Comments on the Draft Guidance
Elements for Bilateral, Multilateral or Regional Agreements or Arrangements

Legal Working Group, Basel Convention, 12-13 October 2000, Geneva

Prepared by the Basel Action Network (BAN)*

I. Introduction

Before commenting on the specific text of the Draft Guidance Elements for Bilateral, Multilateral or Regional Agreements or Arrangements it is important to first review the legal basis and intent of Article 11, and in light of this, assess Australia’s argument that Article 11 can be used to circumvent the Basel Ban Decision and Amendment.

II. Legal Basis and Intent of Article 11

Article 11 has two distinct functions, as expressed by its two paragraphs.

Paragraph 2: Recognizing Prior Agreements

In Paragraph 2 of Article 11, the Convention clearly provides for the recognition of bilateral, multilateral or regional agreements or arrangements “entered into prior to entry into force” for relevant Parties of the Convention, provided that controlled waste movements “take place entirely among the Parties to such agreements” and provided that the agreements are “compatible with the environmentally sound management of hazardous wastes and other wastes” as required by the Basel Convention.

Paragraph 2 thus can be considered to put in place a “grandfather clause” with a caveat – that the agreements remain “compatible with ESM” as provided for in the Convention. The Convention provides for a somewhat less stringent measure of comparison with the Basel Convention for these prior agreements that were not informed by the existence of the Basel Convention.

Already several such agreements have been reported to the Basel Secretariat as required by Article 11. However, the possibility of the list of Paragraph 2, Article 11 agreements growing larger is getting increasingly unlikely as the possibility is only available to agreements entered into “prior to the entry into force of this Convention for them.” As already, the Convention is in force for 136 countries, and such an Article 11, paragraph 2
agreement could only have been entered into at a time when the Basel Convention was not in force for any of the Parties to the Article 11, paragraph 2 agreement, the likelihood of two (or more) non-Parties concluding such an arrangement grows increasingly slim. Certainly for the OECD group of States, concluding new “prior” agreements is impossible under Article 11, paragraph 2.

**Article 11 Paragraph 1: For Trade with non-Parties or for Agreements more Rigorous than the Basel Convention**

Thus there can effectively be but two remaining rationales for utilization of Article 11 today and these are found under its paragraph 1. These encompass:

- those Parties that wish to trade in waste with a non-Party according to all of the provisions and obligations of the Basel Convention; and/or

- those Parties that wish to trade in wastes with Parties or non-Parties in a manner that is more rigorous than the Basel Convention.

The very first words of Article 11, “*notwithstanding the provisions of Article 4 paragraph 5,*” signal the primary rationale for allowing agreements concluded subsequent to the Basel Convention – it allows for exceptions to the general rule of Article 4, paragraph 5. That is, Article 11 is the exception to what is the normal legal position under the Basel Convention that Parties not trade with non-Parties.

However, the framers of the Convention were careful to ensure that such agreements or arrangements with non-Parties stipulate provisions that “*do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interest of developing countries.*”

The prevention of derogation (taking away a part so as to impair)\(^1\) and the assurance that the agreements stipulate provisions that are not less environmentally sound, sets a level of prescription which must be *no weaker* with respect to environmental protections than that of the Basel Convention. This interpretation is mandated by the principle that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.\(^2\)

Thus paragraph 1 of Article 11 allows for Parties that wish to trade in hazardous or other wastes with non-Parties to do so, provided that the agreements or arrangements meet the

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tests that they “do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by the Convention” and that they “stipulate provisions which are not less environmentally sound than those provided for by the Convention in particular taking into account the interest of developing countries.”

An example of such an agreement would be one in which a non-Party country which lacked the capacity to destroy PCB wastes in an environmentally sound manner needed to send those wastes to a Party for disposal. As long as the agreement did not derogate from the environmentally sound management as required by Basel and stipulated provisions no less environmentally sound than Basel, then such an agreement could be allowed as an exception to the general rule.

The only other permissible use of the first paragraph of Article 11, besides the exception to Article 4, paragraph 5, would be if Parties wished to create an arrangement or agreement that is more environmentally protective or more rigorous than the Basel Convention. Examples of this include the Bamako Convention, Waigani Convention, Izmir Protocol, Central American Agreement, etc.

III. Article 11 and the Basel Ban Amendment

Despite the very clear record of negotiations of the Basel Ban Amendment at COP3 in Geneva, where Australia and other countries such as the United States and Canada argued vigorously, but without success, to allow exceptions to the ban, Australia continues to insist that Article 11 can be used as an avenue to circumvent the ban.

Legally however this interpretation has no legs upon which to stand. BAN concurs with the arguments laid forth by the legal advisors of the European Commission, that is:

- The proposed new Article 4A contains no reference to Article 11.
- Decision III/1 (or Article 4A) did not amend Article 11 or otherwise allow for such an exception or derogation from Article 4A. The fact that Article 11 is mentioned in Decision III/1 confirms that the Parties indeed considered Article 11 but chose not to alter it to provide for any exceptions to the ban.

