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**Conference of the Parties to the Basel Convention
on the Control of Transboundary Movements of
Hazardous Wastes and Their Disposal**

Ninth meeting

Bali, 23–27 June 2008

Item 7 (i) of the provisional agenda*

**Implementation of the decisions adopted by the
Conference of the Parties at its eighth meeting:
legal matters**

**Addressing the interpretation of paragraph 5 of Article 17 of the
Basel Convention: compilation of comments received pursuant to
decisions VIII/30 and OEWG-VI/16**

Note by the Secretariat

Attached in annex I to the present note are responses received by the Secretariat pursuant to decision VIII/30 of the eighth meeting of the Conference of the Parties. Annex II to the present note contains a compilation of comments received by the Secretariat pursuant to decision OEWG-VI/16 adopted by the sixth session of the Open-ended Working Group. Responses are reproduced as received, and are presented unedited.

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Annex I

Compilation of comments received pursuant to decision VIII/30 of the eighth meeting of the Conference of the Parties

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 Depository 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 unsupported, 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 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 Depository 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

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.

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.

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 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.

Annex II

Compilation of comments received pursuant to decision OEWG-VI/16 of the sixth session of the Open-ended Working Group

A. Response received from Bahrain

Proposal on the Development of a Draft Decision to Reach an Agreed Interpretation of Paragraph 5 of Article 17 of the Basel Convention for consideration by the Conference of the Parties at its ninth meeting from Bahrain

[The Conference of the Parties]

1. [Desiring to clarify the requirements for the entry into force of amendments to the Convention in paragraph 5 of Article 17 of the Basel Convention to facilitate their entry into force].
2. [(Agrees) (affirms) that matters of substance relating to interpretation of treaties should be resolved in accordance with established practices of international law, including Article 31 of the Vienna Convention on the Law of Treaties].
3. [agrees that paragraph 5 of Article 17 of the Basel Convention [may] presents[s] some ambiguities as to the requirements for the entry into force of amendments the Convention [to some Parties].
4. [emphasizes that the Parties to the Convention have the ultimate power to agree on the interpretation [and application] of the Convention].
5. [agrees that any decision adopted by a Conference of the Parties would need to be adopted **in accordance with rule 40 of the rules of procedure of the Basel Convention** in order to validly serve as an aid to the interpretation of the paragraph 5 of Article 17 of the Basel Convention].
6. resolves that the conditions for entry into force of an amendment to the Convention, as set out in paragraph 5 of Article 17 of the Basel Convention, shall be deemed to have been satisfied upon the ninetieth day after the receipt by the Depositary of the instrument of ratification, approval, formal confirmation or acceptance from: **[at least three-fourths of the current Parties to the Convention]**.
7. [determines that this decision shall constitute a subsequent agreement in the sense used in Article 31, paragraph 3 (a), of the Vienna Convention on the Law of Treaties].
8. [resolves that this subsequent agreement shall enter into force ... [Parties may wish to consider how and when subsequent agreement might enter into force]].

B. Response received from Canada

The Government of Canada forwards this submission to the Secretariat pursuant to paragraph 6 of decision OEWG-VI/16 “Addressing the interpretation of paragraph 5 of Article 17 of the Convention”, which requested comments and views on the annex to the decision as well as proposals on the development of a draft decision, for consideration of an intersessional working group, if convened, and of the Conference of the Parties at its ninth meeting.

When the meaning is ambiguous, the current-time approach should apply

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***

Traditionally Canada has supported the current-time approach, where the number of instruments of ratification (or approval, formal confirmation or acceptance) required for entry into force of an amendment is calculated on the basis of the percentage of the Parties at the time each instrument is deposited. This is the approach advocated by the United Nations Office of Legal Affairs. Canada tends to agree that Article 17(5) may present ambiguities as to the requirements for the entry into force of amendments to the Convention, but believes such ambiguities should be resolved as suggested by the

established practice of the UN Office of Legal Affairs. As the UN Office of Legal Affairs stated in its March 8th, 2004 opinion (emphasis added), “**where the treaty is silent or ambiguous** on the matter, the practice of the Secretary-General 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.”... “**It is only when a treaty specifies** that the percentage should be calculated based upon the number of parties at the time of adoption of an amendment that the depositary, in compliance with the treaty itself, can adopt the “fixed time approach.” In Canada’s view, as it cannot be said that Article 17(5) clearly requires that the percentage of required instruments must be calculated based upon the number of parties at the time of adoption of an amendment, the current-time approach should therefore apply.

Any subsequent agreement and practice on the interpretation of Article 17(5) must include all Convention Parties

Canada agrees that matters of substance relating to interpretation of treaties should be resolved in accordance with international law and practice, including Article 31 of the Vienna Convention on the Law of Treaties, and that the Parties to the Convention have the ultimate power to agree on the interpretation and application of the Convention. While the Rules of Procedure may allow Parties to take decisions by a two-thirds majority vote, any agreement between the Parties regarding the interpretation or application of its provisions is of a different order. In Canada’s view, any decision by the Conference of the Parties regarding the interpretation of Article 17(5) must be adopted by consensus in order to validly serve as an aid to the interpretation of Article 17(5) and constitute a “subsequent agreement between the parties” in the sense used in Article 31(3) (a) of the Vienna Convention on the Law of Treaties.

Canada looks forward to having a constructive dialogue at the ninth Conference of the Parties.

C. Response received from China

As requested by the Secretariat of the Basel Convention, the State Environmental Protection Administration, as Competent Authority of China for Basel Convention would like to inform you of our comments on the annex to decision OEWG-VI/16 as follows. We are sorry that it’s a little bit late, but we still hope it will help to address the current issue.

