Delegate Alert

Number 2

OEWG 9, Basel Convention

September 14, 2014

Delegates are alerted to an important matter slated for the Technical Working Group at the upcoming OEWG 9 meeting in Geneva, 16th – 19th September 2014.

‘Legal Clarity’ Glossary of Terms Document Not Ready for Adoption: Defines Illegal Traffic as “Goods” and Allows Any Country to Delist Material from Waste List!

Background

In order to create a “package deal” by which the Parties could achieve early entry into force of the Basel Ban Amendment, the Parties agreed, as part of the Omnibus Decision XI/1 from the Country Led Initiative, various bodies of further work. One of those tasks was meant to provide “Legal Clarity” to various terms and definitions.

Ironically though, the result of this work being brought before OEWG 9 for adoption and forwarding to COP12 has very problematic new definitions and “explanations” that will:

Undermine the Basel Ban Amendment -- by allowing any country to simply declare materials as non-waste and thereby circumvent the intent and purpose of the Basel Ban. For example, developed countries may simply unilaterally claim non-functional “repairables” as non-waste, removing all Basel regulation of non-working equipment. Further, redefining all manner of hazardous waste as “Goods” sends a signal to customs agents and shippers around the world that Basel has approved their export and that the movement of the material is “desirable.”

Violate a Decision on e-Waste recently adopted by African Parties of the Bamako Convention – by allowing countries to declare that any waste, including non-functional “repairables”, are to be considered non-waste. This is counter to the conclusion of the Bamako Convention (COP1) Decision, which says that all such “repairables” are considered waste.
Undermine the Basic Principle of TBM Technical Guideline on e-Waste – by allowing any country to declare material as non-waste. This undermines the basic tenant of the transboundary movement Guideline to date that all non-functional or untested material be considered waste.

Violate the Basel Convention Itself – because Basel does not allow Parties to unilaterally delist materials from the waste definitions found in the Convention. Such national derogations would surely include exports for repair, which almost always involve export of bad parts (that are replaced as part of the repair) that will end up in Annex IV (disposal) destinations, such as bad batteries, mercury lamps, CRTs, etc.. Further, the definition of “goods” will undermine implementation of Basel by signifying that wastes and Basel contraband are a desirable export or import.

BAN has identified several serious problems in the text of the draft Glossary for Legal Clarity Document UNEP/CHW/OEWG.9/INF/20, but we will highlight three below which, if agreed, will be disastrous to the interests of developing countries, the electronics recycling industry, and to general global governance of hazardous waste. Indeed, the draft as it stands undermines the stated intent of providing global legal clarity between differing agencies (e.g. customs) and governments.

Problem One: Waste, Hazardous-Waste, and Illegal Traffic all defined as ‘Goods’!

The purpose of the Legal Clarity exercise was to insure that all Basel partnerships, stakeholders, Parties and their agencies would share a common, global understanding of the nature of waste and transboundary movement of waste from a legal standpoint, consistent with the Basel Convention.

But here in this document, we find the Basel Parties are deciding to define a term NEVER used in the Basel Convention. And it’s never used for good reason. The term “goods” in common usage simply means anything that is traded that is desirable (e.g. they have commercial value to somebody somewhere, regardless of hazardous characteristics or type of destination). And the Legal Clarity Document has largely echoed that definition:

“Good: A substance or object, such as a product or a component, including a waste, that has economic value and which is capable, as such, of forming the subject of commercial transactions.”

As we can see, this definition includes ANYTHING as long as it has an “economic value” to somebody. The new definition of “goods” introduces a concept that has no place in an environmental convention – the concept of the “economic value” of the hazardous waste. In fact, hazardous waste, e.g. heavy metals mixed with plastics, has a positive economic value to some while it has a negative economic value to others, depending on many factors such as cost externalizations, labor costs, environmental protections, price of metals, etc. The question is also begged, “economic value in terms of what, and to whom?” How is this defined? Something to be serviced due to its hazardousness or problematic nature has value to those that are involved in transporting or conducting that service. For example, those in the business of properly decontaminating PCB-containing electric transformers find great service value in the transformers.

Then there is the case of externalities. For example, some waste might have copper mixed with dioxin. The traders intend to capitalize on the copper value and externalize the negative costs – the liabilities inherent in the dioxin. They intend to dump that in a wayside
in Africa. They, too, see the waste as having great “economic value.” Basel has never defined anything based on economics – and rightly so!

Under this draft definition of “goods”, the following could be considered as “goods” under Basel:

1. Wastes
2. Hazardous Wastes
3. “Other wastes” under the Convention (household garbage and incinerator ash)
4. PCBs
5. Asbestos waste
6. Mercury waste
7. Non-functional e-waste
8. Obsolete ships for scrapping
9. Illegally trafficked waste under the Convention

Imagine when a customs agent finds out that the materials above have been exported as “goods” under the Basel Convention, which the exporter could claim were this definition adopted. Do you think her or she will not simply allow the material in and process it as dutiable imports (‘goods’). Do we really want Basel contraband to be considered as goods? And do we really think that “economic value” has any place in determining Basel definitions -- which are science based — on their capacity to cause harm or not to the environment? Absolutely not.

The entire concept of “Goods” and “Economic Valuation” must be stricken from this draft glossary. As written, it currently basically means anything that is traded by humans. Furthermore, as the Legal Clarity Document has used the term “Goods” throughout and does so in very inappropriate ways, all the terms using these must be revisited.

