A1030	400	A4070	500
A1050	400	A4080	500
A1060	400	A4090	400
A1100	125	A4120	400
A1160	0	A4130	500
A1170	125	Y46	125
A1190	0	AB130	125
A2030	400	AC070	500
A3020	0	AC080	400
A3040	500	AD090	400
A3050	500	B1010	0
A3140	0	B1040	125
A3150	500	B1070	0
A3170	500	B1100	500
A3180	500	B1115	0
A3190	500	B1250	125
A4010	500	B2020	125
A4030	500	B3010	0
A4050	500	B3030	125
A4060	500	B3140	125

Costs of storage per tonne for 90 days = B

Solid waste	€ 15/tonne
Liquid waste	€ 100/tonne

Costs of transport per tonne per unit of distance = C

Waste by land (per km)	€ 0,105/tonne/km
Waste by water (per nautical mile)	€ 0,02/tonne/mile

## I. PORTUGAL

The formula for the determination of the financial guarantee (FG) or equivalent is:

$$FG = (T + E + A) \times Q \times Ns \times 1,4$$

where:

T = transport costs per tonne of waste;

E = final disposal /recovery cost, including any interim operations, per ton of waste;

A = cost of storage for 90 days per tonne of waste;

Q = average quantity in tonnes per shipment;

Ns = maximum number of shipments that are expected to be carried out simultaneously from the place of expedition to the place of destination.

**J. SWITZERLAND**



Schweizerische Eidgenossenschaft  
 Confédération suisse  
 Confederazione Svizzera  
 Confederaziun svizra

**CHF00** \_\_\_\_\_  
 (please fill in)

**Instructions for calculating the financial guarantee in the case of transboundary waste shipments**

<b>Amount of cover = (DC x PA) + (TC x PA) + AC =</b>	<b>CHF 0</b>
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<b>Parameters:</b>			
DC =	Disposal costs per tonne	<input style="background-color: yellow;" type="text"/>	CHF/Tonne Please insert
A =	Notified annual amount	<input style="background-color: yellow;" type="text"/>	Tonnes Please insert
NM =	Number of months until the disposal is confirmed	<input style="background-color: yellow;" type="text"/>	Months Please insert
TC =	Transport costs per tonne	<input style="background-color: yellow;" type="text"/>	CHF/Tonne Please insert
AC =	Additional costs/Interim storage costs	<input style="background-color: cyan;" type="text" value="0"/>	CHF Calculation
	<input style="background-color: yellow;" type="text"/> Lorry or rail wagon (L), Block train (B) or Ship (S)		
	<input style="background-color: yellow;" type="text"/> Dangerous goods (Enter "1" for no or "2" for yes)		
PA =	Partial amount with security reserve	<input style="background-color: cyan;" type="text" value="0"/>	Tonnes Calculation
AOC =	<b>AMOUNT OF COVER</b>	<input style="background-color: orange;" type="text" value="0"/>	CHF Calculation

**Explanation of the boxes to be filled in (yellow)**

**DC:** In principle the costs you should enter are the costs you would pay for disposal in Switzerland. If there are no suitable disposal facilities in Switzerland you can enter the actual disposal costs that have been agreed with the disposal facility. If the waste has a positive market value you should enter CHF 0.-- .

The following disposal costs are to be assumed for the waste items listed here: used tyres: CHF 120.--/t (not retreads); used vehicles, electronic components from appliances (e.g. circuit boards), used cables, cooking oils and fats, waste wood: CHF 0.--/t.

**A:** The amount requested should be entered in Box 5 of the notification form. If a period of more than a year is requested, the scheduled annual amount should be entered.

**NM:** Enter the number of months within which the foreign disposal facility undertakes to confirm the disposal. Even if shorter periods have been agreed, a period of at least 2 months should be entered. The following types of waste are exceptions from this: used tyres for retreading, used vehicles, electronic components from appliances (e.g. circuit boards), used cables (not underground cables), cooking oils and fats, waste wood. 0 months should be entered for these types of waste.

**TC:** Transport costs are the anticipated costs of return transport to the waste producer.

**AC:** In calculating additional costs or interim storage costs, details should be provided of the means of transport and the classification of waste according to the law on dangerous goods (ADR/SDR,RID/RSD). A distinction should be made between transport by lorry or individual rail wagon (L), by block train (B) or inland waterway shipping (S).

Status:  
01.11.2014

#### **Explanation of the calculations (blue and red)**

**AC:** The additional costs comprise the costs for any interim storage for 180 days and the necessary analyses. The maximum amount that can be shipped within a week is relevant. The notified amount and the payload of the means of transport are taken into account. A distinction is made between dangerous and non-dangerous goods in the costs for interim storage. A deposit is paid for the analysis costs.

**PA:** If the disposal contract requires the disposal certificates to be available within a period shorter than 12 months, the relevant partial amount will be insured. In calculating the partial amount 1 month is always added.

$$PA = A/12 \times (NM + 1)$$

**AOC:** The amount of cover corresponds to the partial amount of waste with a security deposit multiplied by the disposal costs + the partial amount of waste with a security deposit multiplied by the transport costs + the additional costs.

$$AOC = (DC \times PA) + (TC \times PA) + AC$$


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#### **K. THE UNITED KINGDOM (ENGLAND AND WALES)<sup>5</sup>**

The formula for the determination of the financial guarantee (FG):

$$FG = [(A + B + C) \times \text{the number of active shipments}] + D$$

where,

A = the cost of shipment;

B = the cost of disposal or recovery;

C = the cost of storage for 90 days; and

D = administrative costs (including legal fees and charges = £595).

A/B/C is filled in by the notifier on basis of his actual costs. The CA scrutinizes this amount and may request an additional security calculated on the basis of a “worst case scenario”. For example, the cost of disposal or recovery should take account of the possibility that the waste might not be described properly and could contain contaminants which the consignee (person receiving the waste) cannot deal with.

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<sup>5</sup> Presentation of Mr. Andreas Moser, Federal Ministry of Agriculture, Forestry, Environment and Water management, Austria on “Possible methods for calculation of the financial guarantee in the EU”, delivered during the Multicounty Training Workshop on Transboundary Movement of Hazardous Wastes, Bratislava, Slovakia, 9-10 December 2015. (<http://www.sazp.sk/bcrc/script/detaily/workshop-11-2015.php>)