Since the Basel Ban Amendment was adopted in 1995, all other member parties who joined the Convention on a later date should have been well aware of the Amendment and its implementation in future. So it is reasonable to assume that these member parties were in support of the entire Convention including the amendment at the time they joined the Convention, and there is already an international recognition of the principle underlying the Ban Amendment. Therefore, any further delay to its entry into force would only send a wrong signal to the international community that member parties of the Convention cannot resolve key issues within its own ambit.

The Chinese government strongly supports that members have the ultimate power to agree on the interpretation and application of any articles of the Convention and supports to push ahead the early entry into force of the Amendment.

Based on the above consideration, we think the “fixed-time approach” is a reasonable interpretation of paragraph 5 of Article 17. So we support “Option 1 Alternative 2” and “Option 2” stipulated in annex to decision OEWG-VI/16.

Thank you for your cooperation.

D. Response received from Costa Rica

Con relación a la comunicación de la Secretaría del Convenio de Basilea de fecha 24 de octubre de 2007 relativa a los posibles elementos para una decisión para llegar a un acuerdo con relación la interpretación del Artículo 17, párrafo 5 del Convenio de Basilea para consideración de la novena reunión de la Conferencia de las Partes, el Gobierno de Costa Rica manifiesta lo siguiente:

Respecto al párrafo 5 del Anexo a la decisión OEWG-VI/15, Costa Rica considera que el Convenio de Basilea contiene ya reglas específicas para la toma de decisiones en el Reglamento de las Reuniones de la Conferencia de las Partes. Por lo tanto, consideramos que la adopción de las decisiones debe ser conforme al Artículo 40 de este Reglamento, que establece, como procedimiento alternativo para alcanzar un acuerdo por consenso sobre los asuntos de fondo, la adopción de decisiones por mayoría de dos tercios de las Partes presentes y votantes. Por consiguiente, Costa Rica apoya la inclusión del párrafo 5 alternativa 1 en la decisión sobre la interpretación del Artículo 17, párrafo 5, para consideración de la novena reunión de la Conferencia de las Partes.

Con relación a la interpretación del Artículo 17.5 del Convenio, el Gobierno de Costa Rica acoge la tesis del momento actual. Con base en esta interpretación, las enmiendas al Convenio de Basilea entrarán en vigor el nonagésimo día después de la fecha en que el Depositario haya recibido los instrumentos de ratificación, aprobación, confirmación formal o aceptación por tres cuartos de las Partes actuales en el Convenio. Por lo tanto, Costa Rica apoya la inclusión del párrafo 6 alternativa 1 del Anexo a la decisión OEWG-VI/15, para consideración de la novena reunión de la Conferencia de las Partes.

E. Response received from El Salvador

(i) Spanish version

ANTECEDENTES

Con fecha 24 de octubre de 2007, se envió el siguiente comunicado en base a la reunión sostenida en septiembre del corriente en Ginebra, Suiza:

[La Conferencia de las Partes

1. [Deseando clarificar los requerimientos para la entrada en vigencia de las enmiendas al Convenio en el párrafo 5 del artículo 17 del Convenio de Basilea para facilitar la entrada en vigencia;]
2. [[Acuerda] [Afirma] que el asunto sustancial relativo a la interpretación de los tratados deberían ser resueltos en concordancia con las prácticas establecidas de la ley internacional, incluyendo el artículo 31 de la Convención de Viena sobre el Derecho de los Tratados;]
3. [Acuerda que el párrafo 5 del artículo 17 del Convenio de Basilea [puede] presentar [o presenta] algunas ambigüedades como los requerimientos para la entrada en vigencia de las enmiendas al Convenio de Basilea [a algunas Partes];]
4. [Enfatiza que las Partes del Convenio tienen la última palabra para acordar sobre la interpretación [y aplicación] del Convenio;]
5. [Acuerda que cualquier decisión adoptada por una Conferencia de las Partes necesitaría ser adoptada

Alternativa 1: [en concordancia con la regla 40 de las reglas de procedimiento del Convenio de Basilea

Alternativa 2: [por consenso]

Alternativa 3: [sin oposición]

En orden a ser útil como una ayuda a la interpretación del párrafo 5 del artículo 17 del Convenio de Basilea;]

6. [Opción 1: *Resuelve* que las condiciones para la entrada en vigencia de una enmienda al Convenio, como se expone en el párrafo 5 del artículo 17 del Convenio de Basilea, serán estimadas por haber sido satisfechas a los 90 días después de ser recibidas por el Depositario del instrumento de ratificación, aprobación, confirmación formal o aceptación de:

Alternativa 1: [al menos las tres cuartas partes de las Partes actuales en el Convenio]

Alternativa 2: [al menos las tres cuartas partes de los estados y organizaciones de integración económica y/o política que fueron partes en el Convenio a la fecha en la cual la enmienda fue adoptada]

Alternativa 3: [un número de Partes equivalente a al menos las tres cuartas partes del número de estados y organizaciones de integración económica y/o política que fueron partes en el Convenio a la fecha en la cual la enmienda fue adoptada]]

7. [Opción 2: *Acuerda* que en la aplicación del párrafo 5 del Artículo 17 del Convenio de Basilea, las tres cuartas partes serán calculadas en base a aquellos estados y organizaciones de integración económica y/o política que fueron partes en el Convenio a la fecha en la cual la enmienda fue adoptada]
8. [Opción 3: *Acuerda* que en la aplicación del párrafo 5 del Artículo 17 del Convenio de Basilea, las tres cuartas partes serán calculadas en base al número de Partes en el momento del depósito de cada instrumento de ratificación, aprobación, confirmación formal o aceptación de las enmiendas]
9. [*Determina* que esta decisión constituirá un acuerdo subsiguiente en el sentido usado en el Artículo 31, párrafo 3 (a), de la Convención de Viena sobre el Derecho de los Tratados;]
10. [*Resuelve* que este subsiguiente acuerdo entrará en vigencia... [Las Partes pueden considerar cómo y cuándo tal subsiguiente acuerdo podría entrar en vigencia]]

