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**Open-ended Working Group of the Basel Convention
on the Control of Transboundary Movements of
Hazardous Wastes and Their Disposal**

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Item 7 (d) of the provisional agenda*

**Legal and compliance matters: addressing the interpretation
of paragraph 5 of Article 17 of the Convention**

**Interpretation of paragraph 5 of Article 17: comments received
pursuant to decision VIII/30**

Note by the Secretariat

Attached in the annex to this document are the responses that the Secretariat has received as at 20 June 2007, pursuant to decision VIII/30 of the Conference of the Parties. Responses are reproduced in the language of submission to the Secretariat.

* UNEP/CHW/OEWG/6/1/Rev.1.

Annex

A. Response received from the European Community and its Member States

The European Community and its Member States forward this submission pursuant to paragraph 3 of Decision VIII/30, for consideration by the Open-ended Working Group and the Conference of the Parties, with a view to developing a draft decision on an agreed interpretation of the expression "who accepted them" in Article 17(5) of the Basel Convention. The European Community and its Member States understand such a decision as a favourable contribution to facilitate the entry into force of amendments, including the amendment contained in decision III/1 (the "Ban Amendment").

I. The new roadmap: solving the interpretation of the expression "Parties who accepted them" in Article 17(5)

1. The second sentence of Article 17(5) reads as follows (emphasis added): "*Amendments adopted in accordance with paragraphs 3 or 4 above shall enter into force between **Parties having accepted them** on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the **Parties who accepted them** ...*".

2. The Conference of the Parties at its eighth meeting (COP8), in decision VIII/30, urged all Parties to make every effort to facilitate the early resolution of an interpretation of the expression "who accepted them". This decision is important on several grounds:

(a) Based on the principle that the Parties have the ultimate power to agree on the interpretation of the Convention, it clarifies the purpose of the exercise, which is to develop a draft decision on an agreed interpretation of Article 17(5).

(b) It provides a pragmatic approach to solve difficulties in the interpretation of the Convention rather than a continued debate on abstract options as the Parties have agreed to address specifically the interpretation of the expression "who accepted them".

II. Identification of the specific source of ambiguity in Article 17(5): the variation of the meaning of the term "accepted"

3. At COP8, a Conference Room Paper submitted by many Parties expressed the view that the expression "who accepted them" raises a problem of ambiguity. There were subsequently some general discussions among Parties on whether Article 17(5) raised concerns of ambiguity, which led to the open language eventually contained in decision VIII/30. In the first recital it is recognised that many Parties consider the expression "who accepted them" Article 17(5) to be ambiguous and in para. 2 the Open-ended Working Group (OEWG) is requested to address further the issue of interpretation taking account of the perception of ambiguity held by many Parties.

4. The difference of views expressed so far concerning the possible interpretation of Article 17(5) is already an indication of the existence of ambiguity, since the expression "who accepted them" seems susceptible to more than one meaning (cf. definition of ambiguity in the Oxford English Dictionary and the Cambridge Dictionary). One purpose of this submission is to facilitate the work of the OEWG by identifying precisely, as a preliminary point, the source of such perceived ambiguity.

5. The report of COP1 refers to the following statement by Japan: Japan observed that the word "accepted" as used in Article 17(5) varied in meaning and that clarity as to the use of the term would be essential for implementing the Basel Convention (see end of para. 40).

6. Ambiguity arises indeed from the fact that the meaning of the term "accepted" is different in two expressions contained in that sentence, as follows:

(a) The use of the term "accepted" in the first part of the sentence ("Parties having accepted them") is clear to all and unproblematic. The term is here equivalent to "ratified", in line with the ordinary meaning or literal sense.

(b) However, the second use of the term “accepted”, in the expression “who accepted them”, does not seem to correspond to the literal interpretation of the term “accepted”. Indeed, no Party has by now expressed the view that the term “accepted” should be construed as meaning “ratified” also in that expression.

