

Time to Repair the "Repairables Loophole" in the e-Waste Guideline



Introduction

The 10th meeting of the Open-Ended Working Group Decision 10/5 took up the mandate from COP12 to make further progress towards addressing the outstanding issues in the Guideline that was adopted on an interim basis because a number of issues were not resolved.

Paragraph 5 of COP12's Decision 12/5 reads as follows (emphasis added):

Acknowledges the need to look further into the guidance on the distinction between waste and non-waste and agrees to include the further elaboration of work on that issue in the work programme of the Open-ended Working Group for 2016–2017 in order to prepare draft revised guidelines for consideration by the Conference of the Parties at its thirteenth meeting, in particular with reference to paragraphs 31 a and 31 b of the technical guidelines on the following issues:

- (a) Residual lifetime and age of used equipment;
- (b) Management of hazardous wastes from failure analysis, repair and refurbishment operations in developing countries;
- (c) Obsolete technologies, including cathode ray tubes;
- (d) Presence of hazardous components in used equipment;

It is important to note that the words "in particular" ensure that any issue can be raised. So while COP12 was particularly interested in points (a)-(d) above, it is appropriate to raise other issues of concern.

In fact, the subsequent 10th Open-Ended Working Group added some additional considerations and direction (emphasis added) in paragraph 8 of Decision 10/5:

Mandates the small intersessional working group, working by electronic means and, subject to the availability of funding, through a face-to-face meeting, to further explore options for addressing outstanding issues, in particular, those listed in appendix V of the technical guidelines, taking into account the following:

- (a) That the residual lifetime and age of used equipment may be based on country-level criteria;
- (b) That the management of hazardous wastes resulting from failure analysis, repair and refurbishment operations in countries may focus on environmentally sound management and that the transboundary movement of such hazardous wastes should take place in case of the non-availability of environmentally sound management in the importing country;
- (c) That the potential link between the amendment set out in decision III/1 and the technical guidelines should be examined;

- (d) That the concept of obsolete technologies, including the link with subparagraph 5 (d) of decision BC-12/5, should be further clarified, taking into consideration other relevant multilateral environmental agreements and country-level criteria;
- (e) That the differences between consumer goods and special-purpose equipment such as medical equipment should be examined when referring to cathode ray tubes in the context of subparagraph 31 (b) of the technical guidelines;
- (f) That the procedure for party notification referred to in item 1 of appendix V should be further examined in terms of its practicality and legal implications;

Impact of the "Repairables Loophole" if unchanged

If the Guideline is left as is, a very dangerous "Repairables Loophole" will become institutionalized. The loophole allows anyone to simply claim waste as repairable and export it outside the rules and obligations of the Basel Convention. No importing country would be asked if it would like to receive container loads of broken e-waste destined for 'repair'. These business-to-business shipments would simply cross borders with no Basel controls.

If this is allowed to stand, for the very first time in the history of the Basel Convention, a Guideline will advocate exports of hazardous waste without prior informed consent or a binding requirement for environmentally sound management. A Guideline will basically be advocating what hitherto would be considered illegal traffic.

Repair operations inevitably involve discarding some parts of equipment to an Annex IV destination, meaning that the equipment, at least in part, is waste. And if the material contains Annex VIII materials then it is hazardous waste. Bad parts pulled out during refurbishment operations tend to include many hazardous components, such as bad batteries, mercury lamps, mercury switches, leaded CRT glass, and low-value boards. If exports of non-functional hazardous e-wastes are taken completely outside of the scope of the Convention as is the case if an actor utilizes paragraph 31(b) in the guideline, then Parties become helpless to control this exempt hazardous e-waste crossing their borders.

BAN, therefore, believes that the questions posed above in Decision 12/5 of COP12 and in Decision 10/5 (attached) of the 10th Open Ended Working Group regarding paragraph 31(b), are probably the most important questions posed to Parties in the last decade. E-waste is *the most illegally traded hazardous waste on earth today*, with the potential to create massive harm in particular to developing countries. The solution to this scourge is not to legalize it.

Below, we first provide a short reminder of what happened at COP12. Second, we summarize the implications of the COP12 Decision. And third, we propose four concrete solutions that Parties should call for.

What happened at COP12

- At COP12, the draft Technical Guideline on TBM of e-Wastes was adopted late at night at the end of a long "triple COP". It was adopted "on an interim basis", despite there being no consensus. During the final debate, Argentina disassociated itself from the proceedings and a number of other countries, including Pakistan, Egypt, India, and Yemen did not agree to adopt. Nevertheless, the chair brought the gavel down.
- There was objection for good reason. Never before had the Convention Parties been asked to adopt a document so fundamentally unfinished, especially considering that the unfinished part was *the fundamental question of the entire exercise, that is -- if and when should used, non-functional electronic equipment ever be considered a non-waste?*

- To date this question has never been answered, but instead of just leaving the unresolved section empty, with brackets saying “(this section is to be completed later)”, certain conditions (which were so weak as to have no objections or controversy attached to them when they were discussed), were put into the text and all of the conditions that could be meaningful in terms of protecting the environment, and developing countries were moved to an Annex (for further work). In this way, we are left with an utterly inadequate text which forms now a gaping loophole which places the environment and human health, especially in developing countries, at great risk.