COMENTARIOS

El mencionado comunicado solicita enviar comentarios a la interpretación al párrafo 5 del artículo 17 del Convenio de Basilea, por lo que se presentan los siguientes comentarios:

1. Después de analizar el contenido del párrafo 5 del artículo 17 del Convenio de Basilea, se concluye que cualquier decisión adoptada por una Conferencia de las Partes debe ser adoptada, de acuerdo a la Alternativa 1 del punto 5, “en concordancia con la regla 40 de las reglas de procedimiento del Convenio de Basilea”. Por tanto, es necesario considerar esta alternativa para que sea congruente con las reglas de procedimiento establecidas en el mencionado Convenio.
2. En cuanto a la frase establecida en el párrafo 5 del Artículo 17, que se refiere a “las Partes que las que las hayan aceptado”, tiene el mismo significado que la frase “las Partes que las hayan adoptado”.
3. Para facilitar la interpretación del párrafo 5 del Artículo 17; debe adoptarse la alternativa 1 de la opción 1, del punto 6; que establece que “las condiciones para la entrada en vigencia de una enmienda al Convenio, como se expone en el párrafo 5 del artículo 17 del Convenio de Basilea, serán estimadas por haber sido satisfechas a los 90 días después de ser recibidas por el Depositario del instrumento de ratificación, aprobación, confirmación formal o aceptación **de al menos las tres cuartas partes de las Partes actuales en el Convenio**”. En este caso, la decisión deberá ser tomada por las Partes en el Convenio y no por otras organizaciones de integración económica y/o política.

ADJUNTOS

I. Convención de Viena sobre el derecho de los tratados

U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entró en vigencia enero 27, 1980.

Viena, 23 de mayo de 1969

SECCIÓN TERCERA

Interpretación de los tratados.

Artículo 31. Regla general de interpretación.

1. Un tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de estos y teniendo en cuenta su objeto y fin.
2. Para los efectos de la interpretación de un tratado. el contexto comprenderá, además del texto, incluidos su preámbulo y anexos:
 - a) todo acuerdo que se refiera al tratado y haya sido concertado entre todas las partes con motivo de la celebración del tratado;
 - b) todo instrumento formulado por una o más partes con motivo de la celebración del tratado y aceptado por las demás como instrumento referente al tratado;
3. Juntamente con el contexto, habrá de tenerse en cuenta:
 - a) todo acuerdo ulterior entre las partes acerca de la interpretación del tratado o de la aplicación de sus disposiciones;
 - b) toda práctica ulteriormente seguida en la aplicación del tratado por la cual conste el acuerdo de las partes acerca de la interpretación del tratado;
 - c) toda forma pertinente de derecho internacional aplicable en las relaciones entre las partes.
4. Se dará a un término un sentido especial si consta que tal fue la intención de las partes.

II. Reglas de Procedimiento del Convenio de Basilea.

Rule 40

1. The Parties shall make every effort to reach agreement on all matters of substance by consensus. If all efforts to reach consensus have been exhausted and no agreement reached, the decision shall, as a last resort, be taken by a two-thirds majority vote of the Parties present and voting, unless otherwise provided by the Convention, the financial rules referred to in paragraph 3 of article 15 of the Convention and the present rules of procedure.
2. Decisions of a meeting on matters of procedure shall be taken by a simple majority vote of the Parties present and voting.

3. If the question arises whether a matter is one of procedural or substantive nature, the President shall rule on the question. An appeal against this ruling shall be put to the vote immediately and the President's ruling shall stand unless overruled by a majority of the Parties present and voting.

4. If on matters other than elections a vote is equally divided, a second vote shall be taken. If this vote is also equally divided, the proposal shall be regarded as rejected.

5. For the purposes of these rules, the phrase "Parties present and voting" means Parties present at the session at which voting takes place and casting an affirmative or negative vote. Parties abstaining from voting shall be considered as not voting.

III. Artículo 17 del Convenio de Basilea.

Artículo 17

Enmiendas al Convenio

1. Cualquiera de las Partes podrá proponer enmiendas al presente Convenio y cualquier Parte en un protocolo podrá proponer enmiendas a dicho protocolo. En esas enmiendas se tendrán debidamente en cuenta, entre otras cosas, las consideraciones científicas y técnicas pertinentes.

2. Las enmiendas al presente Convenio se adoptarán en una reunión de la Conferencia de las Partes. Las enmiendas a cualquier protocolo se aprobarán en una reunión de las Partes en el protocolo de que se trate. El texto de cualquier enmienda propuesta al presente Convenio o a cualquier protocolo, salvo si en tal protocolo se dispone otra cosa, será comunicado a las Partes por la Secretaría por lo menos seis meses antes de la reunión en que se proponga su adopción. La Secretaría comunicará también las enmiendas propuestas a los signatarios del presente Convenio para su información.

3. Las Partes harán todo lo posible por llegar a un acuerdo por consenso sobre cualquier propuesta de enmienda al presente Convenio. Una vez agotados todos los esfuerzos por lograr un consenso sin que se haya llegado a un acuerdo, la enmienda se adoptará, como último recurso, por mayoría de tres cuartos de las Partes presentes y votantes en la reunión, y será presentada a todas las Partes por el Depositario para su ratificación, aprobación, confirmación formal o aceptación.

