

Convention on Long Range Transboundary Air Pollution, CLRTAP

Note by the Ad Hoc Group of Legal Experts on ratification of amended Protocols that have not yet entered into force

1. Background and Problem Identification

At its 33rd session in December 2014, the Executive Body asked the Ad Hoc Group of Legal Experts to provide advice on the ratification of amended Protocols by non-party States before the amendments have entered into force. The background to this issue is that some non-party States wish to become parties to the amended Protocols but may not wish to be bound by certain commitments in the original unamended Protocols.

There are amendments which have not entered into force to the following Protocols:

- The Protocol on Persistent Organic Pollutants¹ (the POPs Protocol);
- The Protocol on Heavy Metals² (the Heavy Metals Protocol);
- The Protocol to abate acidification, eutrophication and ground-level ozone³ (the Gothenburg Protocol)

This note aims to provide an independent legal basis for discussion and decision making in accordance with the request of the Executive Body.

¹ In 2009, Parties to the POPs Protocol adopted decisions 2009/1 (to amend annexes I, II, III, IV, VI and VIII), decision 2009/2 (to amend annexes I and II), and decision 2009/3 (to amend annexes V and VII). The amendments to annexes V and VII entered into force for most of the Parties on 13 December 2010. In line with article 14, paragraph 3, the entry into force of the amendments to the text of the Protocol and to its annexes I, II, III, IV, VI and VIII requires acceptance by two thirds of the Parties. Those amendments have not yet entered into force.

² In 2012, Parties to the Heavy Metals Protocol adopted decision 2012/5 (to amend the text of and annexes other than III and VII) and decision 2012/6 (to amend annex III). The amendment to annex III entered into force on 9 January 2014. In line with article 13, paragraph 3, of the Protocol, the amendments to the text of the Protocol and its annexes other than III and VII require acceptance by two thirds of the Parties. These amendments have not yet entered into force.

³ The Gothenburg Protocol was amended in 2012 by Executive Body decisions 2012/1 (to amend annex I) and 2012/2 (to amend annexes II to IX). The amendments to annex I entered into force on 5 June 2013. In line with article 13, paragraph 3, of the Protocol, the amendments to the text of the Protocol and its annexes II to IX and the addition of new annexes X and XI require acceptance by two thirds of the Parties. These amendments have not yet entered into force.

2. Ratification and acceptance of amendments

Ratification is defined in Article 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT) as ‘the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty’. This should be distinguished from obtaining parliamentary approval of a treaty, which may be required under national constitutional arrangements and is sometimes misleadingly referred to as ‘ratification’⁴. This advice concerns the international ratification and not these domestic processes. Under the POPs, Heavy Metals and Gothenburg Protocols, the process of ratification is affected by depositing of an instrument of ratification with the Secretary-General of the United Nations who acts as the depository⁵.

Certain amendments to the POPs, Heavy Metals and Gothenburg Protocols require acceptance by two third of the Parties before they can enter into force; this involves depositing an instrument of acceptance with the depository⁶. No State or regional economic integration organization may deposit an instrument of acceptance of these amendments unless it has previously, or simultaneously, deposited an instrument of ratification, acceptance or approval of or accession to the Protocol⁷.

3. Previous advice and options

The question of ratification of amended protocols has been previously considered by the ad hoc group of legal experts. The legal group’s note on this issue can be found in informal document 3 prepared by the legal group for consideration of the forty-fifth session of the Working Group on Strategies and Review (WGSR) in September 2009, which illustrated particular issues to be taken into account regarding both an amended and a new Protocol, focusing primarily on the situation for EECCA and SEE countries.

The 2009 note identified a number of potential options to address the situation of non-party States that wished to ratify amended Protocols without being bound by certain obligations in the original unamended Protocols⁸. These are as follows:

1. Non-party States ratifying the Protocol and upon ratification declaring, that they only ratify the amended version of the Protocol.
2. Non-party States ratifying the Protocol subject to reservations regarding the provisions they are not able to implement until such time as those provisions are amended.

⁴ See, Anthony Aust, *Modern Treaty Law and Practice*, second edition, p.103.

⁵ Article 17 POPs Protocol, Article 16 Heavy Metal Protocol and Article 15.3 and 16 Gothenburg Protocol.

⁶ Article 14.3 POPs Protocol, Article 13.3 Heavy Metals Protocol and Article 13.3 Gothenburg Protocol.

⁷ See Article 2 of Executive Body decisions 2009/1, 2009/2, 2012/2 and 2012/5.

⁸ See section 2.2(ii) of the Informal document 3 prepared by the legal group for consideration of the forty-fifth session of the Working Group on Strategies and Review (WGSR) in September 2009.

3. Reaching an informal agreement between the Parties, that the Implementation Committee will not consider cases of non-compliance that relate to the obligations set out in the existing Protocol where these obligations have been amended, but prior to entry into force of the amendments, and in respect of an EECCA or SEE country that has ratified the Protocol as amended but was never a Party to the original Protocol.

4. The Parties to the existing Protocol could decide to temporarily suspend the operation of these provisions for certain specified Parties as provided for under article 57(b) VCLT.

