

R2: Non-Compliance by Design



SERI's Faulty Claims of Legal Export of e-Waste

Basel Action Network
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Assertion v. Fact

Whether you are a large company or an individual, the decisions about who to trust with the management of your electronic waste are vital -- not only for the environment and human health but also due to the liabilities and consequences that might result from making the wrong choice.

SERI, the owner of the R2 Certification Program for electronics recyclers, recently published an article (July 27, SERI Newsletterⁱ) about the importance of adhering to laws governing the export of hazardous electronic waste. The first sentence of this article states:

“Ensuring the legality of exports is a fundamental principle of the R2 Standard – as is promoting responsible reuse of electronics around the world, including in developing countries.”

This is not the first time that R2 proponents have asserted that they are intent on *the principle* of complying with international waste trade law. *If only the R2 standard implemented and operationalized that principle, but sadly it does not.*

In the original multi-stakeholder process to create the R2 standard (which included BAN), industry lobbyists were successful in altering the standard to allow for e-waste exports in violation of international law. This serious deficiency forced BAN and other environmental organizations to disavow the faulty R2 standard and eventually led to BAN's creation of the e-Stewards program. While some of those violations were later rectified, R2 remains out of compliance with the Basel Convention. The Basel Convention, from which the Basel Action Network takes its name, is the global treaty that provides the international rules of the road for trade in hazardous wastes; it is currently ratified by 184 countries. The e-Stewards Standard fully implements Basel's rules for the electronics waste stream and applies these all over the world including in the US, despite the fact that the US is the only developed country that has not ratified this UN treaty.

Indeed, the single most important difference between the R2 and the e-Stewards standards lies in the fact that R2 does not comport with the Basel Convention and in fact provides ready avenues to circumvent it, while the e-Stewards Standard explicitly applies the Basel Convention to the e-waste stream via its definitions and requirements for international trade in e-waste.

On the Contrary

SERI's stated principle of “ensuring legal export” of e-waste is misleading at best.

If in fact *“ensuring the legality of exports is a fundamental principle of the R2 Standard”* were actually a true statement, one would then need to ask why would the R2:2013 Standard:

- *fail* to mention or even reference the global treaty (Basel Convention) controlling the export of hazardous waste, including e-waste?

- *fail* to use or reference the Basel Convention’s definitions of controlled hazardous waste when it comes to export, rather than inventing their own list (Focus Materials) which does not conform to the Basel Convention list?
- *fail* to note that the only authority that can actually provide R2 recyclers proof of legal import is a country’s Basel Convention “competent authority”?
- *fail* to note the list of 150 countries that are prohibited from importing any hazardous e-wastes from the United States due to the fact that the US is not a Party to the Basel Convention?
- *fail* to utilize the carefully considered definition of “full functionality” utilized in the Basel Convention Technical Guideline that distinguishes waste from non-waste and rather, create their own far weaker definition, allowing R2 to promote ‘reuse’ that dumps hazardous parts in developing countries?
- *fail* to require that every facility owned by an R2 certified company adhere to the R2 standard so that they will not export from their non-certified facilities?



Illegal operations in China, breaking open CRTs, much of the glass was smashed -- fate unknown. .Copyright Lai Yun.

Illegal imports of US CRTs flowing into China from Vietnam border town of Mong Cai. BAN tracked CRTs from the R2 company Intercon Solutions across this border. Copyright BAN 2010.



The sum of all of the above failures leads one to understand that the Basel departure is not an accident but is *designed* to weaken the application of international law with respect to R2 Certified Recyclers. When challenged on these things in the past, SERI spokespersons have responded that because the standard states as a general principle that they must abide by all laws, then they can

rightfully state that the standard results in legal trade with other countries:

“General Principle - An R2:2013 electronics recycler shall comply with all applicable environmental, health and safety, and data security legal requirements and shall only import and export equipment and components containing Focus Materials in full compliance with all applicable importing, transit, and exporting countries’ laws.”

But this argument is disingenuous. Understanding that every standard calls for its adherents to obey the law, does not excuse that standard from, at the same time, prescribing or allowing actions which are illegal. The general principle cited above is not implemented in specific requirements in the R2 standard itself. Stating a principle *does not* provide blanket protection or cover for procedures, definitions, and requirements in R2 that directly lead recyclers and their trading partners into violations of the Basel Convention.

The following explores some of these prescribed violations and how they may play out in the real world.

Losing Focus on Basel Wastes

“Focus Materials” (FMs) as defined by the R2:2013 standard are the only materials that trigger export controls under R2:2013, and yet “Focus Materials” are not the list of wastes which are required to be controlled under the international trade rules (Basel).

First, the definition of FMs is extremely problematic as it defines them as only being found in “end-of-life electronic equipment”. But R2 has no definition of “end of life equipment”, leaving this open to wide interpretation. While the R2 definition of FMs mentions the need for greater care during refurbishment, it is extremely unclear as to whether FMs even apply to materials destined for reuse -- before or after repair -- as these are not normally defined as “end-of-life.” It is very easy for a company to claim that *export restrictions for Focus Materials* do not apply to their exports for reuse as these exports are not “end-of-life electronic equipment”. They can then export with impunity based on that definitional limitation alone. We hope that this is simply a textual mistake but it’s of great concern due to the ambiguity and remains uncorrected.