4. El procedimiento mencionado en el párrafo 3 de este Artículo se aplicará a las enmiendas de cualquier protocolo, con la salvedad de que para su adopción bastará una mayoría de dos tercios de las Partes en dicho protocolo presentes y votantes en la reunión.

5. Los instrumentos de ratificación, aprobación, confirmación formal o aceptación de las enmiendas se depositarán con el Depositario. Las enmiendas adoptadas de conformidad con los párrafos 3 ó 4 de este Artículo entrarán en vigor, respecto de las Partes que las hayan aceptado, el nonagésimo día después de la fecha en que el Depositario haya recibido el instrumento de su ratificación, aprobación, confirmación formal o aceptación por tres cuartos, como mínimo, de las Partes que las hayan aceptado o por dos tercios, como mínimo, de las Partes en el protocolo que se trate que hayan aceptado las enmiendas al protocolo de que se trate, salvo si en éste se ha dispuesto otra cosa. Las enmiendas entrarán en vigor respecto de cualquier otra Parte el nonagésimo día después de la fecha en que esa Parte haya depositado su instrumento de ratificación, aprobación, confirmación formal o aceptación de las enmiendas.

6. A los efectos de este Artículo, por "Partes presentes y votantes" se entiende las Partes que estén presentes y emitan un voto afirmativo o negativo.

IV. Artículo 15 del Convenio de Basilea.

Artículo 15

Conferencia de las Partes

1. Queda establecida una Conferencia de las Partes. El Director Ejecutivo del Programa de las Naciones Unidas para el Medio Ambiente convocará la primera reunión de la Conferencia de las Partes a más tardar un año después de la entrada en vigor del presente Convenio. Ulteriormente, se celebrarán reuniones ordinarias de la Conferencia de las Partes a los intervalos regulares que determine la Conferencia en su primera reunión.

2. Las reuniones extraordinarias de la Conferencia de las Partes se celebrarán cuando la Conferencia lo estime necesario o cuando cualquiera de las Partes lo solicite por escrito, siempre que, dentro de los seis meses siguientes a la fecha en que la solicitud les sea comunicada por la Secretaría, un tercio de las Partes, como mínimo, apoye esa solicitud.

3. La Conferencia de las Partes acordará y adoptará por consenso su reglamento interno y los de cualesquiera órganos subsidiarios que establezca, así como las normas financieras para determinar, en particular, la participación financiera de las Partes con arreglo al presente Convenio.

4. En su primera reunión, las Partes considerarán las medidas adicionales necesarias para facilitar el cumplimiento de sus responsabilidades con respecto a la protección y conservación del medio ambiente marino en el contexto del presente Convenio.

5. La Conferencia de las Partes examinará y evaluará permanentemente la aplicación efectiva del presente Convenio, y además:

- a) Promoverá la armonización de políticas, estrategias y medidas apropiadas para reducir al mínimo los daños causados a la salud humana y el medio ambiente por los desechos peligrosos y otros desechos;
- b) Examinará y adoptará, según proceda, las enmiendas al presente Convenio y sus anexos, teniendo en cuenta, entre otras cosas, la información científica, técnica, económica y ambiental disponible;
- c) Examinará y tomará todas las demás medidas necesarias para la consecución de los fines del presente Convenio a la luz de la experiencia adquirida durante su aplicación y en la de los acuerdos y arreglos a que se refiere el Artículo 11;
- d) Examinará y adoptará protocolos según proceda; y
- e) Creará los órganos subsidiarios que se estimen necesarios para la aplicación del presente Convenio.

6. Las Naciones Unidas y sus organismos especializados, así como todo Estado que no sea Parte en el presente Convenio, podrán estar representados como observadores en las reuniones de la Conferencia de las Partes. Cualquier otro órgano u organismo nacional o internacional, gubernamental o no gubernamental, con competencia en las esferas relacionadas con los desechos peligrosos y otros desechos que haya informado a la Secretaría de su deseo de estar representado en una reunión de la Conferencia de las Partes como observador podrá ser admitido a participar a menos que un tercio por lo menos de las Partes presentes se opongan a ello. La admisión y participación de observadores estarán sujetas al reglamento aprobado por la Conferencia de las Partes.

7. La Conferencia de las Partes procederá, tres años después de la entrada en vigor del Convenio, y ulteriormente por lo menos cada seis años, a evaluar su eficacia y, si fuera necesario, a estudiar la posibilidad de establecer una prohibición completa o parcial de los movimientos transfronterizos de los desechos peligrosos y otros desechos a la luz de la información científica, ambiental, técnica y económica más reciente.

(ii) English version

PREVIOUS

Communication referring to the interpretation of paragraph 5 of Article 17 of the Basel Convention, in its sixth session of Open-Ended Working Group (OEWG-VI):

[The Conference of the Parties

1. *[Desiring to clarify the requirements for the entry into force of amendments to the Convention in paragraph 5 of Article 17 of the Basel Convention to facilitate their entry into force;]*
2. *[[Agrees] [affirms] that matters of substance relating to interpretation of treaties should be resolved in accordance with established practices of international law, including Article 31 of the Vienna Convention on the Law of Treaties;]*
3. *[Agrees that paragraph 5 of Article 17 of the Basel Convention [may] present [s] some ambiguities as to the requirements for the entry into force of amendments to the Convention [to some Parties];]*
4. *[Emphasizes that the Parties to the Convention have the ultimate power to agree on the interpretation [and application] of the Convention;]*
5. *[Agrees that any decision adopted by a Conference of the Parties World need to be adopted]*

Alternative 1: [in accordance with rule 40 of the rules of procedure of the Basel Convention