The resulting problems and their implications

- **Extremely weak requirements instead of real controls:** The resulting interim Guideline, primarily in the critical paragraph -- 31(b), simply declares that broken, untested, or non-working equipment that is claimed to be destined for **failure analysis, or for repair and refurbishment** can be considered as falling outside of the scope of the Basel Convention, without requiring any Basel controls as long as the export arrangement meets 5 very minimal requirements. Below are the requirements in the text with an explanation as to why these are not an adequate package by themselves:

1. The trader must claim that the non-functional electronic equipment is being exported for failure analysis or repair.

-- One can do this even if it will not be so destined because it will be very rare that anybody will have an opportunity to actually check.

2. The trader that arranges the shipment (which can even be located in the importing country!) needs to establish a partner in the importing country and sign a contract with this partner that claims environmentally sound management, proper management of residuals, and agrees to make a final report etc.

-- Because this is simply a contract between the waste trader and their partner, it does not matter if it's really upheld because there will rarely be any government or court even looking at it unless there is a dispute between the two contractors. Further, a violation of a contract is a matter of civil law and not criminal. It will be impossible for the government to enforce the contract from the point of view of their interest -- protecting human health and the environment.

3. The exporter must make a declaration, that none of the equipment within the consignment is defined as or considered to be waste in any of the countries involved in the transport.

-- It is entirely inappropriate for a non-governmental operative (e.g. a broker or recycler) to make a declaration of law and assert that they are compliant. They cannot possibly know how to correctly interpret the laws of any given government. If they are caught making the wrong determination they can simply claim ignorance. This form of self-regulation is almost useless from a legal standpoint. Further, this turns the burden of proof of waste v. non-waste on its head. The default assumption should be that countries consider that non-functional equipment is a waste. This is the view of the EU and of Africa and was the view of the MPPI and PACE. After all, 31(b) is written into the Guideline as an exception. Thus only when countries specifically pre-announce that they believe that non-functional repairables are not waste, should this exception ever be considered.

4. Ensure that each piece of equipment is individually protected against damage

--Plastic shrink wrap or cardboard separators are very cheap so this requirement is easily accommodated and not an insurance policy against receiving shipments of junk toxic scrap equipment that will never be reused.

5. Documentation is to accompany the shipments as to the origin and nature of the equipment, the existence of the contract and declaration described above in 3.

--Such documentation is quite easy to provide once one has a partner, but what good will it really be? Parties will not have prior notification that the shipment is going to cross their border, so the burden will be placed on importing countries to try and detect such at the border and then analyze the paperwork to see that it is all correct. There is a reason we have "prior informed consent" in the Convention. Do we really want to give it away without a workable alternative for the most traded hazardous waste stream?

- **No monitoring possible:** Because the Guideline removes the requirement for "prior informed consent" for these hazardous wastes that are deemed "repairable", there is no ability for the importing or transit states to know what e-wastes they are receiving; thus, they have diminished ability to conduct enforcement of any of the 5 stated conditions (above) unless they open each and every possible transboundary shipment and spend time determining if the paperwork is correct or not. Further by the time enforcement is possible, the shipment has already been made and is likely to be abandoned in the importing state if found to be illegal.
- **No ability for exporting states to check on exporters:** The obligations that Basel places on Parties to ensure that the exports are handled correctly and by a responsible company are lost. Any company or broker, no matter their track record, can exercise this loophole and only if the contract comes to light will Parties know anything about who the exporters are.
- **No ability to check repair operations:** The Guideline provides no formal registry of where these repair activities will take place – it's all in a cloak of contractual secrecy. How can any State Concerned know whether the facility is environmentally sound, permitted or not?
- **Incentivizes export:** The Guideline actually requires stricter conditions for exports of fully functional equipment (e.g. they must pass tests of functionality), than it does for exporting broken equipment. This perversely incentivizes exportation for repair which is contrary to a primary goal of the Convention -- to minimize exports of wastes. It also incentivizes the transboundary movement of hazardous parts (bad batteries, mercury lamps, CRTs, etc.) and equipment that turns out to be non-repairable.
- **Violates Ban Amendment:** Another serious matter is that once the Ban Amendment is in force (currently only 7 more Parties are needed), exports of repairables from Annex VII to

non-Annex VII countries can violate the Ban Amendment. This is not an exaggeration because export of equipment for repair involves, the export of hazardous components that will be discarded (sent to Annex IV destination) upon repair in the importing country. Thus, for example, an LCD computer monitor which must have its mercury-laden lamps replaced in order to repair it, is as much an export of hazardous waste as would be the export of those same broken mercury lamps for disposal. The Guideline though states that miraculously, if one claims the LCD is exported for repair even when the mercury lamps cannot be repaired but only replaced, that export does not need to be controlled. This is a direct violation of the Ban Amendment and the principle under which it was conceived. The Ban Amendment is the most important environmental decision of the Basel Convention since its inception.

