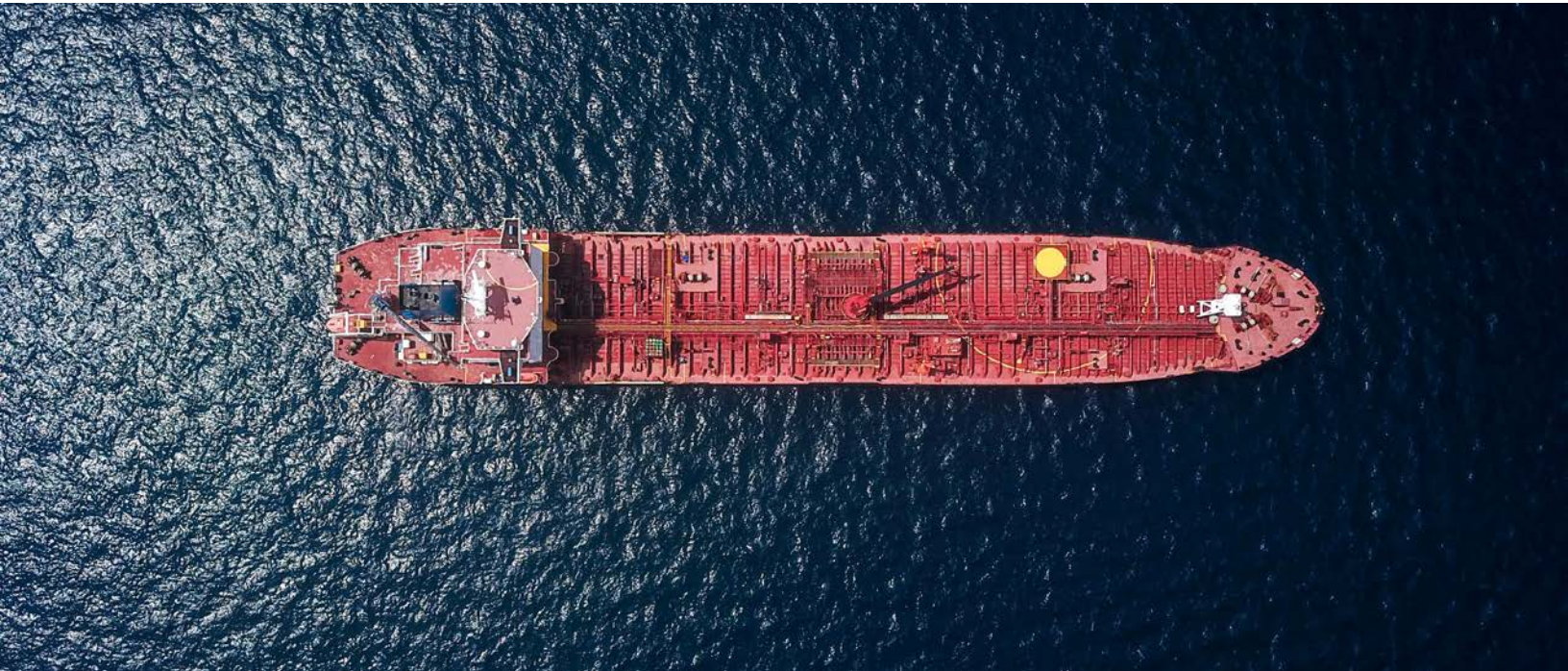




Legality of EU Proposals on Ship Recycling

Updated Legal Opinion of the Center for International Environmental Law (CIEL)



Center for International Environmental Law (CIEL)
1101 15th Street NW, 11th Floor, Washington DC, 20005
15 Rue des Savoises, 1205, Geneva, Switzerland

This legal opinion has been prepared by CIEL Attorney David Azoulay and CIEL Law Fellow Nathaniel Eisen. Please send comments or questions to dazoulay@ciel.org and neisen@ciel.org to be sure of a reply.