Alternative 2: [by consensus]

Alternativa 3: [without opposition]

In order to validly serve as an aid to the interpretation of the paragraph 5 of Article 17 of the Basel Convention;]

6. *[Option 1: Resolves that the conditions for entry into force of an amendment to the Convention, as set out in paragraph 5 of Article 17 of the Basel Convention, shall be deemed to have been satisfied upon the ninetieth day after the receipt by the Depositary of the instrument of ratification, approval, formal confirmation, or acceptance from:*

Alternative 1: [at least three-fourths of the current Parties to the Convention]

Alternative 2: [at least three-fourths of status and political and/or economic integration organizations that were Parties to the Convention on the date upon which the amendment was adopted]

Alternative 3: [a number of the Parties equivalent to three-fourths of the number of States and political and/or economic organizations that were Party to the Convention on the date upon which the amendment was adopted]]

7. [Option 2: *Agrees* that in the application of paragraph 5 of Article 17 of the Basel Convention, three fourth of the Parties shall be calculated on the basis of those Status and political and/or economic integration organizations that were Party to the Convention on the date upon which the amendment was adopted]
8. [Option 3: *Agrees* that in the application of paragraph 5 of Article 17 of Basel Convention, three fourths of the Parties shall be calculated on basis of the number of Parties at the time of deposit of each instrument of ratification, approval, formal confirmation or acceptance of amendments;]
9. [*Determines* that this decision shall constitute a subsequent agreement in the sense used in Article 31, paragraph 3 (a), of the Vienna Convention on the Law of Treaties;]
10. [*Resolves* that this subsequent agreement shall enter into force... [Parties may wish to consider how and when such a subsequent agreement might enter into force]]

COMMENTS

The communication above requests to send comments to the interpretation on paragraph 5 of Article 17 of the Basel Convention, therefore it presents the following comments:

1. After analyzing the content of the paragraph 5 of Article 17 of the Basel Convention, it is concluded that any decision which is adopted by a Conference of the Parties must be adopted, according to the Alternative 1 of number 5 of the communication above, “**in accordance with rule 40 of the rules of procedure of the Basel Convention**”. Therefore, it is necessary to consider this alternative in order to follow accordingly the rules of procedure stated in the Convention.
2. With respect to the statement in the paragraph 5 of Article 17 of the Basel Convention, that refers to “the Parties who accepted them”, it means exactly the same as “the Parties who adopted them”.
3. In order to facilitate the interpretation of paragraph 5 of Article 17 of the Basel Convention; the alternative 1 of the option 1 of number 6 should be adopted; that states that the conditions for entry into force of an amendment to the Convention, as set out in paragraph 5 of Article 17 of the Basel Convention, shall be deemed to have been satisfied upon the ninetieth day after the receipt by the Depositary of the instrument of ratification, approval, formal confirmation, or acceptance from “**at least three-fourths of the current Parties to the Convention**”. In that case, the decision should be taken by the Parties at the Convention and not by political and/or economic organizations.

ATTACHMENTS

I. Vienna Convention on the Law of Treaties

U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entered into force January 27, 1980.
Vienna, May 23rd, 1969

SECTION 3. INTERPRETATION OF TREATIES

Article 31. General rule of interpretation

1. 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. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

II. Rules of Procedure of the Basel Convention.

Rule 40

1. The Parties shall make every effort to reach agreement on all matters of substance by consensus. If all efforts to reach consensus have been exhausted and no agreement reached, the decision shall, as a last resort, be taken by a two-thirds majority vote of the Parties present and voting, unless otherwise provided by the Convention, the financial rules referred to in paragraph 3 of article 15 of the Convention and the present rules of procedure.
2. Decisions of a meeting on matters of procedure shall be taken by a simple majority vote of the Parties present and voting.
3. If the question arises whether a matter is one of procedural or substantive nature, the President shall rule on the question. An appeal against this ruling shall be put to the vote immediately and the President's ruling shall stand unless overruled by a majority of the Parties present and voting.
4. If on matters other than elections a vote is equally divided, a second vote shall be taken. If this vote is also equally divided, the proposal shall be regarded as rejected.
5. For the purposes of these rules, the phrase "Parties present and voting" means Parties present at the session at which voting takes place and casting an affirmative or negative vote. Parties abstaining from voting shall be considered as not voting.

III. Article 17 of Basel Convention.

ARTICLE 17

AMENDMENT OF THE CONVENTION

1. Any Party may propose amendments to this Convention and any Party to a protocol may propose amendments to that protocol. Such amendments shall take due account, inter alia, of relevant scientific and technical considerations.
2. Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties. Amendments to any protocol shall be adopted at a meeting of the Parties to the protocol in question. The text of any proposed amendment to this Convention or to any protocol, except as may otherwise be provided in such protocol, shall be communicated to the Parties by the Secretariat at least six months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate proposed amendments to the Signatories to this Convention for information.
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.
4. The procedure mentioned in paragraph 3 above shall apply to amendments to any protocol, except that a two-thirds majority of the Parties to that protocol present and voting at the meeting shall suffice for their adoption.
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.
6. For the purpose of this Article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

IV. Article 15 of Basel Convention.

ARTICLE 15
CONFERENCE OF THE PARTIES

1. A Conference of the Parties is hereby established. The first meeting of the Conference of the Parties shall be convened by the Executive Director of UNEP not later than one year after the entry into force of this Convention. Thereafter, ordinary meetings of the Conference of the Parties shall be held at regular intervals to be determined by the Conference at its first meeting.

2. Extraordinary meetings of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at the written request of any Party, provided that, within six months of the request being communicated to them by the Secretariat, it is supported by at least one third of the Parties.

