



turn back the toxic tide

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BAN Comments on the Proposal by Switzerland and Ghana to Amend the Basel Convention to Place Non-Hazardous e-Waste on Annex II of the Basel Convention

Basel Action Network

June 2020

I. Summary

BAN has read with interest the proposal by Switzerland and Ghana to add a new entry to Annex II to cover all e-waste no matter whether it is hazardous or not. While BAN finds this a useful idea from a procedural standpoint, from the standpoint of substance, it fails to address the real problem. This idea fails to close the real loophole causing so much of the exploitive abuse of developing countries -- *the export of non-functional electronic equipment, hazardous or not, as "non-waste."*

It is this latter problem which is of greatest concern -- not the export of non-hazardous e-wastes. Indeed, it is this problem which has made it impossible to finally adopt the Guidelines on the Transboundary Movement of e-Wastes, and which has in fact been identified by Africa in no less than 3 different Bamako Convention decisions as being the most dangerous regulatory loophole utilized by unscrupulous traders, seeking to move e-scrap to Africa and other continents.

The traders have been allowed to do this in the name of repair and re-use and the false claim that such materials can help the poorer countries and therefore cannot be "wastes." Too often these claims prove to be false and the material is simply dumped or found to be unrepairable. And, even legitimate repair operations involve, at least in part, disposal (Annex IV) of the unrepairable fractions. It is from a legal and scientific standpoint, a grave mistake therefore to not also include these exports for repair within the control procedures of the Basel Convention.

If these exports are not included within Basel, all Basel legal tools become unavailable to the Parties. This includes the right to transparency (notification) to know what might be entering their territories, the right to assert environmentally sound management (ESM), or if such ESM is

not guaranteed, the right to deny entry of the material and to prosecute illegal traffic. All of these rights guaranteed under the Convention are thrown away if one can simply claim something as being a non-waste because it might be repaired.

In our experience and that of border agents all over the world, almost all e-waste that is traded too liberally to the detriment of the receiving country is *not* due to people identifying it as non-hazardous, but rather because they are identifying it as *not* being waste. It is difficult indeed to characterize most electronic waste as non-hazardous currently due to the prolific use of BFRs, leaded solders, phosphors, flammable lithium-ion batteries etc. No, that is rarely the claim made by the unscrupulous traders. T

The claim that is made is that they are *non-wastes* -- simply because of a stated intention to repair the equipment. Once this broken scrap is claimed to be a non-wastes they can then move the material (hazardous or not) to any location in the world outside of the legal constraints of the Basel Convention.

It is for this reason that BAN strongly suggests that an amendment to the proposal by Switzerland, and Ghana is necessary. We propose that the e-waste listings must include these non-functional (claimed as repairable) e-wastes as well as those deemed non-hazardous as Annex II wastes.

This will finally accomplish what the MPPI and PACE agreed earlier, what the EU WEEE directive does in most part today, and what has been called for by the Parties to the Bamako Convention on three separate occasions -- *to define all used electronics that are not functional, as wastes subject to strict international control.*

II. Discussion

Hazardous v. non-Hazardous e-Waste

The question -- which e-wastes are hazardous and which are not-- has never been decisive as most agree that electronics, even in the post ROHS directive days, are hazardous. This may change in due time, but currently due to the additives placed into computer plastics (e.g. BFRs and lead), remaining lead found in circuitry solders, hazardous constituents of batteries including flammable solvents in lithium ion batteries, mercury laden backlights, largely inclusive data on liquid crystal displays and rare earth metals, all lead to the general thinking that e-waste is for the most part hazardous and certainly the burden of proof is upon the exporter to prove that it is not.

Indeed, paragraph 49 of the Interim e-Waste Guidelines states:

"49. E-waste should therefore be presumed to be hazardous waste unless it can be shown either that it does not exhibit hazardous characteristics or that it does not contain hazardous components or substances, in particular:"

In all of the research BAN has done over time, we have not ever seen exporters make claims that their waste is not hazardous and therefore should be exempt from Basel controls.

Wastes / non-Wastes

In recent years it has been the question of waste v. non-waste and not the question of

hazardous waste v. non-hazardous that has been at the crux of e-waste export abuse and controversy.

This is the loophole that is exploited to the great harm of developing countries and is the reason for the lack of control on e-waste globally. By using the word "waste" at the beginning of the newly proposed Y49 listing, Switzerland and Ghana do not solve this matter and in fact leave us with the controversy of what is electronic waste and what is not. As currently written, the Swiss/Ghanaian proposal adds very little to the amount of exported material that is not already controlled, to that which will be controlled.