I. INTRODUCTION

On November 20, 2013, the European Union adopted the Ship Recycling Regulation (SRR), which entered completely into force (as amended) in December 2018. The regulation was intended to integrate the provisions of the International Convention for the Safe and Environmentally Sound Recycling of Ships (the Hong Kong Convention)¹ into the law of the European Union (EU). To that effect, the EU removed ships flying an EU member state flag from the scope of application of the Waste Shipment Regulation (WSR)² that currently implements the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention).³

The SRR, among other things, creates a framework for exporting EU-flagged ships to facilities outside of the European Union or OECD, including facilities in developing countries, provided that these facilities are included on the European List of approved ship recycling facilities (“the European List”). Ship recycling facilities in India and China have applied to be listed as eligible facilities under the SRR, although none have been approved as of the time of writing.⁴

Furthermore, there is reported interest among EU institutions and member states in concluding bilateral or multilateral agreements with developing countries where the majority of unsafe ship recycling currently occurs, such as India, Pakistan, and Bangladesh. Such agreements would allow for the export to these countries of ships at the end of their lives. It is understood that the states and institutions would argue that such agreements would fulfill the provisions of Article 11 of the Basel Convention.

The Center for International Environmental Law (CIEL) conducted a complete analysis of the legality of the Ship Recycling Regulation at the time of its drafting, in which CIEL concluded that the Regulation’s attempt to unilaterally exempt a certain category of hazardous waste covered by the Basel Convention, namely end-of-life ships, from the control mechanisms of the Convention is illegal under international and EU law.⁵ CIEL stands by that analysis today. Our previous argumentation has become even more conclusive now that the Basel Ban Amendment, which prohibits the export of hazardous waste from the EU and OECD to non-EU/OECD countries, entered into force on

¹ [The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships](#), 2009 has still not entered into force as it is still awaiting requisite ratifications by major flag and recycling states.

² [Regulation \(EU\) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation \(EC\) No 1013/2006 and Directive 2009/16/EC Text with EEA relevance.](#)

³ [Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal](#), 28 I.L.M. 657 (1989), Mar. 22, 1989, 1673 U.N.T.S. 125.

⁴ See “List of Applications Received from Yards Located in Third Countries,” available at <https://ec.europa.eu/environment/waste/ships/list.htm>.

⁵ Center for International Environmental Law, “[Legality of the EU Commission Proposal on Ship Recycling](#)” (Dec. 2012).

December 5, 2019.⁶ The present legal opinion will not repeat the points made in the 2012 legal opinion, with the hopes that the readers will avail themselves of that analysis.

Rather, this opinion focuses on two fundamental questions that have become even more important following the entry into force of the Ban Amendment:

1. Would the inclusion of ship recycling facilities in developing countries on the European List under the SRR and the eventual export of EU-flagged ships to such shipyards be consistent with the obligations of the EU and its member states as Parties to the Basel Convention now that the Convention contains the Ban Amendment?
2. Would the conclusion of a bilateral or multilateral agreement between the EU or its member states and developing countries that facilitates the export of end-of-life ships to those countries constitute a valid Article 11 agreement under the Basel Convention?

II. THE EU AND ITS MEMBER STATES ARE BOUND BY THE BASEL CONVENTION, INCLUDING THE BASEL BAN AMENDMENT.

II.1 The Basel Convention

The Basel Convention is the principal international legal instrument governing the control of transboundary movements of hazardous and other wastes and their disposal. The Convention was adopted in 1989 under the auspices of the UN Environment Programme and entered into force on May 5, 1992. The Basel Convention aims to protect human health and the environment against the adverse effects that may result from the generation and management of hazardous and other wastes. It specifically controls and limits the export of hazardous and other wastes, in particular from developed to developing countries, to ensure the environmentally sound management of waste.

The Basel Convention requires strict controls of transboundary movements of hazardous wastes either by way of 1) strict prohibitions or 2) via a control procedure known as prior informed consent (PIC) described in detail in Article 6.

⁶ [The Basel Ban Amendment entered into force on December 5, 2019. 99 Parties have so far ratified it.](http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx) The Convention with this amendment inserted into it is now available online: <http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>

In particular, pursuant to the Ban Amendment, trade in hazardous waste from countries listed in the new Annex VII (i.e., EU, OECD, and Liechtenstein) to non-Annex VII countries, for any reason is prohibited.⁷

The Basel Convention also establishes an enforcement framework that requires State Parties to criminalize illegal shipments of hazardous and other wastes.¹³

II.2 Ships are Hazardous Waste under the Basel Convention

End-of-life ships are wastes that contain many hazardous materials.⁸ They thus fall under the scope of application of the Basel Convention as hazardous waste. The Basel Conference of the Parties (COP) by Decision VII/26 of October 2004 affirmed this, stating that “many ships and other floating structures are known to contain hazardous materials and... such hazardous materials may become hazardous wastes as listed in the annexes to the Basel Convention,” and “a ship may become waste as defined in Article 2 of the Basel Convention and (...) at the same time it may be defined as a ship under other international rules.”⁹ The Basel Convention, therefore, unquestionably applies to the recycling and disposal of end-of-life ships

II.3 The EU Implements the Basel Convention through the Waste Shipment Regulation but Illegally Exempts EU-flagged Ships

The EU implements the Basel Convention through the Waste Shipment Regulation (WSR).¹⁰

The EU transposed the Ban Amendment into EU Law in 1997¹¹ even prior to its entry into global force. Article 36 of the current WSR provides for an absolute ban on the export of hazardous waste from EU member states to non-OECD countries.