7. This creates a major interpretative difficulty. In the view of the EU, the best solution seems to be a subsequent agreement between the Parties regarding the interpretation of the Convention, in accordance with Article 31(3)(a) of the Vienna Convention on the Law of Treaties. The OEWG should, in accordance with decision VIII/30, develop a draft decision on an agreed interpretation of the expression “who accepted them”.

III. The informal advice by the depositary did not address the specific ambiguity created by the expression “Parties who accepted them”

8. The informal advice from the UN OLA explained its own practice where a treaty is “silent or ambiguous” on the total number of Parties that should be counted for the purpose of determining the entry into force of amendments. Its reasoning focused on treaties which are ‘silent’, which seems rather unproblematic and not the issue under discussion in the context of Basel Convention.

9. The general concept of ambiguity addressed by the informal UN OLA advice only referred to a very broad issue (i.e. the ambiguity that arises in the cases where the entry into force clause requires a particular percentage of Parties to have accepted to be bound by an amendment).

10. This is different from the specific concern of the Parties of the Basel Convention in relation to the difficulty in addressing the meaning of the expression “who accepted them”. Since that advice was made in general or abstract terms, the Parties cannot draw any direct conclusion for the purpose of solving the specific ambiguity of that expression, which is the question to be addressed by Parties according to decision VIII/30.

11. Solving a specific interpretative issue, such as the meaning of the expression “who accepted them”, is a responsibility of the Parties themselves in accordance with Article 31 of the Vienna Convention on the Law of the Treaties relating to interpretation. For this reason, the Parties have now undertaken to resolve the interpretation of this ambiguous expression.

12. If a treaty raises serious interpretative difficulties, as in the case of Article 17(5) of the Basel Convention, recourse to a default interpretation does not seem to be appropriate, since each case of ambiguity is by definition different and depends on the specific language used and the circumstances of the particular case. In such cases, Parties should instead assess the language and bear the responsibility to find a suitable interpretation with regard to the ordinary meaning of the words, their context and in the light of object and purpose of the provision in question in accordance with the criteria contained in the Vienna Convention on the Law of the Treaties.

IV. The qualifying expression “who accepted them” must have a purpose

13. The countries adopting the Basel Convention decided to add the expression “who accepted them” after the word “Parties”. Therefore, the specific context and the purpose of this expression were to qualify the main term “Parties”. Accordingly, as for all treaty language, it must be assumed that the qualifying expression “who accepted them” was intended to, and should have, a useful meaning. In the view of the EU, the starting point cannot be to assume that it was superfluous and with no purpose.

V. A proposed interpretation: reading “who accepted them” as “who adopted them”

14. In the view of the EU, the solution to solve the ambiguity should be that the Parties agree on the following interpretation: The expression “who accepted them” is to be read as “who adopted them”. In that case, the qualifying expression and the whole sentence would make sense by adapting the sense of one single word (“accepted” by “adopted”) having regard to the object and the purpose of this provision, instead of ignoring the whole expression.

(a) Where other treaties have introduced qualifying language after the word “Parties” in similar provisions, the purpose has been to restrict it to a specific number of Parties, and specifically the Parties at the time of adoption. In addition to the example mentioned by the UN OLA on the International Criminal Court, the UN Convention to Combat Desertification contains in Article 30(4) comparable qualifying language when it states that amendments come into force after ratification by

at least two thirds of the Parties to the Convention "which were Parties at the time of the adoption of the amendment". The fact that the Basel Convention also contains qualifying language after the word "Parties" can be an indication of a similar purpose.

(b) In addressing the object and purpose, it is noted that both words ("accepted" and "adopted") have a partial commonality, as they have a general connotation of expressing consent (the difference being the moment in the process where it is expressed).

(c) It is also noted that a number of notes from the Secretariat (e.g. UNEP/CHW.5/3 "the amendment has to be ratified by 3/4 of the Parties present at the time of the adoption") were actually based on this interpretation, and no COP reports reflected a disagreement at the time on such documents.