Even with the Swiss/Ghanaian proposal, traders can simply claim that the material they wish to export can move, no matter whether it is hazardous or not, is a non-waste. And why is it non-waste? Simply, they have claimed, because it shall be repaired. This is the problem that has been created by the infamous paragraph found in the TBM of e-waste guidelines -- now numbered as 32(b). It is this paragraph in fact that has made it impossible to conclude and finally adopt the e-Waste Guidelines as many Parties know this loophole is where the problem lies. At COP14 this problem was highlighted by India and other Parties and resulted in the following paragraph of the Decision 14/5:

"4. Acknowledges the need to look further into subparagraphs 32 (a) and 32 (b) of the revised technical guidelines referred to in paragraph 3 of the present decision, in particular the concerns of Parties on the distinction between waste and non-waste, to advance the work towards the finalization of the guidelines;"

III. The Need to Close the "Repairables" Loophole

MPPI and PACE

In the initial days of the Basel Convention's work on the e-waste crisis, when the Mobile Phone Partnership Initiative (MPPI) and the Partnership for Action on Computing Equipment (PACE) were concluded, the vast majority of Parties agreed that if electronic equipment is not functional then it is a waste subject to control by the Basel Convention. This was the logical conclusion due to the fact that even export for repair operations involve the recycling and disposal of unrepairable residual materials.

For example, when a flat screen monitor is exported from Germany to Thailand to repair and replace the Cold Cathode Fluorescent Lamps (CCFLs) with LED lamps to be remarketed, the highly toxic mercury containing CCFLs are discarded, resulting in the same amount of contamination to the Thai territory as if it had been exported for landfilling. This example and many others, makes the need to consider repair as a waste operation quite clear.

European Union

Indeed, this is already the overarching conclusion of the European Union. In the WEEE directive on Wastes from Electronic and Electrical Equipment, the EU adopted Annex 6 which makes it clear -- except for a few exceptions (found in paragraph 2 of the Annex) -- that the electronic equipment in question is Waste Electronic and Electrical Equipment (WEEE) and not simply Electronic and Electrical Equipment (EEE):

[emphasis added]

"In order to distinguish between EEE and WEEE, where the holder of the object claims that he

intends to ship or is shipping used EEE and not WEEE, Member States shall require the holder to have available the following to substantiate this claim:

- (a) a copy of the invoice and contract relating to the sale and/or transfer of ownership of the EEE which states that the equipment is destined for direct re-use and that it is fully functional;
- (b) evidence of evaluation or testing in the form of a copy of the records (certificate of testing, proof of functionality) on every item within the consignment and a protocol containing all record information according to point 3;
- (c) a declaration made by the holder who arranges the transport of the EEE that none of the material or equipment within the consignment is waste as defined by Article 3(1) of Directive 2008/98/EC; and
- (d) appropriate protection against damage during transportation, loading and unloading in particular through sufficient packaging and appropriate stacking of the load."

As can be noted, the definition of waste for the EU hinges upon functionality where electronic equipment is concerned.

Bamako Convention

African Countries, acutely aware of the problem of unscrupulous traders using the reuse excuse, have sought to establish beyond any doubt that when electronic equipment is non-functional or untested then it is a hazardous waste and its entry into the continent of Africa is illegal if it contains a hazardous constituent or exhibits a hazardous characteristic.

The Bamako Convention's first conference of Parties adopted the following active paragraph in its decision 1/15 on e-waste:

"Calls upon, Parties and other African states that have not already done so to legally consider all non-functional or untested used electronic equipment as hazardous waste and prevent their importation into the African Continent."

The Bamako Convention has at its second conference of Parties also adopted the following active paragraph in its decision 2/6 on e-waste:

"Calls upon, Parties and other African states that have not already done so to legally consider all non-functional or untested used electronic equipment as hazardous waste and prevent their importation into the African Continent."

And most recently, this year at COP3 the Parties went even further and singled out the need to amend the Bamako Convention to include in its Annex I all non-functional electronic equipment and to promote the removal of the "repairables" exception in the Basel Convention's Guidelines -- Paragraph 32:

"Calls upon, parties and other African States that have not yet done so to legally consider all non-functional or untested used electronic equipment as hazardous waste and prevent the import into Africa of such equipment, and consider the addition to Annex I of all non-functional electronic equipment bearing in mind the procedures to be followed under Article 18, to ensure that traders do not make the African continent a target for foreign plastic waste;

Also calls upon, Parties and other African States that are Parties to the Basel Convention to promote the removal of the exception found in Paragraph 32, of the technical guidelines on transboundary movements of electrical and electronic waste and used electrical and electronic equipment that will allow non-functional, hazardous e-wastes to be exported as non-waste and thus outside of the control procedures of the Basel Convention and in contradiction to the Bamako Convention;"

Note that the Bamako Parties do not advocate for non-hazardous waste to be controlled but rather -- *non-functional electronic equipment to be controlled.*

The Basel Ban Amendment

The Ban Amendment -- the strongest legal expression of concern over harmful transboundary movements made at Basel level -- is now in force. Those who negotiated and ratified this important agreement never envisioned that it would not cover so-called "repairable" broken and hazardous electronic scrap. Yet, the current version of the TBM of e-Waste Guidelines allows for this to take place. It allows in Paragraph 32(b) for *broken hazardous electronics* to fall outside of the Basel Convention and the Ban Amendment, simply if one claims that the material might be repairable.

