

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)

**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.

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)