(d) Parties to the Convention have the ultimate power to agree on the interpretation of the Convention (as reflected in decision VIII/30). In particular, they can enter into subsequent agreements regarding the interpretation of the treaty or the application of its provisions (Article 31(3)(a) of the Vienna Convention). There are precedents of decisions where Parties, for the purpose of facilitating the entry into force of amendments, have agreed on an interpretation, by which the relevant number of Parties is that at the time of adoption of the amendment. Such interpretative decisions have even taken place in treaties which were 'silent' on this issue (CITES, Ramsar), and seem even more warranted in cases raising serious interpretative doubts such as the Basel Convention. This positive interpretation is also coherent with the assumption that Parties are favourable to the entry into force of the amendments that they adopted by consensus (and which, in any case, will only bind those that ratify them).

15. Article 17(5) might be construed by some as requiring ratification of the amendment by three-fourths of the current Parties. However, the EU does not share this view for the following reasons:

(a) This approach does not suit the existing treaty language in the Basel Convention. This approach would need to assume that the whole expression "Parties who accepted them" would have to be notionally deleted with only the word "Parties" to be retained. This runs counter the notion that used words need to be construed in a meaningful way.

(b) This approach would imply disregarding the expression in question, instead of addressing it, as has been decided in decision VIII/30. Insisting on this approach on the basis of general considerations would not fulfil the explicit mandate of the work to be carried out by the Parties, which are called upon to "make every effort to facilitate the early resolution of an interpretation of the expression 'who accepted them'".

VI. Conclusion – possible way forward

16. In the view of the EU, there appear to be sufficient objective grounds for the Parties to agree that the expression "who accepted them" should be read as meaning "who adopted them". In fact, there seems to be no alternative feasible approach to resolve the interpretation of the expression "who accepted them", as requested by decision VIII/30.

17. As recalled in decision VIII/30, Parties have the power to agree on the interpretation. This can be done by subsequent agreement of the Parties (Art 31(3)(a) of the Vienna Convention). As under the CITES and Ramsar Conventions, the Parties to the Basel Convention should start expeditiously to develop a draft decision at the sixth meeting of the OEWG on an agreed interpretation of Article 17(5) for consideration at the next meeting of the Conference of the Parties.

B. Response received from Norway

Reference is made to COP Decision VIII/30, and in the request for comments.

For the upcoming discussions in the Open-ended Working Group, with the intention to develop a draft decision on an agreed interpretation of Article 17.5, Norway would like to submit the following views:

1. It should be taken as a starting point for the discussion that the Parties who agreed on Decision III/1 at COP 3 had the intention to facilitate the entry into force as soon as possible of the amendment to the Convention contained in Decision III/1. This intention has repeatedly been underlined by the COP in decisions on the issue. Unless otherwise explicitly stated by the Parties in their decisions, this will certainly be the general understanding when Parties agree to amend a convention. This fact and clear intention should be taken into account in interpreting Article 17.5.
2. The Parties to the Convention have the ultimate power to agree on the interpretation of the Convention, re Decision VIII/30, last recital.
3. Article 17.5 explicitly refers to “the Parties who accepted them”. (The article does NOT say “by at least three-fourth of the Parties to the Convention”.) The understanding of the wording of Article 17.5 must therefore be that it refers to three-fourth of the (number of) Parties who accepted Decision III/1 when the decision was adopted at COP III. The wording of Article 17.5 can not reasonably be said to be ambiguous on this point.
4. Hence, it is the view of Norway that the solution to the issue raised concerning the interpretation of Article 17.5 should be that the Parties agree that the expression “who accepted them” is to be read as “who adopted them”, meaning the (number of) Parties at the time of the adoption of the decision in question. We also refer to the fact that this interpretation of Article 17.5 has been expressed by the Secretariat in documents presented to the COP on earlier occasions, and this interpretation has not been challenged by the Parties. We also refer to resolutions made by the parties to the CITES and the Ramsar conventions (CITES Resolution 4.27 and Ramsar Resolution 4.1), where the Parties agreed on similar interpretation of the amendment procedures of those conventions, even if the wording of the relevant articles of those conventions are considerably less clear than the wording of Article 17.5 of the Basel Convention.