The EU has previously endorsed the view that end-of-life ships fall under the Basel Convention’s scope, and several MS court decisions have concluded that the Basel Convention and the EU regulations implementing it apply to end-of-life vessels destined for

⁷ *Id.* Art. 4A. The full decision adopting the Basel Ban Amendment is available in Annex II of this opinion.

⁸ See M. Saraf et al, “Ship Breaking and Recycling Industry in India and Pakistan” Table 3.1 (World Bank Dec. 2010)

⁹ This was confirmed by the Parties at their Tenth Conference in Decision X/17, which “[a]cknowledges that the Basel Convention should continue to assist countries to apply the Basel Convention as it relates to ships.”

¹⁰ [Regulation \(EC\) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.](#)

¹¹ Council Decision 97/640/EC.(8) concerned the approval, on behalf of the Community, of the amendment to the Basel Convention, as laid down in Decision III/1 of the Conference of the Parties. Regulation (EEC) No 259/93 was amended accordingly by Council Regulation (EC) No 120/97.(9).

scrapping or recycling.¹² Such end-of-life ships are hazardous waste and are therefore *a priori* subject to the prohibition of Article 36 of the WSR.

However, by adopting the SRR, the EU chose to unilaterally exempt EU-flagged vessels from the scope of the existing WSR. Ships exported for recycling from the EU *not* flying an EU flag are still covered under the WSR. In doing so, the EU unilaterally created an illegal exemption to the implementation of the Basel Regime for certain categories of hazardous waste with no adequate justification.¹³

III. THERE REMAINS NO LEGAL MEANS FOR THE EU TO EXPORT END OF LIFE SHIPS FOR DISPOSAL TO DEVELOPING COUNTRIES

III.1 The EU May Not List Shipyards in Developing Countries on the EU List Under the SRR

The SRR includes a process to include ship recycling facilities to a list of approved facilities where EU-flagged ship can be sent for recycling and disposal. Several facilities located in China and India have applied for inclusion on the European List and indeed the European Commission has visited several of these facilities with a view to their possible inclusion. Yet, inclusion of ship recycling facilities located in developing countries on the European List and the eventual export of EU-flagged ships to such facilities would be illegal under both EU and international law.

The Basel Convention is an international treaty that creates obligations for the Parties under public international law. Under the international law of treaties, a Party cannot derogate unilaterally from a treaty or even from a single provision of a treaty unless the treaty in question expressly provides for reservations and the Party has announced its reservation in accordance with the procedures in the Vienna Convention.¹⁴ The Basel Convention does not accept reservations.¹⁵ Accordingly, the EU cannot unilaterally depart from obligations established under the Basel Convention to which it is a Party.

The Basel Convention now expressly prohibits the export of hazardous waste, including end of life ships, from Annex VII countries to non-Annex VII countries. Listing ship recycling facilities in developing countries on the European List would allow the export of end-of-life EU-flagged ships to such facilities and thus violate the EU's obligation to adhere in good faith to the

¹² The Sandrien Case (2002), Council of State of The Hague, case number: 200105168/2, June 19, 2002; the Clemenceau Case (2005), Conseil d'Etat, contentieux n. 288801, 6eme et 1ere sous-sections reunies, Lecture du 15 Fevrier 2006; the Otopan Case (2007), Council of State of The Hague, case number: 200606331/1, February 21, 2007; the Seatrade Case (2018), the District Court of Rotterdam ECLI:NL:RBROT:2018:2108, 15 March 2018.

¹³ [Center for International Environmental Law, "Legality of the EU Commission Proposal on Ship Recycling" \(Dec. 2012\).](#)

¹⁴ Arts. 19-23.