Customs officials searching containers might be fooled by Basel “Goods” that are actually illegal traffic in waste.

Copyright BAN 2014
**Problem Two: Allowing any Country to Determine When Something is a Non-Waste**

In the definition of “end-of-waste status”, the Legal Clarity group injected new concept borrowed from the European Union. In the Basel context it is very dangerous

The draft Glossary for OEWG consideration says:

*End-of-waste status*: In accordance with applicable national law, waste can cease to be waste when it has undergone a recovery, including recycling, operation, and the resulting material meets a predefined set of criteria, such as the following:

(a) It is commonly used for specific purposes;
(b) A market or demand exists for it;
(c) It fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products;
(d) Its use will not lead to overall adverse environmental or human health impact; and
(e) Limit values for pollutants are specified, where necessary.

This language gives ‘carte blanche’ to any country that wants to declare Basel listed wastes as non-wastes, if they have “undergone a recovery”, which is not defined.

The criteria is not laid out in the draft definition of “end-of-waste status”, but only examples are given (a–e in the definition), leaving this waste-delisting exercise granted to Parties by virtue of the Legal Clarity Document completely open to however any Party wants to use it. This idea of unilaterally de-listing waste is not allowable under the Convention. In fact, allowing each nation to create its own definitions runs at cross purposes to the entire purpose of international law, which is to create a common set of rules and a level playing field for all Parties involved. This has never been allowed under Basel, where reservations and unilateral derogations are not allowed (Article 26).

In fact, the only place where the Convention specifically allows for national definitions is in Article 1,1,b, which says, “wastes that are not covered under 1,1,a (waste considered hazardous by virtue of the use of Annexes I and III) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.”

In other words, under the Convention, Parties may ADD materials to the list of hazardous wastes, but cannot SUBTRACT them, such as defining them as non-wastes in domestic laws.

The Basel Convention did not envision, nor should it allow, any government to decide unilaterally when a waste is not a waste. This is a fundamental alteration of the Convention’s obligations accomplished by a Legal Clarity group! If the Parties need to decide this collectively, they should do so multilaterally and in a legally binding manner.

This notion that countries may define when something is no longer a waste, found in the definition of “end of waste status”, must be stricken from this document.
Problem Three: Non-Functional Repairables May be Considered Non-Waste!

Far from providing legal clarity on the very important question that the world is struggling with right now -- how to deal with "repairables" and whether they fall under the Basel Convention -- the issues are instead considerably muddied and undermined by the work of the Legal Clarity group. This is due precisely to the problem noted above -- that any country can now decide that something destined for repair is a non-waste.

Earlier it had been established by the MPPI and PACE that exports for repair included, at least in part, an export of a waste (non-functional components or equipment) that would likely have to be disposed of (Annex IV destination). Indeed, that basic tenant that non-functional or untested equipment should be considered waste, which is the basis for the current TBM of e-Waste Guideline, has been undermined or made more unclear, perhaps unwittingly, in this Legal Clarity Document.

This is because here we find that, contrary to what has been agreed previously in Basel, Bamako, EU, etc. we see that “repairables” might be considered non-waste if a Basel Party wants to do that. Already in discussions in the TBM of e-Waste Guideline, it is clear that many developed (exporting) countries would like to open the doors to such a massive exemption. These include Japan, the US, and Canada.

It will open the floodgates to e-waste trafficking if any country can simply declare non-functional “repairables” as non-waste by use of their own home-baked definitions of when a waste ceases to be a waste. As a result, many of the agreements noted in the background introduction above will be violated or undermined, and it will spell disaster for those businesses that have based their existence and model on the notion that electronic and other equipment must be recycled and dismantled at home and not exported abroad. Many recyclers have invested in very expensive shredders and separators. If a country simply claims that “repairables” are not waste, then all of that investment is for naught as it will be more profitable to freely export unprocessed equipment as ‘repairable non-waste’ than to pay for expensive dismantling and shredding. All e-waste can simply be labelled as repairable non-waste under a national definition, and exported with no controls.

Certainly the work of the Legal Clarity group should not trump the work occurring for the e-Waste TBM Guideline. This could well happen if this document is adopted here at OEWG 9, as the TBM guideline is still being worked on. But that appears to be the case.

---

There are many other problems found in the text. For example, the explanations are not consistent with, and sometimes contradict, the definitions in the glossary, lending confusion, not clarity.

While surely well intended, it is very clear that this document oversteps its bounds by fundamentally altering the obligations of the Convention. Further, it fails to provide legal clarity. On the contrary it runs afoul of many previous agreements and sends false signals that many things that are actually “bads” are now “goods.”

What You Can Do

It is clear that despite some worthy text found in this document, it is not as yet ready for adoption.
To do so would seriously undermine the Basel Convention and the Basel Ban Amendment and many other major achievements of the Convention. The very foundation of any Convention or law is its definitions. However great liberties have been taken, departing from Basel’s existing norms and definitions. These are so important as to warrant far more scrutiny.

Please consider raising your concerns during the plenary about these matters and within any working groups formed to discuss these this week.

We look forward to seeing you all again in Geneva.

Sincerely yours,

Jim Puckett, Sarah Westervelt
Basel Action Network