C. Response received from the United States of America

In response to the invitation set forth in paragraph 3 of COP-8 Decision VIII/30, the United States submits the following comments for consideration by the Open-ended Working Group and the Conference of the Parties regarding interpretation of Article 17(5) of the Basel Convention.

I. Context

1. As reflected in Decision VIII/30, the impetus for the invitation to Parties and others to comment on Article 17(5) is the failure to achieve entry into force of the so-called “Ban Amendment” contained in Decision III/1 in the eleven years that have elapsed since its adoption at COP-3. While this longstanding and increasingly charged issue has set the stage for the invitation to comment, equally longstanding UN practice supports a default rule, in the absence of a clear intention in a treaty to provide otherwise, which the United States supports. Moreover, issues of treaty interpretation must be addressed through a lens that is not colored by the desire to reach a particular outcome on that or any other single issue. Decisions taken here may be cited as precedent in other situations involving very different facts. Accordingly, every effort must be made to ensure that core principles of treaty interpretation are respected.

II. Summary

2. As explained in the following paragraphs, the United States respectfully submits that:
 - (a) insofar as Article 17(5) presents interpretive difficulties, the Depositary has identified a well established default rule to guide interpretation;
 - (b) the relevant default rule calls for using the “current time” approach, not the “fixed time” approach (or some variant thereof) to calculate whether sufficient instruments of ratification, accession, acceptance, etc., have been deposited to bring an amendment into force;

(c) if, notwithstanding the default rule, Parties undertake to clarify the meaning of Article 17(5), they will need to do so by consensus; and

(d) any such consensus clarification should be based on consideration of Article 17(5) taken as a whole, and should take care not to undermine the well established meaning under international treaty law of the term “accepted”.

III. Relevant Articles of the Basel Convention

3. Articles 17(3) and (5) of the Basel Convention provide, respectively, that:

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting, and shall be submitted by the Depositary to all Parties for ratification, approval, formal confirmation or acceptance.

5. Instruments of ratification, approval, formal confirmation or acceptance of amendments shall be deposited with the Depositary. Amendments adopted in accordance with paragraphs 3 or 4 above shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted them or by at least two thirds of the Parties to the protocol concerned who accepted them, except as may otherwise be provided in such protocol. The amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval, formal confirmation or acceptance of the amendments.

(Emphasis supplied.)

IV. Discussion

4. Adoption of the Ban Amendment at COP-3 has spawned considerable discussion over several years regarding the meaning of the entry into force provision set forth in Article 17(5) of the Basel Convention. Discussion has focused on the so-called “current time” approach versus the so-called “fixed time” approach to calculating whether sufficient instruments of ratification, accession, acceptance, etc., have been deposited to constitute the necessary three-fourths ratio set forth in Article 17(5). In addition, as described below, the non-governmental organization Basel Action Network (BAN) has put forward a novel, but unsupportable, third approach that is a hybrid of the “current time” and “fixed time” approaches.

5. Under the “current time” approach, both the numerator and the denominator of the ratio are based on current information. The numerator is the number of depositing Parties who are currently Basel Parties. The denominator is the current total number of Basel Parties. Under this approach, the number of ratifications that would be needed to bring the Ban Amendment into force today would be 127 – based on 169 current Parties.¹

6. Under the alternative “fixed time” approach, both the numerator and the denominator of the ratio are based on information at a fixed point in time – the time a treaty amendment is adopted. For example, counting all Basel Parties attending COP-3, at which the Ban Amendment was adopted, the denominator would be 82.² In that case, entry into force would require a numerator of 62 – representing deposits of instruments by 62 of those 82 Parties. To date, deposits have been made by only 41 of those 82 Parties – 21 short of the number needed for entry into force.

