

A Call for an Interpretation of Article 17 by the Parties for Rapid Entry into Force of the Basel Ban Amendment

Prepared by the



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The OLA Interpretation

In early 2004, the United Nations Office of Legal Affairs (OLA) issued an interpretation of Article 17, paragraph 5 of the Basel Convention - on the issue of entry into force of the Basel Ban Amendment.

At the outset, it is important to note that the Parties have not issued a decision seeking or agreeing to OLA's interpretation. Instead of providing insight that would help interpret the original intent of the Parties, and reminding the Parties that they are masters of their own Convention, the OLA instead provided an extreme view that differed widely from the historical and previous understanding of the majority of the Parties and in fact, the Secretariat.

Historically, the Parties have interpreted Art. 17, para. 5, to mean three-fourths of the Parties at the time of the adoption of the amendment (82) or 62. The only ambiguity for most is whether the 62 were to be drawn from all of the Parties at the current time or only from the actual 82 that were there in 1995.

The OLA stated in a May 2004 letter to the Basel Secretariat: "...Where there is ambiguity as to the provisions governing

entry into force, the depositary [UN Secretary General] will apply the 'current time approach' which stipulates that the number of ratifications required for entry into force will be calculated on the basis of the percentage of the Parties at the time each ratification is deposited; not the Parties at the time of the adoption of the amendment."

The "current time" approach OLA advocates creates even more uncertainty, and dissatisfaction, as it is vastly inconsistent with the original intent of the Parties. If the Parties were to accept this approach, this action would

1. Apply an interpretation to the Convention that is far from the interpretation that has been commonly understood for 15 years.
2. Create a draconian interpretation whereby amendments face an ever increasing, unlimited number of required ratifications, and with such a high number as to pose an almost insurmountable challenge.

The Parties are Masters of their Own Convention

Unfortunately, ambiguities in international treaties are all too common. *Fortunately*, the

Parties are the masters of their Convention and thus the ultimate determination of the interpretation of ambiguous language lies with the Parties.

BAN has questioned several of the world's foremost experts in international law. These experts include Professor Alexandre Kiss, President of the European Council of Environmental Law as well as Professor Durwood Zaelke, author of classic texts on international environmental law including: "International Environmental Law and Policy" 1998; and Trade & the Environment: Law, Economics, & Policy" 1993. Prof. Kiss and Zaelke explain the options available to the Parties as follows (see attached letters for details):

The Parties have *two* choices to determine an interpretation.

Authoritative Interpretation: The parties can adopt a decision to cede their authority, if they wish, agreeing to accept an authoritative interpretation (i.e. by an authority such as the OLA).

Authentic Interpretation: The Parties can choose another method of interpretation known as "authentic interpretation" whereby the Parties to a treaty resolve the question themselves.

To date, the Parties have not adopted a decision nor have they given the Secretariat a mandate for which path to take. Thus, the OLA opinion is not binding, but will de facto be the way the OLA interprets things until the Parties take matters into their own hands.

Other Precedents

It will hardly be the first time an authentic interpretation has been reached in just such a situation.

CITES: In 1983, the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) resolved an almost identical ambiguity that was found in their Article XVII, paragraph 3, by adopting the following recommendation:

"Recommends that the meaning of Article XVII, paragraph 3, of the Convention be interpreted in its narrow sense so as to mean that the acceptance of two-thirds of the Parties at the time of the adoption of an amendment is required for the coming into force of such amendment." (see attached)

RAMSAR: In 1990, the Ramsar Convention on Wetlands similarly followed the CITES Resolution precedent in interpreting the ambiguity of their two-thirds requirement in Art. 10 par. 6 of the Ramsar Convention (see attached).

These are two recent, relevant and very similar instances to the Basel Convention situation where the Parties involved chose to exercise their sovereignty and choose an authentic interpretation, thus clearing up the ambiguity in their Conventions in a manner reflecting the will of the Parties.

The Will of the Basel Parties: Early Entry into Force

There can be no doubt that the will of the Basel Parties with respect to the Basel Ban Amendment has always been one of urgency.

It has been the issue highest on the agenda of the first four conferences of the Parties and

has facilitated the following decisions at every Conference of the Parties. Urgency and unanimity, has been noted every step of the way as indicated in the Table 1 below.

Table 1	
Decision	Indicators of Urgency and Support
I/22	Passed by <u>consensus</u> .
II/12	Passed by <u>consensus</u> . Calls for all Parties to “ <i>work actively to ensure effective implementation.</i> ”
III/1	Passed by <u>consensus</u> .
IV/7	Passed by <u>consensus</u> , “ <i>strongly appeals to Parties to ratify the Amendment...as soon as possible to enable the early entry into force...</i> ”
V/3	Passed by <u>consensus</u> , “ <i>strongly appeals to Parties to ratify the amendment...as soon as possible to facilitate early entry into force...</i> ”
VI/33	Passed by <u>consensus</u> , “ <i>Strongly appeals to Parties... to expedite the process of ratification...of the Amendment to facilitate its entry into force at the earliest opportunity.</i> ”
VII/23	Passed by <u>consensus</u> , “ <i>Strongly appeals to Parties... to expedite the process of ratification...of the Amendment to facilitate its entry into force at the earliest opportunity.</i> ”

The “current time” OLA model, if accepted by the Parties, would dramatically delay and perhaps prevent the entry into force of the Ban Amendment, which the Parties spent thousands of person-hours and many millions of dollars creating.