¹⁵ Art. 26(1) of the Basel Convention clearly provides that "[n]o reservation or exception may be made to this Convention."

provisions of the Basel Convention that prohibit the export of ships from the EU to these countries.¹⁶ The actual export of EU-flagged ships to these shipyards pursuant to the SRR would be a clear violation of the EU's international obligations under the Basel Convention.

III.2 The Relevance of Article 11

The Basel Convention *does* permit parties to enter into separate agreements concerning the movements of waste with parties or non-parties. Those agreements must comply with Article 11 of the Basel Convention.

Article 11 permits,

“bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements 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.”¹⁷

Therefore, in order to be valid, an Article 11 agreement must establish an equivalent level of protection and control as that established under the Basel Convention, “in particular taking into account the interests of developing countries.”¹⁸ The SRR fails this test for three reasons.

First, the SRR section permitting export to qualified facilities in third party states for recycling is not an agreement with those states. It cannot, therefore, satisfy the threshold requirement of Article 11, namely being a bilateral, multilateral, or regional agreement or arrangement. The mere fact that the SRR contains provisions requiring a ship disposal facility located in a third party to “identify the permit, license or authorisation granted by its competent authorities to conduct the ship recycling”¹⁹ does not transform the SRR into an agreement or arrangement with the third-party state.

Second, even if the SRR *were* considered a multilateral agreement or arrangement under Article 11 of the Basel Convention and included ship recycling states outside of the EU, it would not meet the further requirement of Article 11 of establishing an equivalent level of protection and control, taking into account the interests of developing countries. The Basel Ban Amendment was formulated based on an explicit “recogni[tion] that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an

¹⁶ See Vienna Convention on the Law of Treaties Art. 26.

¹⁷ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal Art. 11.

¹⁸ *Id.*

¹⁹ Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling Art. 15.2(a)

environmentally sound management of hazardous wastes as required by this Convention.”²⁰ This recognition led Parties to the Basel Convention to adopt the complete ban on exports of hazardous waste rather than any other system of control. In contravention of these goals, the SRR facilitates the export of hazardous wastes from developed to developing countries, whereas the Basel Convention as amended by new Article 4A clearly forbids it. An agreement that facilitates an activity the parties have deemed to be so risky as to require a complete ban absolutely cannot be argued to provide an equivalent level of control to that ban.

This view was already articulated clearly by the Legal Service of the European Council in their opinion of November 28, 2012:

“The most obvious difficulty with [arguing that the Ship Recycling Regulation complies with the Basel Ban Amendment], however, is that it amounts to arguing that the proposed regulation's provisions concerning the recycling of ships in, for example, China or India, "... are not less environmentally sound..." than the outright ban required by the Ban Amendment in respect of those two States. Conceptually, a prohibition appears on the face of it to be more protective of the environment than a regime of managed exports of hazardous waste. Moreover, this appears to be precisely the concern recognised by the new preambular paragraph 7bis....”²¹

Indeed, the Legal Service stated in their conclusion that,

“it would be difficult for the Member States and the EU to rely on Article 11 of the Basel Convention, as regards the Ban Amendment, once that amendment enters into force, particularly in the absence of any appropriate interpretative Decision of the Basel Convention COP.”²²

Finally, as indicated in CIEL’s legal analysis of December 2012, the other provisions of the SRR and the HKC it purports to implement also do not provide an equivalent level of control and enforcement to the Basel Convention, in particular with respect to: The rights of states to deny export and import of particular ships out of and into their territory (i.e., prior informed consent); the obligations for downstream management of waste beyond the ship-recycling facility; and the failure to criminalize illegal exports of hazardous waste or require re-importation to the exporting country of such shipments.²³ Indeed, the parties to the Basel Convention explicitly refused to endorse the view that the Hong Kong Convention (which the SRR largely mirrors)

²⁰ Preambular paragraph 7 bis, added with the Basel Ban Amendment.

²¹ [Council of the European Union, Legal Services, 28 November 2012, 16995/12. Proposal for a Regulation of the European Parliament and of the Council on ship recycling - relationship between Regulation 1013/2006 on waste shipments, the Basel Convention.](#)

²² *Id.*

²³ See Art. 10 of the Hong Kong Convention calling only for “sanctions” that are “adequate in severity to discourage violations of this Convention” and Art. 22 of the Ship Recycling Regulation calling only for unspecified “penalties” that are “effective, proportionate and dissuasive.”

provides an equivalent level of control via Decision X/17 in October 2011.²⁴

III.3 Bilateral Agreements to Export Ships to Developing Countries Would Also Violate the Basel Convention

Given the impermissibility of relying on the SRR to export ships to developing countries, EU member states and institutions have expressed interest in concluding agreements with those countries, separately or in combination with the listing of facilities in the European List. This approach likewise is a clear violation of the Basel Convention, in particular Article 4A and Article 11.