7. Deciding on a “fixed time” approach would not end the inquiry, since the approach contemplates a number of possible variants. Indeed, applying the “fixed time” approach would require that several subsidiary interpretive questions also be addressed, such as whether the denominator should reflect (1) the total number of Parties at the time an amendment is adopted; (2) the total number of Parties attending the COP where the vote occurred; (3) the total number of Parties

¹ For purposes of the examples here, the numerical counts of Parties include the EC in addition to relevant EC Member States. However, the appropriateness of including both under any approach remains an open issue.

² See footnote 1, above. The remaining 22 deposits (for a total of 63, to date) come from Parties who joined the Convention after COP-3. Under the “fixed time” approach, those deposits would not be counted in the entry into force ratio.

present at the time of the vote; (4) the total number of Parties present and voting; (5) the total number of Parties present and voting in favor of the amendment; or (6) some other alternative.³

8. Going a step further and conflating these two distinct approaches, BAN has proposed a ratio that uses the numerator from the “current time” approach, thereby counting all 63 of the instruments that have been deposited – including by Parties that joined Basel after COP-3. At the same time, it proposes to use the denominator from the “fixed time” approach, counting only the 82 Basel Parties participating in COP-3.⁴

9. The United States submits that neither logic nor the plain language of Article 17(5) would support such an interpretation. As noted above, it is not appropriate to utilize an approach just because it gives a desired result in a given case. The interpretation applied to the Ban Amendment would also apply to any other amendment – it must be supportable. BAN’s proposal fails this test.

10. In a May 5, 2004, legal opinion prepared in response to inquiries from the Basel Secretariat, the Assistant Secretary-General in charge of the UN Office of Legal Affairs (UN OLA), which acts as the Depositary for the Basel Convention, confirmed UN OLA’s view that the “current time” approach is the more appropriate one in the Basel Convention context. The UN’s legal opinion notes that the “normal practice” is to “calculate the number of acceptances on the basis of the number of parties to the treaty at the time of deposit of each instrument of acceptance of an amendment.” UN OLA noted that where, as here, there are no *travaux préparatoires* or other documents to provide assistance to the treaty interpretation, the “normal practice” of the UN must be applied. UN OLA cited its application of the current time approach to the amendment of Article 61 of the UN Charter, to the amendments to the Constitution of the WHO, and to the amendments to the Convention on the IMO. Based on practices dating back more than three decades, the Depositary found that the default rule – in the absence of a clear intention in a treaty to provide otherwise – would be to look at the current number of Parties to a treaty in terms of the entry into force of amendments. In contrast, the Depositary found that the “fixed time” approach is appropriately used only when the Parties’ intent to do so is clear, which it found not to be the case regarding Basel Convention Article 17(5).

11. In their submission of 29 March 2007, the European Community and its Member States acknowledge the advice provided by UN OLA but propose that “[i]f a treaty raises serious interpretative difficulties, as in the case of Article 17(5) of the Basel Convention, recourse to a default interpretation does not seem appropriate.” The logic of such an assertion is difficult to fathom inasmuch as it is especially important to be able to use default rules in situations where interpretive difficulties are real and significant, and may effectively foreclose developing an interpretive consensus.

12. The United States takes note of the proposal by the European Community and its Member States calling for the Parties to endeavor to reach a subsequent agreement among the Parties regarding the interpretation of the Basel Convention, in accordance with Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT). Article 31 sets out a general rule of treaty interpretation and Article 31(3)(a) provides that there shall be taken into account, *inter alia* and together with the context, “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”

13. The United States further notes that if the Parties choose to develop such a subsequent interpretative agreement regarding Article 17 pursuant to VCLT Article 31(3)(a), it will need to be adopted by consensus at a Conference of the Parties, rather than by majority voting. In addition, there will need to be a process whereby Parties not present at the relevant Conference of the Parties have an opportunity to express their views – even if that means breaking consensus. Consensus is imperative because entry into force provisions provide the quintessential case in which there must be one rule for all of the Parties. It would not work for a phrase such as “who accepted them” to have different meanings for different Parties, depending on whether they join in a subsequent agreement interpreting the clause. The potential consequences for entry into force of Basel Convention amendments would be entirely too mischievous.