3. The Conference of the Parties shall by consensus agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish, as well as financial rules to determine in particular the financial participation of the Parties under this Convention.

4. The Parties at their first meeting shall consider any additional measures needed to assist them in fulfilling their responsibilities with respect to the protection and the preservation of the marine environment in the context of this Convention.

5. The Conference of the Parties shall keep under continuous review and evaluation the effective implementation of this Convention, and, in addition, shall:

(a) Promote the harmonization of appropriate policies, strategies and measures for minimizing harm to human health and the environment by hazardous wastes and other wastes;

(b) Consider and adopt, as required, amendments to this Convention and its annexes, taking into consideration, *inter alia*, available scientific, technical, economic and environmental information;

(c) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation and in the operation of the agreements and arrangements envisaged in Article 11;

(d) Consider and adopt protocols as required; and

(e) Establish such subsidiary bodies as are deemed necessary for the implementation of this Convention.

6. The United Nations, its specialized agencies, as well as any State not Party to this Convention, may be represented as observers at meetings of the Conference of the Parties. Any other body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to hazardous wastes or other wastes which has informed the Secretariat of its wish to be represented as an observer at a meeting of the Conference of the Parties, may be admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.

7. The Conference of the Parties shall undertake three years after the entry into force of this Convention, and at least every six years thereafter, an evaluation of its effectiveness and, if deemed necessary, to consider the adoption of a complete or partial ban of transboundary movements of hazardous wastes and other wastes in light of the latest scientific, environmental, technical and economic information.

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

THE CONTEXT

1. Paragraph 5 of article 17 of the Basel Convention is unclear on the requirements for entry into force of amendments. This was confirmed by the Parties in decision OEWG-VI/16 where they agreed that “paragraph 5 of article 17 presents some ambiguities as to the requirements for the entry into forced of amendments to the Convention”. In the same decision the Parties also emphasized that they, as the Parties to the Convention, have the ultimate power to agree on the interpretation of the Convention.

2. By decision OEWG-VI/16, Parties and others were requested to submit comments and views on the elements for a draft decision to reach an agreed interpretation of paragraph 5 of article 17 as well as proposals on the development of a draft decision.

THE POWER OF PARTIES TO AGREE ON THE INTERPRETATION OR APPLICATION

3. The EU would like to recall that Parties have the ultimate power to agree on the interpretation and the application of the provisions of the Convention. They should exercise this power with a view to facilitating the early entry into force of amendments that they adopted unanimously.

4. The EU notes that UN Office of Legal Affairs (UNOLA) explained its own practice where a treaty is ambiguous, as in the case of paragraph 5 of article 17 of the Convention, on the total number of Parties that should be counted for the purpose of determining the entry into force of amendments. UNOLA in its letter dated 12 February 2007 clarified that "the position of the depositary is taken on a subsidiary basis, only in the absence of a clear indication of the will of the Parties. (...) if the Parties formally agree on a particular interpretation (...) that particular interpretation would then be followed."⁵

5. Therefore, the EU would like to stress that Parties have the right and responsibility to give clear guidance to the depositary on the entry into force of amendments to the Basel Convention. Such guidance should be provided in accordance with Article 31(3) (a) of the Vienna Convention on the Law of Treaties by way of a subsequent agreement on the interpretation of the treaty or the application of its provisions.

THE FORMAT OF AN AGREEMENT ON THE INTERPRETATION OR APPLICATION

6. The EU would like to recall that there are examples of subsequent agreements on interpretation of provisions of environmental treaties. Notably, the Conferences of Parties to CITES and Ramsar Conventions resolved the ambiguity surrounding the entry into force of amendments in a simple and effective way by adopting appropriate interpretative decisions⁶. These decisions provided for interpretations leading to the early entry into force of the relevant amendments and produced their effects from the moment of their adoption.

7. A similar decision should be adopted to address the interpretative difficulty relating to the entry into force of amendments to the Basel Convention to meet the objective of quickly resolving the current ambiguity while having due regard to the broad membership of the Basel Convention⁷.

SUGGESTED WAY FORWARD

8. The EU is convinced of the importance of resolving the ambiguity in paragraph 5 of article 17 of the Basel Convention at the earliest opportunity by means of a COP decision on interpretation. To this end, the annex to decision OEWG-VI/16 is a good basis for further work.

9. A COP decision on the interpretation or application of paragraph 5 of article 17 should recall Article 31 (3)(a) of the Vienna Convention on the Law of Treaties and should be modelled upon similar decisions taken by the Conference of the Parties to Ramsar and CITES Conventions. An EU proposal for a decision is attached to the present submission.

10. Such a decision should reflect the agreement of the Parties. It would also be consistent with decision VIII/30 and allow for the entry into force of amendments that have already been adopted.

⁵ UNEP/CHW/OEWG/6/INF/9/Add.1.

⁶ Such agreements are reflected respectively in: Resolution 4.27 of the 4th meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and Resolution 4.1 of the Conference of the Contracting Parties to the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention).

⁷ The EU takes note of the fact that Parties to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context chose to address the issue of ambiguity surrounding the entry into force of amendments in article 14(4) of the Espoo Convention by amending that provision. This, however, was done on the occasion of the adoption of a much broader amendment to the Convention, where amending art. 14 (4) was only one of a wide range of issues addressed. The solution chosen by Parties of the Espoo Convention, which is a regional agreement with 40 Parties, would not be efficient in the case of the Basel Convention which has 170 Parties.