The TBM Guidelines is attempting to do what Guidelines are not supposed to do -- to legislate and remove existing obligations under the Convention and the Basel Ban Amendment at the same time. It is the right opportunity now for the Swiss/Ghanaian proposal to make it clear that controls over non-functional hazardous equipment are necessary and in keeping with the fact that repair destinations include disposal/recycling destinations.

Many countries have been calling for a clear distinction to be made between functional and non-functional in equipment when it comes to determining what e-waste is controlled. There has been no such call for making a distinction for non-hazardous waste. This is because unscrupulous traders have taken advantage of a simple claim that second hand electronic equipment should not be considered a waste. Thus, the expensive proposition of proving hazardousness via chemical analysis is not needed when its far easier to exercise the "repairables" loophole to skirt the obligations of the Basel Convention

IV. Conclusion

In summary, we believe that the idea of using Annex II to finally tackle the e-waste crisis as proposed by Switzerland and Ghana is a good one. However, in order to effectively address this crisis, we must target the real problem in the effort. The addition of controlled e-wastes must actually be those e-wastes identified by numerous studies and experiences around the world that have identified that the toxic tide of non-functional equipment claimed to be exported for repair presents a grave threat to global waste governance. The resulting exploitation does not help impoverished countries -- it poisons them. It does not improve the circular economy -- it exacerbates brute linearity.

This primary flaw in waste governance has already been identified by the EU, by African nations, and by most Parties earlier in the MPPI and PACE partnerships. This is the problem the revised Swiss-Ghanaian proposal, as suggested in this communication, should effectively address.

We therefore urge Switzerland and Ghana to amend their well-reasoned proposal to ensure

that all non-functional e-wastes are likewise effectively covered by the Basel Convention in Annex II as shown below in Appendix 1.

APPENDIX 1

Proposed Annex II Texts

Swiss/Ghanaian Proposal

Y49 Waste electrical and electronic equipment not containing components included on list A and not containing or contaminated with ANNEX I constituents to an extent that the waste exhibits an ANNEX III characteristic; or waste electrical components not containing and not contaminated with ANNEX I constituents to an extent that the waste exhibits an ANNEX III characteristic (note the related entry on list A1180).

BAN's Amended Proposal

Y49 Non-functional or untested electrical and electronic equipment that is not destined for reuse, including repair, not containing components included on list A and not contaminated with ANNEX I constituents to an extent that the waste exhibits an ANNEX III characteristic; or waste electrical components not containing and not contaminated with ANNEX I constituents to an extent that the waste exhibits an ANNEX III characteristic (note the related entry on list A1180).

Y50 Non-functional or untested electrical and electronic equipment destined for reuse, including repair.

APPENDIX 2

Graphic Summary of Proposals

Current Situation:

Trade in Used Electronic Equipment/ Current Situation Assuming Guideline Para. 32(b) is Accepted as Binding				
Fully Functional?	Claimed as Repairable in accordance with Interim Guideline?	Hazardous?	Likely to cause present or future harm	Basel Control Listing
yes	(Not applicable)	yes	medium	Free Trade
yes	(Not applicable)	no	low	Free Trade
no	no	yes	high	Annex VIII
no	no	no	medium	Free Trade
no	yes	no	medium	Free Trade
no	yes	yes	high	Free Trade

Change Proposed by Switzerland/Ghana:

Trade in Used Electronic Equipment Proposed by Switzerland/Ghana Assuming Para. 32(b) is accepted as Binding

Fully Functional?	Claimed as Repairable in accordance with Interim Guideline?	Hazardous?	Likely to cause present or future harm	Basel Listing
yes	Not applicable	yes	medium	Free Trade
yes	Not applicable	no	low	Free Trade
no	no	yes	high	Annex VIII
no	no	no	medium	Annex II (Y49)
no	yes	no	medium	Free Trade
no	yes	yes	high	Free Trade

Change proposed by Switzerland/Ghana Amended as Proposed by BAN

Trade in Used Electronic Equipment Proposed by BAN Amending the Swiss/Ghanaian Proposal, (alters 32(b) of Guideline)				
Fully Functional Electronic Equipment?	Claimed as Repairable in accordance with Interim Guideline?	Hazardous?	Likely to cause present or future harm	Proposed Basel Listing
yes	Not applicable	yes	medium	Free Trade
yes	Not applicable	no	low	Free Trade
no	no	yes	high	Annex VIII
no	no	no	medium	Annex II (Y49)
no	yes	no	medium	Annex II (Y50)
no	yes	yes	high	Annex II (Y50)

As can be seen by the above diagrams, the latter proposal which amends the Swiss/Ghanaian proposal is most effective in controlling potential harm of high and medium levels. This latter proposal only allows free trade in fully functional equipment (commodities).