4. The Parties to the Protocol could enter into a waiver agreement - a consensus agreement on the basis of Article 31(3)(a) VCLT to waive application of these provisions for certain specified countries.

All of these options are potentially available to address the situation in relation to the POPs, Heavy Metals and Gothenburg Protocols. This advice will focus on Options 1 and 2 as these are considered to be the most practical.

4. Discussion of options 1 and 2

4.1 Non-party States ratifying the Protocol and upon ratification declaring, that they only ratify the amended version of the Protocol.

Under this option a non-party State would ratify a Protocol and upon ratification declare that it is only ratifying the amended version of the Protocol. This could be done by virtue of an analogous application of Article 40(5) VCLT for a State ratifying before entry into force of the amending agreement.

This would have the effect that the Protocol in its original version would not enter into force for such a State either pending entry into force of the amendment(s) or, upon entry in force of the amendment(s), as regards those Parties that have not accepted the amendment(s). The amended Protocol would become applicable once there are sufficient acceptances for it to enter into force.

This option should be distinguished from including a declaration in the instrument of ratification, before adoption or entry into force of the amendments, to the effect that the provisions of the existing, unamended Protocols would not apply. Such declarations are likely to be deemed to be disguised reservations and the rules on reservations set out in articles 20 – 23 VCLT would therefore apply. (The option of using a reservation is discussed below.)

It is important to bear in mind what it would mean for a State to ratify only an amended Protocol before the amendment(s) in question have come into force and the limitations on what this would achieve.

If a State is asserting that is not yet bound by a Protocol, that state could not be considered to be a Party for legal purposes, including for purposes of counting towards the number of acceptances from Parties required in order for the amendment(s) to the Protocol to enter into

force. The State would only become a Party once the amendment entered into force. Therefore, this option would not be a means of securing sufficient ratifications to bring the amended Protocols into force. It would remain necessary for a sufficient number of Parties to the original Protocols to accept the amendments in order to bring them into force.

This option would, however, enable non-party States who cannot comply with the unamended Protocols to nevertheless move forward with depositing instruments of ratification, even before the amendments come into force. The paperwork would be on the books for administrative purposes thus avoiding delay in these States becoming Parties once the amendments to the Protocols enter into force.

It should be noted that this option may also present a certain risk of confusion on the status of ratifications of the Protocols in their unamended versions. An alternative approach, which would avoid this risk, would be for non-party States interested in ratifying the Protocols to complete as soon as possible their own internal treaty approval processes in order to be ready for the deposit of their instruments of ratification upon entry into force of the amended Protocols. Such an approach would also permit non-Party States interested in joining the amended Protocols to demonstrate their willingness to move forward with ratification in due course.

4.2. Non-party States ratifying the Protocol subject to reservations regarding the provisions they are not able to implement until such time as those provisions are amended.

Under this option a non-party State would explore, in accordance with Article 19 VCLT, the possibility of ratifying the Protocol subject to reservations regarding the provisions they are not able to implement until such time as those provisions are amended. Such reservations could be written to expire upon entry into force of the relevant amendments.

This option would potentially enable non-party States to become parties to the POPs, Heavy Metals and Gothenburg Protocol (subject to the reservations as to those provisions they felt unable to comply with). These States would therefore count as Parties for the purposes of bringing the amendments into force.

A reservation must not be incompatible with the object and purpose of the Treaty⁹, and therefore a reservation may therefore be difficult to justify in this context. This will depend upon what provisions are covered by the reservation and whether they include core obligations in the original Protocol.

Any Party to a Protocol may object on any grounds to a reservation entered by another Party. Accordingly, this option may not result in uniform application of a Protocol to a State which enters a reservation, if not all the other Parties accept the reservation. One way of addressing this issue would be to secure some sort of understanding among the Parties to the Protocol that they would not object to the reservation.

⁹ Article 19(c) VCLT

5. Conclusion

As stated in this document, the options identified in the 2009 note are potentially available. Of these, the options most likely to be practical are:

1. Non-party States ratifying the Protocol and upon ratification declaring, that they only ratify the amended version of the Protocol.
2. Non-party States ratifying the Protocol subject to reservations regarding the provisions they are not able to implement until such time as those provisions are amended.

If non-party States choose to ratify the Protocols and upon ratification declare that they only ratify the amended version of the Protocol, this would mean that they would not be Parties to the Protocols until the amendments entered into force. Their ratifications could not therefore be counted towards the number of acceptances necessary to bring the amendments into force. However, this option would enable these States to complete the process of lodging their instruments of ratification and avoid delay in these States becoming parties to the amended Protocols once the amendments have entered into force.

If non-party States choose to ratify the Protocols subject to reservations concerning those provisions which they feel unable to implement, then this would potentially enable them to be counted as Parties and count towards the number of acceptances required to bring the amendments into force. There would need to be some consideration of whether such reservations were compatible with the object and purpose of the Protocols. Furthermore, the option of securing some sort of understanding among the Parties to the Protocols that they would not object to the reservations may need to be considered.