



Distr.: General  
11 October 2011

English only

---

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

Cartagena, Colombia, 17–21 October 2011

Item 3 (a) (iii) of the provisional agenda\*

**Matters related to the implementation of the Convention:  
strategic issues: Indonesian-Swiss country-led initiative  
to improve the effectiveness of the Basel Convention**

**Indonesian-Swiss country-led initiative to improve the  
effectiveness of the Basel Convention: note for the tenth meeting  
of the Conference of the Parties on the interpretation of  
paragraph 5 of Article 17**

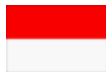
**Note by the Secretariat**

The annex to the present note is a submission by Indonesia and Switzerland. It has not been formally edited by the Secretariat and is presented as received.

---

\* UNEP/CHW.10/1.

## Annex



### **INDONESIAN-SWISS COUNTRY-LED INITIATIVE (CLI) TO IMPROVE THE EFFECTIVENESS OF THE BASEL CONVENTION**

#### **Note for COP 10 on the interpretation of the fixed-time approach**

##### **1 Introduction**

This paper submitted by Indonesia and Switzerland describes and compares possible interpretations of paragraph 5 of Article 17 of the Basel Convention, which specifies the requirements for an amendment to the Convention to enter into force.

By decision VIII/30, the Conference of the Parties has acknowledged that there is a difference of views concerning the interpretation of the expression “who accepted them” in paragraph 5 of article 17 and recognized that many Parties considered the expression to be ambiguous. As discussed in a document submitted to the sixth meeting of the Open-ended Working Group (OEWG),<sup>1</sup> Article 17(5) leaves room for more than one interpretation.

One way of addressing the perceived ambiguity in the Convention’s text is for the Parties through a decision by the Conference of the Parties (COP) to agree on their interpretation of paragraph 5 of article 17. In the interest of facilitating the entry into force of new amendments, the interpretation that would require fewest future ratifications would be the most appropriate.

However it should also be noted that any such interpretation by the COP would apply to all amendments to the Basel Convention and not just to the amendment of immediate interest. It is important to ensure, therefore, that any interpretative decision adopted at the COP 10 for the purposes of expediting the early entry into force of the Ban Amendment does not pave the way for unintended or undesirable consequences with regard to future amendments. And of course there is an onus on parties to interpret any instrument in good faith and in a legally sound manner. The Vienna Convention indicates specifically the interpretation rules that must be followed for treaty interpretation. This paper does not intend to be a legal paper but an illustration of Parties different interpretations of article 17 para 5, as expressed *inter alia* during COP, OEWG meetings and in other instances.

##### **2 Fixed and current time approaches**

Article 17(5) specifies that amendments to the Convention shall enter into force after they have been ratified “by at least three-fourths of the Parties who accepted them”.

The ambiguity resides in the phrase “who accepted them”, which critically sets the baseline for the  $\frac{3}{4}$  figure. The ambiguity is discussed in more detail in the OEWG paper<sup>1</sup>, but in essence there are two broad categories of interpretation, which revolve around whether the baseline should refer to the continually evolving number of parties at the present (“current time approach”) or the fixed number of parties at the time that the amendment in question was adopted (“fixed time approach”).

---

<sup>1</sup> UNEP/CHW/OEWG/6/15

According to the “*current time approach*”,  $\frac{3}{4}$  of the current members of the Basel Convention have to ratify an amendment to the Convention to bring it into force (i.e. currently ratification by 132 Parties ( $\frac{3}{4}$  of the total 176 Parties) would be required). As the number of parties continues to increase, the threshold for the entry into force of any amendment will similarly increase. The UN Office of Legal Affairs has indicated in its correspondence of 8 March and 5 May 2004 that – unless otherwise determined by the COP – it would use the “current time approach” in interpreting Article 17(5).

According to the “*fixed time approach*”, the starting point is the number of parties that were parties when the amendment was adopted. This interpretation can be supported by an understanding that the phrase “who accepted them” indicates that the current number of parties to the Convention should not be used to determine the entry into force of an amendment, but rather the number of members that were party to the Convention (or party and present) when the amendment was adopted.

The figures in the calculations that follow have been provided by the Basel Convention Secretariat and are presented for illustration of the impact of the different approaches.

### **3 The different interpretations of the fixed time approach and their implications for the entry into force of the Ban Amendment**

There are several possible interpretations for the fixed time approach, each giving a different interpretation to the phrase “who accepted them”. If the COP agrees on an interpretation endorsing the fixed time approach, it would have to determine which possible version of the fixed time approach should be relevant. The following paragraphs illustrate what each version would imply for the entry into force of the Ban Amendment.

1. An amendment will enter into force when the Depositary has received a number of instruments of ratification equivalent to three-fourths of the number of parties to the Convention when the amendment was adopted.