Article 11 of the Basel Convention is the only mechanism by which Parties to the Convention may enter into other international agreements with Parties or non-Parties that regulate the transboundary movement of hazardous waste. Any bilateral arrangements between the EU or its member states and non-EU/OECD countries for the trade of end-of-life ships must, therefore, comply with the provisions of Article 11 of the Basel Convention. And, Article 11 requires such agreements to establish an equivalent level of protection and control as that established under the Basel Convention. For the reasons described above, any agreement that permits the export of end-of-life ships from EU member states to non-Annex VII Parties does not, and cannot under any circumstances, be considered to provide an equivalent level of protection to the ban now incorporated as Article 4A.

This legal interpretation was, in fact, already examined and endorsed by the Council of Ministers of the Environment in their meeting of October 6, 1995 when they weighed whether Article 11 could ever be used to circumvent the recently (at that time) adopted Ban Amendment. Their conclusion was affirmed very clearly by the former head of the Legal Unit and contemporaneous head of the Waste Management Unit within DG-Environment, who expressly indicated in a letter to the UNEP Executive Secretary that “*any derogation from the general obligation of Article 4A by way of a bilateral, multilateral or regional agreement or arrangement would be a violation of the spirit and the provisions of the Convention.*”²⁵

V. CONCLUSION

This analysis of the coherency and legality of EU law and proposals to utilize Article 11 to enable EU Member States’ trade in hazardous waste ships with non-Annex VII countries supports the following conclusions:

²⁴ Decision CP.X/17 (2011): “ Notes that, while some parties believe that the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships provides an equivalent level of control and enforcement to that established under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, some parties do not believe this to be the case.”

²⁵ See letter from Dr Kramer available in Appendix I to this legal opinion.

1. End-of-life vessels constitute Basel waste and are thus subject to the mechanisms of control set forth in the Basel Convention and relevant EU law implementing that treaty.
2. Neither the EU nor its Member States may unilaterally derogate from the Basel Convention obligations. They must apply the Basel Convention mechanisms of control, including the mechanism now found in Article 4a (the Basel Ban), to Basel covered waste, including end-of-life ships.
3. The inclusion of ship recycling facilities located in non-Annex VII countries on the European List of approved facilities under the SRR and the eventual export of EU-flagged ships to such shipyards is illegal under EU and international law.
4. The conclusion of bilateral or multilateral agreements between the EU or its member states and developing countries that facilitate the export of end-of-life ships to those countries would not be consistent with the provisions of Article 11 of the Basel Convention, and the eventual export of EU-flagged ships pursuant to such agreements is illegal under EU and international law.

Appendix I

European Commission Directorate-General Environment, Nuclear Safety and Civil Protection XI.E.3
Waste Management Policy

Dr. I. Rummel-Bulska Executive Secretary, UNEP/SBC 15, Chemin des Anémones CH - 1211,
Geneva 10

Dear Dr. Rummel-Bulska,

Thank you for your letter of 19 December 1995 by which you request input to the work of the Technical Working Group regarding technical guidelines for the conclusion of agreements or arrangements concerning the transboundary movements of hazardous waste. In reaction, I would like to make the following observations.

1. By means of Decision III/1, the Third Conference of the Parties adopted an amendment to the Basel Convention in the form of a new Article 4A. In accordance with this new Article 4A, Parties listed in Annex VII shall prohibit all transboundary movements of hazardous wastes to States not listed in Annex VII, with immediate effect when destined for disposal and as of 1998 when destined for recovery. For example, a Member State of the European Community, as a Party to the Convention, will be obliged to prohibit exports of hazardous wastes to all the States in the world which are not listed in Annex VII. It must be noted that there is neither an explicit reference to the possibility to conclude bilateral, multilateral, or regional agreements or arrangements, nor to Article 11, in this new Article 4A.

2. The new Article 4A will be inserted into the Convention after Article 4, and in view of this place in the legislative body of the Convention can be considered to install an obligation for Parties in addition to the general obligation for Parties in addition to the general obligations laid down in Article 4, among which the obligation to prohibit exports to non-Parties (Article 4.5). Thus, taking Article 4 and 4A together, a Party to the Basel Convention and having ratified Article 4A takes it upon itself to prohibit exports of hazardous waste to non-Parties and, in addition to that, to all Parties which are not listed in Annex VII.

