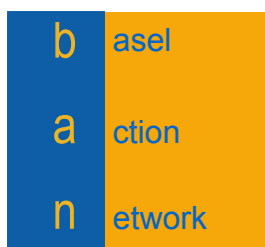


# Entry into Force of the Basel Ban Amendment

Prepared by the



October 2004

## Introduction

As many of you are now aware, earlier this year, the United Nations Office of Legal Affairs (OLA), issued an opinion interpreting 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 did not ask the OLA to provide this opinion nor to act as an authority of any kind. Instead of providing insight that would help interpret the original intent of the Parties, the OLA provided an extreme opinion that wildly veered away 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 the amendment will enter into force after three-fourths of the Parties *at the time of the adoption* of the amendment. The only ambiguity is whether the three-fourths applied to those Parties *actually present and voting*, or 3/4 of the *number of Parties present and voting* at the time the amendment was adopted.

Instead of sorting out that question, 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 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. supplant the Basel Parties prerogative to be masters of their own Convention.
2. apply an interpretation to the Convention that is far from the interpretation that has been commonly understood for 15 years.

3. create a draconian interpretation whereby amendments face an ever-increasing, unlimited number of necessary ratifications, and at 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 to a Convention are the masters of their Convention and thus the ultimate determination of the interpretation of ambiguous language lies with the Parties. BAN has conducted research and 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. Mr. Zaelke explains the options available to the Parties as follows (and see attached letter).

The Parties now 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 (e.g. by an authority such as the OLA).

**Authentic Interpretation:** Alternatively, 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 given the Secretariat a

mandate for which path to take. Thus, the OLA opinion is not binding, and in fact is simply an opinion until the Parties take a formal decision.

### **Other Precedents**

It will hardly be the first time an authentic interpretation has been reached. The Basel Convention Parties need only look at other precedents that addressed the same issue, and where Parties to treaties found it necessary to exert their sovereign right to eliminate the ambiguities in their treaties.

**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 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 below:

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 “work actively to ensure effective implementation.” Called for all such waste trade to cease by 1998.
III/1	Passed by <u>consensus</u> . Called for all such waste trade to cease by 1998.
IV/7	Passed by <u>consensus</u> , “strongly appeals to Parties to ratify the Amendment as soon as possible to enable the early entry into force.”
IV/8	Passed by <u>consensus</u> , refers to “urges Parties to <u>ratify this Amendment as a matter of priority.</u> ”
V/3	Passed by <u>consensus</u> , “ <u>strongly appeals to Parties to ratify the amendment as soon as possible to facilitate early entry into force.</u> ”
VI/33	Passed by <u>consensus</u> , “ <u>strongly appeals to Parties to expedite the process of ratification of the Amendment to facilitate its entry into force at the earliest opportunity.</u> ”

The “current time” model, if accepted by the Parties, would dramatically delay and perhaps prevent the entry into force of the Ban Amendment, the creation of which the Parties spent thousands of person-hours and many millions of dollars. It would work against the language of repeated Basel decisions calling for early entry into force.

To demonstrate the undue and inappropriate burden the current time

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	<b>122+ Parties</b> (current time interpretation)?

interpretation would place on such an amendment, consider in the table above, the existing requirements for an Amendment to enter into force in comparison with other similar Basel Convention instruments.

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

### **Recommendation**

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 should 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 Ban Amendment.

It is never appropriate to press for revisionism in a treaty but to press for the original intent and general understanding of a majority of Parties.

As we have seen, the UN Office of Legal Affairs (OLA) opinion if it were to be accepted would depart from original intent, would equate to a massive waste of United Nations and national resources involved in amendment negotiation, and will lead to 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 the ambiguity on Art. 17, para. 5 in favor of either 3/4ths of the number of Parties present and voting at the time of the amendment's adoption.

### **Basel Action Network**

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## Institute for Governance & Sustainable Development

19 October 2004

Mr. Jim Puckett  
Coordinator  
Basel Action Network  
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USA

### **Re: Basel Treaty Interpretation**

Dear Mr. Puckett,

I am writing in response to your inquiry on the opinion issued by the Chief of the Treaty Section of the United Nation Office of Legal Affairs in its attempt to resolve the ambiguity in Article 17(5) of the Basel Convention, specifically, the number of ratifications required for the Basel Ban Amendment to enter into force.

While treaty ambiguities are not uncommon, it is in the power of the Parties to a Convention—the treaty constituents—to choose the method of interpretation to resolve ambiguities.

One method is called “authoritative interpretation”, which is when the Parties request an opinion from a designated external institution, such as the treaty depositary. The Basel Secretariat took this approach, although it is still within the power of the Parties to decide whether or not to accept such an interpretation.

The other method is called “authentic interpretation”, which is done when Parties resolve the question themselves. This method was followed by the Conference of the Parties to CITES in 1983 to resolve a very similar ambiguity in Article XVII, paragraph 3, of the CITES Convention.

As you will see from CITES Resolution Conf. 4.25 (attached), the Parties rejected the “current time approach”, which I understand is the proposed resolution recommended by the Chief of the Treaty Section of the UN Office of Legal Affairs. While theoretically, the CITES Conference can only “recommend” action, resolutions have been followed by Parties as if they were binding.

See also, Ramsar Convention Resolution IV.1: Interpretation of Article 10 bis Paragraph 6 of the Convention (1990), which follows the CITES Resolution Conf. 4.27 in interpreting the ambiguity of the two-thirds requirement.

Mr. Jim Puckett  
19 October 2004  
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These are but two recent and relevant instances where the “authentic interpretation” approach was utilized by the Parties; there are many more instances where Parties have resolved interpretation issues themselves in a manner consistent with their intentions.

In summary, the selection of the appropriate method in removing the ambiguity in Art. 17 of the Basel Convention is entirely the sovereign/democratic choice of the Parties themselves. The Parties are the masters of their own instrument.

Best Regards,

A handwritten signature in black ink, appearing to read 'Durwood Zaelke', written in a cursive style.

Durwood Zaelke  
Institute for Governance & Sustainable Development  
President

Att. CITES Resolution Conf. 4.27  
Ramsar Convention Resolution IV.1



## 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.

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## 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.