To these legally irrefutable arguments we would add:

- Article 11, paragraph 1 requires explicitly that the new agreement cannot derogate from the environmentally sound management of hazardous wastes and other wastes as required by the Convention and must stipulate provisions...
which are no less environmentally sound than those provided for by the Convention in particular taking into account the interests of developing countries. As the Basel Ban would be a part of the Convention (Article 4A) and has indeed been formed on the basis of environmental soundness, in particular taking into account the interests of developing countries, such an avenue is clearly untenable.

Australia’s argument in their comments of 30 August 2000 provides no real legal grounds to further their case. Implicitly accepting that they can not comply with the wording of Article 11(1), rather, in so many words, they simply reiterate their disagreement with the Basel Ban decisions I/22, II/12 and III/1: decisions that they joined in the consensus of adoption. The belief by Australia that parties should only need to consent to the shipments when those parties make the case that they are environmentally sound, is not relevant in regards to the ban and the rationale for its adoption. That scenario would have been acceptable in the original Basel Convention prior to the Basel Ban adoption but that was precisely what the Ban decision changed.

Despite the repeatedly demonstrated will of the international community (decisions I/22, II/12, III/1, IV/7, V/3), Australia simply wishes to turn back the clock to the original text of the pre-ban Convention. In continuing along this path they risk showing bad faith with respect to the negotiation and formation of international law.

Finally, it is important to note that Australia is not, in their argumentation, wishing to utilize Article 11 for the purposes of trading with a non-Party, nor are they interested in utilizing Article 11 to provide more rigorous criteria and provisions than the Basel Convention. Rather they are seeking to utilize Article 11 to substantially weaken a future obligation of the Convention: Article 4A. Weakening the obligations or provisions of the treaty is contrary to the clearly stated provisions of Article 11. To follow this line of “reasoning” it should be just as permissible for two countries to utilize Article 11 to dump hazardous waste on Antarctica in contravention of Article 4, paragraph 6!

**Specific Recommendations for the Draft Guidelines**

**Section (a) – Purpose**

In the first paragraph we find it inappropriate that only one of the key obligations of the Basel Convention is cited, when in fact several are very relevant to the context of Article 11. Thus we would amend the opening sentence to read as follows:

“Within the obligations of the Basel Convention it is in the wider global interest that hazardous waste generation is reduced to a minimum; that to
the extent possible national self-sufficiency in waste disposal is achieved; that the transboundary movement of hazardous wastes is reduced to a minimum; and those transboundary movements that must take place, do so in the wider global interest that hazardous wastes and other wastes are dealt with in an environmentally sound manner.”

Although some have objected to the last sentence of paragraph 1 of section (a) as unduly infringing on the sovereignty of countries, if the intention is placed in the proper context and the words “should not serve” is replaced with “is not intended to serve”, the problem is solved while retaining an important statement. We thus recommend the following revised text:

“As Article 11 agreements are exceptions to the general rule of Article 4, Paragraph 5, the use of Article 11 is not intended as a mechanism for non-Parties to avoid or delay ratification of the Basel Convention.”

Paragraph 2 of section (a) is a statement that runs counter to the obligations of the Basel Convention found in Article 4, paragraph 2. This paper should not become a backhanded, disguised, way to encourage transboundary movements. Moreover the context of trade with non-Parties should be reiterated for clarity. A more balanced statement would read as follows:

”Without prejudice to the obligations found in Article 4 paragraph 2 of the Convention, there may be times when transboundary movements of hazardous or other wastes between non-Parties and Parties may be desirable for the purposes of reducing environmental risk.”

Section (c) – Scope

In the subsection (i) including with the “framework” of the Basel Convention, we would recommend including reference to its decisions and provisions. We suggest the following language for (i):

“The obligations, provisions, decisions and framework of the Basel Convention.”

With respect to (ii) we would recommend similar revisions as follows:

”The environmentally sound management of hazardous and other wastes as required by the Basel Convention and its decisions.”

With respect to (iii): This should be left as it is for it makes statements that are absolutely
correct and does provide greater clarity with respect to Decision III/1 and Article 11.

Section (d) – Optional considerations

The only change we would recommend to this section would be to change the last part of the section to state correctly, “country” instead of “party” and to add the words “and its amendments” to the end of the section, as in:

“...the progress made by the country towards ratification of the Basel Convention and its amendments.”

Section (e) – Additional considerations

The only changes suggested would be to add the word “may” to the chapeau; add the principle of “self-sufficiency” as well as “polluter pays”; take away “flexibility” as being an unnecessarily vague “principle” and thus open to dangerous interpretation, and to combine the two sections as follows:

“Some principles that may merit further consideration include:

– national self-sufficiency principle
– proximity principle
– integrated life-cycle principle
– producer responsibility principle
– polluter pays principle
– precautionary principle”

END

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