Proposal for a draft decision on the application of paragraph 5 of article 17 of the Basel Convention for consideration by the Conference of the Parties at its ninth meeting

The Conference of the Parties

Recalling article 31 (3) (a) of the Vienna Convention on the Law of Treaties;

Desiring to clarify the requirements for the entry into force of amendments to the Convention in paragraph 5 of Article 17 to facilitate their early entry into force;

1. *Agrees* that in the application of paragraph 5 of article 17 of the Basel Convention, three fourth of the Parties shall be calculated on the basis of those States and political and/or economic integration organisations that were Parties to the Convention on the date upon which the amendment was adopted;
2. *Determines* that this decision shall constitute a subsequent agreement in the sense of article 31, paragraph 3 (a) of the Vienna Convention on the Law of Treaties.
3. [process to be considered further]

G. Response received from Japan

As of 28 December, 2007

Submission by the Government of Japan
On the Annex to the Decision of Open-Ended Working Group VI/16
Regarding the Interpretation of paragraph 5 of Article 17 of the Basel Convention

In response to the request set out in paragraph 6 of the OEWG Decision VI/16 regarding the interpretation of paragraph 5 of Article 17 of the Basel Convention (hereinafter referred to as "the Convention"), the Government of Japan would like to submit the following comments on the annex to the said decision.

1. (i) Regarding paragraph 2, Japan would like to replace the proposed text with the same wording of the operative paragraph 1 of the OEWG Decision IV/16. Alternatively, we would maintain the proposed text with choosing "affirm" instead of "agree" at the beginning of this paragraph and with deleting "established practices of" and "the matters of substance relating to" from the proposed text.
 - (ii) Therefore, the whole paragraph should read as follows:
"Affirms that Article 31 of the Vienna Convention on the Law of the Treaties constitutes a sound basis for resolving issues of general interpretation"; or,
"Affirms that interpretation of treaties should be resolved in accordance with international law, including Article 31 of the Vienna Convention on the Law of Treaties".
 - (iii) The reason is as follows: Since it is universally accepted that interpretation of treaties should be resolved in accordance with international law regardless of the matters of substance or that of technicality, we therefore consider it appropriate to start this paragraph with "affirms" instead of "agrees" and to delete "the matters of substance relating to". As for the "established practices", it is fully recognized that international law includes them. We should thus use the term "international law" which is more comprehensive. Furthermore, we prefer to replace the whole proposed text with the same wording of the operative paragraph 1 of the OEWG Decision VI/16 since the latter has the same meaning of the proposed text with the above-mentioned changes.
2. Regarding paragraph 4, we should delete "and application" in the 2nd line. Since the problem lies on the interpretation of paragraph 5 of Article 17 of the Convention, the "application" of the said paragraph should not be included.

3. Regarding paragraph 5, we consider that Alternative 3 is most appropriate with the following reasons:
- (i) First of all, it should be noted that this paragraph does not intend to challenge the existing procedure of the Conference of the Parties of the Convention. The intention of this paragraph is to set an extra condition to make the so-called "subsequent agreement" on the interpretation of paragraph 5 of Article 17 serve validly as an aid to reach an agreement on the interpretation of paragraph 5 of Article 17.
 - (ii) When a decision on the interpretation of a treaty is taken by the Conference of the Parties after the treaty comes into force, such decision may constitute the "subsequent agreement" as set forth in the Vienna Convention of the Law of the Treaties under certain circumstances and conditions. Taking into account the views expressed by UNOLA as set out in UNEP/CHW/OEWG/6/INF/Add.1, any "subsequent agreement" regarding the interpretation of the treaty "must be drafted in such a manner to ensure the consent of all Parties". UNOLA further elaborated that the (subsequent) agreement would only enter into force upon the deposit of instruments by each and every party or only when no objection to the agreement is expressed within a limited consultation period among the Parties. This indicates that if a decision regarding an interpretation of a treaty is adopted by a majority and not by the consent of all the parties, the decision would not be considered as a valid agreed interpretation of a treaty and thus, it would not constitute the "subsequent agreement" as set forth in the Vienna Convention of the Law of the Treaties. From this point of view, Alternative 3 which demonstrates "no objection to the agreement" is most appropriate.
 - (iii) We would also like to reiterate that, if the Contracting Parties makes a decision to adopt the "fixed-time approach" for the interpretation of paragraph 5 of Article 17, such decision would imply a substantive amendment to the original text of the paragraph. Therefore, fundamentally, such decision should be made in accordance with the amendment procedure of the Basel Convention and could be imposed only to the Contracting Parties which accept that amendment. We believe that the decision could be made at a COP meeting legitimately only when all the Parties to the Convention do not oppose it.
4. Regarding paragraph 6, we support Alternative 1 with the so-called "current-time

approach". The reason why Alternative 2 and 3 are not acceptable to us has already been elaborated and circulated as CRP 1 of OEWG 6 (see attached).

5. Regarding paragraph 7 and 8, the phrase "in the application of" is not acceptable for us. The reason is already elaborated in the above paragraph 2 of this comment. This phrase confuses the issue of interpretation with that of application, which is contrary to the purpose of the consultation undertaken since COP 8 (2006) on the interpretation of paragraph 5 of Article 17. We should also recall to the title of Decision COP VIII/30: "Addressing the interpretation of paragraph 5 of Article 17 of the Basel Convention."
6. Regarding paragraph 9, we propose the following in order to outline the intention of this paragraph:

"Determines that this decision, which is the reflection of the agreement of all the Parties to the Basel Convention and is adopted without objection, shall constitute a subsequent agreement in the sense used in paragraph 3 (a) of Article 31 of the Vienna Convention on the Law of Treaties;

(End)

**United Nations
Environment
Programme**

UNEP/CHW/OEWG/6/CRP.1
3 September 2007

English only

**Open-ended Working Group of the Basel Convention
on the Control of Transboundary Movements of
Hazardous Wastes and Their Disposal**
Sixth session
Geneva, 3–7 September 2007
Agenda item 8 (d)

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

Interpretation of paragraph 5 of Article 17 of the Basel Convention

Submission by Japan

The annex to the present conference room paper contains a submission by Japan on the interpretation of Article 17 of the Basel Convention. It is presented as submitted and has not been formally edited by the Secretariat.

