

Repairing the "Repairables Loophole" in the e-Waste Technical Guideline



Submission by the Basel Action Network (BAN)

October 30, 2017

What happened at COP12

- At COP12, the draft Technical Guideline on the Transboundary Movement of e-Wastes (unofficial name) 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 placing the environment and human health, especially in developing countries, at great risk.

What happened at COP13

- At COP13 there was general recognition by the bureau that the further work needed would be significant and would not be accomplished during the meeting. The meeting therefore agreed in BC-13/5 to arrange for further intercessional work.
- BC 13-5 inter alia therefore established an expert working group consisting of 25 Parties, 5 from each UN region, and open to observers. The group was to be led China. A revised questionnaire was to be sent to all Parties to be responded to by 30 November 2017.
- And, Parties and others were invited to: *"...provide comments on the technical guidelines on transboundary movements of electrical and electronic waste and used electrical and electronic equipment, in particular regarding the distinction between waste and non-waste under the Basel Convention, including suggestions for text on the issues mentioned in paragraph 5 of decision BC-12/5 and/or alternative text to Appendix V of the*

guidelines, to the Secretariat by 30 October 2017;"

What follows are BAN's comments (deadline 30 October 2017) in regard to the mandate of Decision 13/5 above.

Impact of the "Repairables Loophole" if unchanged

It is very important to understand the importance of completing the unfinished work of the Guideline. If the Guideline is left as is, a dangerous "Repairables Loophole" could become institutionalized and the inadequate text within the current guideline could become "the method" by which all exporters of e-waste could avoid the Basel Convention.

The current loophole allows anyone to simply claim used electronic waste as repairable and export it completely outside of the rules and obligations of the Basel Convention. No importing country would even 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 whatsoever.

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 (ESM). A Basel guideline will basically be advocating what hitherto would be considered illegal traffic.

And yet repair operations, like recycling operations, can be just as highly dangerous and polluting as many other types of waste management. While these operations, if done correctly, are preferred options over disposal and recycling, they usually involve importing non-functional parts (requiring repair) and then discarding these parts or residual material (non-repairable components) to an Annex IV destination, meaning that the used equipment, at least in part, is waste and thus is exported and imported as waste. And if the material contains Annex VIII materials then it is hazardous waste. Bad parts pulled out during refurbishment operations may include many hazardous components, such as bad batteries, mercury lamps, mercury switches, leaded CRT glass, and lead-tin soldered circuit boards. If exports of non-functional hazardous electronic equipment 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.

Further, the repairable loophole might be utilized as simply a pretext for exporting equipment that is not economically repairable at all. In this form of fraud a contractual arrangement can be made with a partner in fraud that claims they can repair the material but this is not actually the intent at all. But with no government agency scrutiny, the scam is not revealed.

e-Waste volumes continue to rise globally and continue to be toxic. *e-Waste is the most dangerous form of traded hazardous waste on earth today, with the potential to create massive harm in particular to developing countries.* Already most trade in e-waste is done illegally. The solution to this scourge should be to strictly control it, not to legalize it!

Specific problems with the existing loophole 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 of the interim Guideline, 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/controls possible by importing states:** 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 and what they are exporting to whom.
- **No ability to check repair operations to ensure ESM:** 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 and what they are going to do with the wastes?
- **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 of broken equipment (for repair). Remember exports for repair most often include exports of waste as waste makes up part of equipment being repaired. Included in this will be greater incentive to export hazardous waste parts (bad batteries, mercury lamps, CRTs, etc.) to developing countries from developed countries as this material is more expensive to deal with in a developed country. All of these incentives are contradictory to a primary goal of the Convention -- to minimize exports of wastes including hazardous wastes, in particular to developing countries.
- **Violates Ban Amendment:** Another very serious matter is that once the Ban Amendment is in force (currently only 5 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 often involves the export of hazardous components that will be discarded (sent to an 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 exported from an Annex VII country to a non-Annex VII country for disposal. The current Guideline however, 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.

What can we do? Recommended solutions

Parties should either:

- 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 five given reforms described below be created.

Below we have identified key conditional reforms needed to repair the "Repairables Loophole", at times with new text indicated in italics and highlighted in yellow.

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 for repair is not waste under certain conditions prescribed in the guideline, 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, 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.

c. 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.

Delete former paragraph 27.

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 an approved importing repair facility.

Delete former paragraph 31(a) iii.

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 to be 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 sub-paragraphs (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 obsolete hazardous electronic scrap exports

Ensure that the export of highly problematic equipment that consists of banned or obsolete technologies does not take place under the newly prescribed exception except in the case of professional specialty equipment.

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 repairable whole equipment or parts, that do not consist of, or contain, cathode ray tubes (CRTs), mercury, asbestos or Polychlorinated Biphenyls (PCBs), unless such equipment or parts is defined as professional specialty equipment¹.

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, following failure analysis, repair and refurbishment, repatriated to that country without delay, or by arrangement with the original exporter, sent to an ESM facility in another Annex VII country.

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.

Conclusion

While the Technical Guideline on the Transboundary Movement of Electronic Waste was a much-needed document, called for by the African group and so many other developing countries, it was a grave mistake to adopt it even on an "interim basis" until the section on exporting repairables was reformed and completed.

As it stands, with its 31(b) "repairables loophole", it is a ready tool for abuse, particularly of developing countries.

The Parties, therefore, are urged to first refrain from utilizing the incomplete section 31(b) until it is completed and safeguards to prevent wholesale avoidance of Basel obligations by unscrupulous traders are put in place.

The Parties are urged, secondly, in the meantime, to adopt the safeguarding reforms highlighted above both nationally and at COP14 in a final completed guideline.

END