Recommended solutions/Party input

BAN calls for Parties to consider the following recommendations. Either Parties should:

- 1) decide that the blanket exception now found in 31(b) should be withdrawn, and perhaps a small medical equipment exemption described instead, or
- 2) that the given conditions need to be reformed.

Below we have identified the key conditional reforms needed to repair the "Repairables Loophole", at times with new text indicated with **yellow** highlight.

1. Establish Country and Trader Registry

It is paramount that the Parties re-establish that **the export, transit, and import of hazardous e-waste for repair is truly an exception exercised only by countries that affirm in advance they agree that such equipment is not waste, and are willing to provide transparency of where this equipment can be legally processed.** This can be done by:

A. Changing Paragraph 27 to reverse the burden of proof and to provide full transparency of where the equipment will be going with the new replacement text:

27 (new). Any State Concerned that considers used electrical and electronic equipment destined for failure analysis, repair or refurbishment as a non-waste is so entitled to trade in such equipment as non-waste as long as they make this formal position clear by notifying the Secretariat they wish to join the Country Registry of such countries, and provide and maintain a national registry of approved exporters and approved processing facilities for such operations, and, as long as such a designation complies with applicable international, regional and national legal instruments. Such Parties should notify the Secretariat of the Basel Convention of this information in accordance with Article 13 ("Transmission of information"), paragraph 3 of the Convention. Such notification shall include:

a. Formal notification that the Party does not consider electronic equipment destined for failure analysis, repair or refurbishment to be a waste.

b. Any additional conditions to those found in the Guideline, by which the equipment might or might not be considered a waste or non-waste.

b. The names and addresses of approved exporters (for exporting countries) and processing facilities (for importing countries) wishing to trade in electronic equipment destined for failure analysis, repair or refurbishment.

B. Change paragraph 31 (a) iii (which applies also to 31 (b)) and replace it with this new language:

31. (a) iii (new) A declaration made by the person who arranges the transport of the equipment that all States Concerned are listed in the country registry as described in Paragraph 27(new) and that they are so listed in the registry as an approved exporter and that the importing facility is likewise so listed in the registry as in approved importing repair facility.

2. Re-establish the default that tested, functional equipment is non-waste and non-functional or untested equipment is waste (with some exceptions)

The most appropriate place to ensure that 31(b) is considered an exception to the rule established above in the text, is to alter 31 (b) and delete paragraph 43.

31 (b) (new) When all of the countries concerned have declared in advance in accordance with paragraph 27 (new) that they consider such equipment as a non-waste when a transport is destined for **failure analysis, or for repair and refurbishment** with the intention of reuse, or extended use by the original owner, for its originally intended purpose, and provided that the criteria set out in subparagraphs (a) (iii) and (a) (iv) of paragraph 31 above and all of the following conditions are met:

Delete Paragraph 43.

3. Prevent the transfer of highly problematic electronic scrap exports

Ensure that the export of highly problematic equipment does not take place. These will include

a) anything not considered to be whole equipment and thus unlikely to be repairable or subject to failure analysis, and

b) scrap equipment that is both largely obsolete in the marketplace while being very hazardous.

This, for example, will ensure that we are not exporting now outdated mercury backlit LCD screens which inevitably break in transit or during repair and in any case leave a toxic legacy waste in the recipient country.

These conditions must be a requirement in a new 31(b) i(bis), as follows:

31. (b) i (bis) The equipment consists of whole equipment and not parts or fragments, and unless such equipment is defined as professional specialty equipment¹, does not consist of, or contain, cathode ray tubes (CRTs), mercury, asbestos or Polychlorinated

¹ Professional Specialty Equipment is defined as equipment that is not consumer electronics and is only used in unique professional fields such as science, medicine, aviation etc.

Biphenyls (PCBs).

4. Preserve intent of Ban Amendment

It is vital that this exception does not contradict the letter or intent of the Basel Ban Amendment. Thus the following text needs to be added as new 31(b) ii (f):

31(b) ii (f): Assurance that all un-repairable equipment, parts or residues derived from the imports that are hazardous under the Convention and coming originally from an Annex VII country, are repatriated to that country, or by arrangement with the original exporter, sent to an ESM facility in another Annex VII country.

END