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Annex

31 August, 2007

**Submission by the Government of Japan
Regarding the interpretation of paragraph 5 of Article 17
of the Basel Convention**

In response to the invitation set forth in paragraph 3 of the Decision VIII/30 adopted at the 8th Conference of the Parties to the Basel Convention, the Government of Japan submits the following comments regarding the interpretation of paragraph 5 of Article 17 of the Basel Convention.

While acknowledging the fact that there are different views concerning the interpretation of the expression "who accepted them" in paragraph 5 of Article 17 of the Basel Convention, Japan wishes to emphasize again that the so-called "current-time approach" should be applied to the interpretation of the said paragraph and such interpretation should be confirmed at the forthcoming Conference of the Parties with the following reasons:

- Japan would like to recall once again the view forwarded by the UN Office of Legal Affairs (UN OLA) in its correspondence of 8 March 2004 addressed to the Executive Secretary of the Basel Convention as contained in UNEP/CHW/OEWG/6/INF/9/Add.1, which indicated that in case of the Basel Convention where it is silent or ambiguous on the matter, the practice of the Secretary-General is to apply the "current-time approach".
- Japan is also aware that some Contracting Parties insist that right of interpretation of a treaty would lie not in the UN OLA but in Contracting Parties and that it would be possible to agree on a common interpretation such as the "fixed-time approach" by making a decision at a COP meeting. However, Japan thinks it inappropriate to agree on the "fixed time approach" for the following reasons:
 - (i) The "fixed-time approach" (either in the first or the second variation of such approach as stated in UNEP/CHW/OEWG/6/15) premises the idea that the term "accepted" stipulated in paragraph 5 of Article 17 of the Convention should be regarded as "adopted". As the Vienna Convention on the Law of the Treaties clearly sets out in the relevant provisions (see paragraph 1(b) of Article 2 and paragraph 1 of Article 9), the term "accept" differs from the term "adopt" in its definition. Paragraph 3 of Article 17 of the Basel Convention uses the terms "adopt" and "accept" correctly in accordance with the definition set forth in the said paragraphs of the Vienna Convention. The "fixed-time approach" demands to interpret these two terms differently in the context of the same Article and it is unreasonable.
 - (ii) As for the case of the second variation of the "fixed-time approach" as stated in 10(b) in UNEP/CHW/OEWG/6/15, it is more problematic. According to the second variation of the "fixed-time approach", the amendment would enter into force when the Depositary receives instruments of ratification from more than three-fourths of the Parties to the Convention whose denominator is based on the number of the Parties at the time of the adoption of the amendment, without differentiating the instruments by the States which were already Parties when the amendments were adopted from the instruments by the States which has become Parties after the amendment. Therefore, according to this approach, the denominator is based on the number of the Parties at the time of "adoption" of the amendment (1995), while the numerator is based on the number of the current Parties who "ratified" it (2007) including those who became Parties to the Basel Convention after the adoption of the amendment. This case is quite illogical as the terms "Parties having accepted them[amendments]" stipulated in paragraph 5 of Article 17 and the terms "the Parties who accepted them[amendments]" in the same paragraph should be regarded as having the same meaning if they are read naturally. We are not aware of any precedence of interpretation like the second variation of the "fixed-time approach" and we think it inappropriate to agree on such interpretation.

- (iii) Furthermore, if the Contracting Parties would make a decision at a COP meeting to adopt a different interpretation of the said paragraph such as the "fixed-time approach" (either in the first or the second variation of the approach as described in UNEP/CHW/OEWG/6/15), such decision would imply a substantive amendment to the original text of paragraph 5 of Article 17 of the Basel Convention. We are fully aware that the Vienna Convention on the Law of Treaties foresees subsequent agreement between the Parties regarding the interpretation or the application of a treaty or its provisions be taken into account in interpreting the treaty and that such agreement is sometimes made without formal amendment procedures. However, it must be pointed out that such subsequent agreement could be made without undertaking amendment procedures only for technical or procedural matters. As for substantive matters, such agreement should be made through the amendment procedure. Making a decision to take the "fixed-time approach" for paragraph 5 of Article 17 is not a technical or procedural matter because there is ambiguity for the interpretation of that paragraph and the "fixed-time approach" would make a substantive change on the interpretation. Therefore making a decision to take the "fixed-time approach" is deemed to be a substantive amendment to the original text of the said paragraph and such amendment should be made in accordance with or, at least, in proportion to the procedure of Article 17 of the Basel Convention which provides that the Parties shall make every effort to reach agreement by consensus.

(End)

H. Response received from Norway

Reference is made to decision OEWG-VI/16 and the request for comments.

Norway would like to submit the following views:

1. Norway respects the view that paragraph 5 of article 17 of the Basel Convention is ambiguous on the entry into force of amendments.
 2. The Parties to the Convention have the ultimate power to agree on the interpretation of the Convention. Reference is made to COP decision VIII/30 and to the United Nations' Office of Legal Affairs advice of 12 February 2007.
 3. Norway maintains its position that the understanding of the wording of paragraph 5 of article 17 of the Basel Convention in "*the Parties who accepted them*" must 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.
 4. Norway furthermore underlines the need to reach an agreement on the application of paragraph 5 of article 17. Resolving the issue by way of a vote should be avoided.
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