3. Article 11 provides for an exception to the general obligation laid down in Article 4.5; ie.. If a Party enters into a bilateral, multilateral, or regional agreement or arrangement with a non-Party, it can be allowed to export to that country as an exception to the export prohibition of Article 4.5, on the one condition that environmentally sound management of the exported waste as required by the Convention is guaranteed. Article 11, however does not relate in any way to the new Article 4A and does therefore not provide an exception to the obligation for Parties listed in Annex VII to prohibit exports of hazardous wastes to all countries not listed in that Annex.

4. On the basis of these elements, it is clear that bilateral, multilateral, or regional agreements or arrangements between Parties listed in Annex VII and Parties or other States not listed in Annex VII, when allowing for hazardous waste to be exported from the first to the latter, would circumvent the legal requirement of Article 4A in a way which is not foreseen by the Convention and are therefore not acceptable from a legal point of view.

This leads to the conclusion that the only possibilities to conclude agreements or arrangements in accordance with the provisions (Article 4.5, 4A and 11) of the Convention would be:

1. between a Party listed in Annex VII and another State listed in Annex VII;
2. between a Party not listed in Annex VII and a State which is also not listed in Annex VII;
3. between a Party listed in Annex VII and a State not listed in Annex VII as far as exports from the latter to the first are concerned only.

For the reasons afore-mentioned, and without entering into the details of public international law regarding the notions of *lex specialis* and *lex posterior* which would also apply in this case, I am of the opinion that any derogation from the general obligation of Article 4A by way of a bilateral,

multilateral or regional agreement or arrangement would be a violation of the spirit and the provisions of the Convention.

In addition, I would like to inform you that the European Community discussed this matter and agreed upon the position as indicated above at the meeting of Council of Ministers of the Environment of 6 October 1995. Moreover, the EC is currently in the process of transposing the requirement of the new Article 4A into Community law in accordance with this position. Procedures for the ratification for the amendment will be started as soon as possible.

In view of the above, I am unable to provide you with any input with regard to technical guidelines for assistance concerning agreements or arrangements under Article 11 which would be in contravention of Article 4A.

However, as regards the remaining possibilities for concluding agreements or arrangements (eg. under 4), I enclose for your information a draft model agreement elaborated by the Directorate General for External Economic Relations (DG I) which may serve as a guideline for the Commission services in the negotiation of possible agreements with third countries in conformity with the mandate from the Council to the Commission in this respect of October 1994.

Yours sincerely,

L. Kramer

Head of Unit

(Original Letter available upon request from the Basel Convention Secretariat or EU Commission).

Appendix II

Adopted at the Third Conference of the Parties to the Basel Convention (COP3), 22 September 1995, Geneva, Switzerland

Decision III/1

Amendment to the Basel Convention

The Conference,

Recalling that at the first meeting of the Conference of the Parties to the Basel Convention, a request was made for the prohibition of hazardous waste shipments from industrialized countries to developing countries;

Recalling decision II/12 of the Conference;

Noting that:

- the Technical Working Group is instructed by this Conference to continue its work on hazard characterization of wastes subject to the Basel Convention (decision III/12);
- the Technical Working Group has already commenced its work on the development of lists of wastes which are hazardous and wastes which are not subject to the Convention;
- those lists (document UNEP/CHW.3/Inf.4) already offer useful guidance but are not yet complete or fully accepted;
- the Technical Working Group will develop technical guidelines to assist any Party or State that has sovereign right to conclude agreements or arrangements including those under Article 11 concerning the transboundary movement of hazardous wastes.

1. Instructs the Technical Working Group to give full priority to completing the work on hazard characterization and the development of lists and technical guidelines in order to submit them for approval to the fourth meeting of the Conference of the Parties;
2. Decides that the Conference of the Parties shall make a decision on a list(s) at its fourth meeting;
3. Decides to adopt the following amendment to the Convention:

"Insert new preambular paragraph 7 bis:

Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention;

Insert new Article 4A:

1. Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A, to States not listed in Annex VII.
2. Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under Article 1(i)(a) of the Convention which are destined for operations according to Annex IV B to States not listed in Annex VII. Such transboundary movement shall not be prohibited unless the wastes in question are characterised as hazardous under the Convention.

Annex VII

Parties and other States which are members of OECD, EC, Liechtenstein."

END