14. The invitation set forth in Decision VIII/30 to address the interpretation of Article 17(5) of the Basel Convention acknowledges the difference of views that have been expressed regarding the

³ The European Community and its Member States have glossed over these variants – with undifferentiated references to several alternatives in paragraph 14 of their submission of 29 March 2007.

⁴ See footnotes 1 and 2, above.

meaning of that Article. The thrust of the commentary submitted by the EC and its Member States is that the term “accepted” should retain its standard meaning in the first instance, but later in the same sentence it should be construed to mean “adopted” – which is very different. In truth, such a result would appear to constitute a *de facto* amendment of the Basel Convention, which should more appropriately be addressed as a treaty amendment, not an interpretation.

15. In addition to being accomplished by consensus, any clarification of Article 17(5) should be based on consideration of the article taken as a whole, and should take care not to undermine the well established meanings in international treaty law of the terms “accepted” and “adopted.”

16. As noted above, Article 17(5) provides that an amendment would enter into force after ratification by three-fourths of the Parties “who accepted them.” Both the “fixed time” approach and BAN’s novel approach would require that the Parties interpret at least one (but not all) of the Article’s references to Parties “who accepted them” to mean “who adopted them.” There are several difficulties with such an interpretation.

17. As a matter of treaty law, the word “acceptance” is not the equivalent of “adoption.” “Acceptance” is akin to ratification, in that it refers to the 2nd step that a party takes to indicate its intention to be bound by an amendment, not the 1st step of adopting the amendment. In fact, VCLT Article 2(b) specifically defines “acceptance” (along with “ratification,” “approval,” and “accession”) to mean the “international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.” (Compare VCLT Article 9 (Adoption of the text) and VCLT Article 16 (Exchange of deposit of instruments of ratification, acceptance approval or accession).) In order to utilize either the “fixed time” approach or the BAN alternative, the phrase “three-fourths of the Parties who have accepted them” would have to be interpreted in a manner inconsistent with the VCLT, since it would require the phrase “accepted them” to be understood to mean “adopted them”.

18. The “fixed time” approach – *i.e.*, to effectively substitute “adoption” for the second use of “acceptance” so that ratification by three-fourths of the Basel Parties at the time of adoption would bring the ban amendment into force -- would lead to anomalous results. First, it would mean that the word “accepted” – used three times in paragraph 5 would have two different meanings. The word would twice mean “acceptance” as “ratification”, and once as “acceptance” in the “adoption” sense. The alternative of substituting “adoption” for “acceptance” throughout Article 17(5) would also yield anomalous results. Article 17(3) provides for a situation in which the amendment would be “adopted by a three-fourths majority of the Parties present.” Reading Article 17(5) in conjunction with that article and substituting “adoption” for “acceptance” in paragraph 5 would lead to confusion since it would suggest that an amendment only enters into force upon the ratification of three-fourths of those States that “adopted” the amendment. Under such a reading, a contested amendment adopted by a bare minimum three-fourths vote would require fewer acceptances to enter into force (three-fourths of the three-fourths voting for the amendment) than an amendment adopted by consensus (three-fourths of those reaching consensus). It is so unlikely that such a result would be intended that it undermines any argument for the interpretation.

19. A resolution that would suggest that the number of Parties required for entry into force is “three fourths of the Parties who adopted” the amendment or “three fourths of the Parties at the time of adoption” of the amendment would, at a minimum, be inconsistent with the text of the Basel Convention, since one cannot interpret “acceptance” to mean “adoption”. Given the different and well understood meanings of these two terms, treating them as interchangeable would set a bad precedent, which could lead to uncertain and untoward results in other settings in situations that cannot now be foreseen. The Parties have a responsibility to avoid such consequences.