To demonstrate the undue burden the “current time” interpretation would place on such an amendment, consider such requirements for an Amendment to enter into force in comparison with other similar Basel Convention instruments. See Table 2.

Table 2	
Basel Instrument	Entry into Force Requirement
Basel Convention	20 Parties
Liability Protocol	20 Parties
Adding Annexes	Automatic after 6 months
Amending Text	Automatic after 6 months
Basel Ban Amendment	126+ Parties (“current time” interpretation)?

As can be seen, the undue burden placed upon the Basel Ban Amendment is disproportionate to any other similar decision by a factor of more than 6. This is clearly far away from what has been, and is expected by the Parties for entry into force of Basel instruments.

The Basel Ban Amendment – A matter of Urgency

Indeed one could argue that the need for the ban is more urgent than ever before and thus the interpretation most likely to succeed in the most timely entry into force is the most appropriate. Already, it has been almost 11 years since the Amendment was adopted. And yet we find its relevance greater than ever today.

Unfortunately, the preconditions for economically motivated waste trade, namely the disparity between wealth of nations, the disparity between costs of disposal in developed and developing nations, and the amounts of wastes produced in developed countries, have all increased in recent years, providing even more economic incentive than ever before for operators in rich countries to find pathways for dumping their polluting wastes in poorer countries.

As we have witnessed in recent years and today, post-consumer wastes such as electronic waste and waste ships are increasingly traded to developing countries - placing upon them a disproportionate burden of the world's hazardous waste, and doing so in areas lacking the infrastructure and capacity to manage such wastes. The problem is more pressing now than ever.

The Basel Convention is what it is today because of the Parties. Every letter, every word, every decision, every guideline, was achieved through the work of all the Basel Parties. They are the ones bound by it, and it is only correct that the Parties themselves determine every decision.

Likewise, the true determination of the meaning of Art. 17, para. 5 of the Basel Convention must be concluded by the Parties in the spirit of consensus, past and present and in the spirit of the consistent call for urgency in entry into force of the Basel Convention.

As we have seen, the UN Office of Legal Affairs' (OLA) opinion, if accepted, would lead to the following:

1. Departure from original intent;
2. Massive waste of United Nations and national resources that was used in amendment negotiation; and
3. Unintended consequences, including the possibility that the Amendment will never enter into force or will enter into force far too late for it to serve as it was intended.

There remains little choice but for the Parties to assert their proper role and set forth an unequivocal **authentic interpretation** in a decision clearing up the ambiguity of Art. 17, para. 5 that will interpret Article 17 as meaning that entry into force will take place when the number of ratifications are deposited which is **equivalent** to 3/4 of the **number** of the Parties that were present and voting at the adoption of the amendment.

END

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Conf. 4.27

Interpretation of Article XVII, paragraph 3, of the Convention

RECOGNIZING that the Convention can only operate and be effective if the Conference of the Parties defines the provisions of the Convention in line with the basic principles which gave birth to it;

ACKNOWLEDGING that Article XVII, paragraph 3, of the Convention could be legally defended in both its narrow and wide interpretations;

CONSIDERING the difficulties which might result from a wide interpretation of Article XVII, paragraph 3, of the Convention;

CONSIDERING that any amendment to the present Convention could not enter into force unless a limitation is established as to the number of Parties required for the coming into force of an amendment;

THE CONFERENCE OF THE PARTIES TO THE CONVENTION

RECOMMENDS that the meaning of Article XVII, paragraph 3, of the Convention be interpreted in its narrow sense so as to mean that the acceptance of two-thirds of the Parties at the time of the adoption of an amendment is required for the coming into force of such amendment.

RAMSAR RESOLUTION

4th Meeting of the Conference of the Contracting Parties
Montreux, Switzerland
27 June-4 July 1990

Resolution IV.1: Interpretation of Article 10 bis Paragraph 6 of the Convention*

RECALLING that amendments to Articles 6 and 7 of the Convention were adopted on 28 May 1987 in Regina, Canada;

BEING AWARE that Article 10 bis paragraph 6 of the Convention provides that an amendment adopted shall enter into force for the Contracting Parties which have accepted it on the first day of the fourth month following the date on which two-thirds of the Contracting Parties have deposited an instrument of acceptance with the Depositary;

CONSIDERING that there is a need to dispel any ambiguity as to the date on which amendments enter into force;

THE CONFERENCE OF THE CONTRACTING PARTIES

DECIDES that in order to determine the date of the entry into force of any amendment to the Convention, the expression "two-thirds of the Contracting Parties" in paragraph 6 of Article 10 bis shall be interpreted as meaning two-thirds of the Contracting Parties at the time of the adoption of that amendment.

* Note: The operative part of this resolution is based on the corresponding paragraph of CITES Resolution Conf.4.27 and is intended to serve the same purpose.