*There were 87 parties to the Convention when the amendment was adopted at COP 3 in September 1995. The threshold for the entry into force of the amendment adopted at COP3 is therefore 66 ratifications. “Equivalent to” means that this could include ratifications from parties which became party to the Convention after the adoption of the amendment.*

*Currently 68 Parties have ratified the Ban Amendment so the threshold has already been reached under this interpretation.*

*Analysis:*

*While this leaves the way open for the Ban Amendment to enter into force very soon the legal basis is problematic: counting parties that were not party when the amendment was adopted would be difficult to justify as it seems to be in contradiction to the wording of Article 17(5) (“three fourth of the Parties who accepted them”), and in any case re-introduces an element of the current time approach.*

2. An amendment will enter into force once three-fourths of those Parties that were Parties when the amendment was adopted have deposited their instrument of ratification.

*Entry into force would be calculated on the basis of the actual number of parties at the time of COP 3 in September 1995, regardless of whether or not they were represented at COP3. By this interpretation, if 66 of the 87 parties that were parties to the Convention when the amendment was adopted were to ratify the amendment, it would enter into force.*

*Currently 47 of the 87 Parties of the Convention at the time of COP 3 have ratified the Ban Amendment, leaving a further 19 ratifications to bring the amendment into force.*

*Analysis:*

*The legal basis for this interpretation is sound: it only makes reference to Parties that were party to the Convention when the amendment was adopted, and this is clearly in accordance with the concept of the fixed time approach. However it does require a rather large number of further ratifications, which even with a concerted effort to encourage and assist ratification would likely take a long time to achieve.*

- 3.** An amendment will enter into force when the Depositary has received a number of instruments of ratification equivalent to three-fourths of the number of Parties to the Convention who were present when the amendment was adopted.

*This differs from interpretation 1 in that only parties that were present at COP 3 are included in the calculation. There were 79 Parties present at COP 3 when the amendment was adopted, so according to this interpretation 60 ratifications would bring the amendment into force. As in interpretation 1, "equivalent to" means that this includes ratifications from parties which became party to the Convention after the adoption of the amendment.*

*Currently 68 Parties have ratified the Ban Amendment so the threshold has already been reached under this interpretation.*

*Analysis:*

*Under this interpretation the Ban Amendment would immediately enter into force, but the same legal problems arise as with the first version of a fixed time approach: it seems to contradict the wording of Article 17(5) (three fourth of the Parties who accepted them) and re-introduces an element of the current time approach.*

- 4.** An amendment will enter into force once three-fourths of those Parties who were present when the amendment was adopted have deposited their instrument of ratification.

*Entry into force would be determined by the number of Parties present when the amendment was adopted at COP 3 in 1995.<sup>2</sup> By this interpretation the amendment would enter into force when 60 of the 79 Parties that were present at COP 3 have ratified it.*

*Currently 46 of this group of Parties have ratified the Ban Amendment, leaving a further 14 ratifications to bring the amendment into force.*

*Analysis:*

*As in option 2 of the fixed time approach, this interpretation can be supported by the text of the convention. The main different is, that "who accepted them" is construed in a narrower manner to include only those Parties who were present at the COP 3 meeting and thus effectively adopting the Ban Amendment.*

#### **4 Conclusion**

Indonesia and Switzerland support an interpretation of paragraph 5 of Article 17 based on the fixed time approach. In principle, of the possible interpretations put forward, options 2 and 4 seem best to reflect the wording and intent of Article 17(5) and thus to be the best compromise between bringing the Ban Amendment into force without unnecessary delay and a logical and legally defensible interpretation of Article 17(5) of the Basel Convention. While the current time approach would require at present 64 additional ratifications, interpretations 2 and 4 would require 19 or 14 (respectively) further ratifications of the Ban Amendment by countries that were Party to the Basel Convention when the Ban Amendment was adopted (option2: by countries that

---

<sup>2</sup> As the Ban Amendment was adopted by consensus, all Parties present at the COP have adopted it.

were party to the Basel Convention at the time the Ban Amendment was adopted; option 4: by countries that were party to the Basel Convention and present at the COP 3 adopting the Ban Amendment).

However these are not the fastest options and the COP may wish to consider (and take legal advice on) whether either of the other options would provide a more satisfactory resolution, bearing in mind that whatever is adopted for the Ban Amendment must also apply to other future amendments to the Convention.

It remains to mention, that the consequences for Parties by deciding to apply the fixed time approach are not big: any future amendment of the Convention will not face the same situation as the Ban amendment because the number of Parties to the Convention has by now reached more or less the maximum, it will certainly not double over the next 10 years as was the case since the Ban amendment was adopted. Future differences between the fixed time approach and the current time approach therefore will be limited.

### **Numeric overview of the different interpretations applied to entry into force of the Ban Amendment**

Interpretations of the fixed time approach	Total number of Parties needed for the entry into force of the Ban Amendment	Number of relevant parties that have ratified the Ban Amendment	Additional ratification for the entry into force of the Ban Amendment
1.	66	68	0
2.	66	47	19
3.	60	68	0
4.	60	46	14
Current time approach	132	68	64

(The figures in the table above have been provided by the Basel Convention Secretariat and are presented for illustration of the impact of the different approaches)