Second, the R2 definition of FM’s exempts ‘de minimus’ amounts of FMs from the definition, but does not define it. Who decides what is de minimus and thus exempted from the definition of FM, and how is this being interpreted in practice across the R2 program? *The Basel Convention’s legally-binding regime has*



The Basel Convention is not a guideline. It is binding international law for more than 180 trading partners of the United States. R2 Recyclers must heed this Convention but it is not even mentioned in the R2 Standards.

no exemptions based on 'de minimus' amounts of hazardous materials. Thus the R2 standard directly flies in the face of existing international law governing trade in hazardous wastes.

Thirdly, and very significantly, the FM provided in R2 is far too limited a list to be compatible with international law. Glaringly absent are the Basel listed hazardous wastes found in electronics that contain selenium, asbestos, antimony, beryllium, cadmium, arsenic, flammable solvents, etc.ⁱⁱ Export of waste electronic equipment containing any of these hazardous materials requires legally binding international trade controls by recipient and transit countries; yet R2:2013 saw fit to ignore this fact and created a new, smaller subset of the Basel list.

Also absent from the definition of FMs are any materials which an importing country considers hazardous waste, above and beyond the Basel or FM definitions, which *must* be respected by the 184 nations that have ratified the Convention and therefore must be respected by R2 recyclers wishing to trade with those countries. A mechanism in R2 must exist to determine these valid laws in importing countries. But R2 provides no such mechanism.

All of these shortcomings mean that R2:2013 does not require their recyclers to control internationally defined hazardous waste as required under international law. This makes trade in such equipment at risk of being criminal traffic, placing their own companies, their customers, and trading partners subject to prosecution or negligence.



Almost every import into the New Territories area of Hong Kong today is allegedly for "reuse" and yet almost no reuse happens there. Rather equipment like that seen here is broken apart crudely in electronics junkyards spreading pollutants such as toners and mercury. Copyright BAN, March 2016.

The Reuse Excuse

As evidenced in their July 27 article, R2 likes to discuss export rules at the same time they extoll the virtues of reuse. It is a fact that both international export laws and reuse are very important for the environment; however, it's very telling that these two distinct subjects are discussed together as if R2 reuse policy trumps or mitigates application of the law. It is almost as if R2 is saying "well, yes, the law exists, but we are going to ignore it because we want to promote reuse." But promoting reuse does not allow one to ignore the rules for international trade in waste, including those

applying to broken equipment and parts destined for repair and eventual reuse. Reuse should be promoted, of course, but always within the confines of the law.

As we shall see, R2 has taken liberties with the norms, guidance and legally-binding application of the Basel Convention and unilaterally exempts entire reuse categories of e-waste from any R2 export requirements, resulting in a certification program that actually drives illegal trade.

First, In the R2:2013 Standard, if one ensures that the equipment is tested for its “key functions”, and passes the test it can be exported without controls of any kind.

This might sound reasonable, but in addition to the problem cited above where some countries may still consider this used equipment hazardous waste, there’s a mighty catch found in the definition for “key functions” invented solely by R2.

R2 has altered the language employed in the Technical Guideline for Transboundary Movement of Electronic Waste adopted by the Basel Convention, which distinguishes between waste and non-waste.ⁱⁱⁱ The altered R2 text, contrary to the Basel guideline text, allows the export of non-functional hazardous electronic equipment without the controls envisaged by the international community.

Compare the two definitions of “key functions” (emphasis added) below:

Basel Convention Guideline Definition

Key Function: *“The essential function of a unit of equipment that will satisfactorily enable the equipment to be used as originally intended.”*

R2:2013 Definition

“Key Functions are the originally-intended functions of a unit of equipment or component, or a subset thereof, that will satisfactorily serve the purpose(s) of someone who will reuse the unit.”



In Accra, Ghana perfectly functional CRTs are imported from Europe and North America. Yet the demand for this obsolete equipment is far less than the incoming CRTs. As a result, they are smashed and burned at the Agbogbloshie dump for their copper. Copyright Kai Löffelbein.

The difference is glaring. The R2 language “*that will satisfactorily serve the purpose(s) of someone who will reuse the unit,*” allows the end user to define what functions, if any, need to be working in the R2 category called “Tested for Key Functions, R2/Ready for Resale. This R2 definition of ‘key functions’ effectively allows the R2 customer to define what is waste and what is not, based on their own declared purpose for the used equipment, rather than by what the equipment was designed to do.



BAN's e-Trash Transparency Project which placed tracking devices inside electronic equipment and then following their trade paths found that 40% of the deliveries to US recyclers were exported. Most of the CRT monitors, printers and LCD monitors arrived at Hong Kong junkyards like this one. Copyright BAN, December, 2015.

It is important to know that this notion of trader-defined definitions of waste was fundamentally rejected at the Basel Convention negotiations for obvious reasons. With such a definition, the end user could decide they wanted the waste for the purpose of filling a hole in the ground, or serve as an “artificial reef” in the sea, or more likely to reuse part of the device and dispose of the rest. For example, one could reuse the CRT of a television but throw away the toxic circuit board, or vice versa. Obviously, allowing the whims of an importer to define the scope of the Basel Convention is asking for abuse and corruption, and violates a Basel country’s obligation to control cross-border movements of hazardous waste.

Further, as mentioned above, some countries, such as Egypt, have passed legal restrictions even against importing fully functional used equipment based on issues like age or obsolete technology. R2 has no mechanism for recognizing these distinctions.

Again, *nobody* is arguing that reuse is not extremely important, but for more than a decade it has been very well known that e-waste exporters have used “reuse” as an excuse for all manner of illegal exportation. In fact, contrary to what the SERI article states, this practice remains extremely common.

BAN’s e-Trash Transparency Project has recently documented massive quantities of electronic waste, such as LCD monitors, CRT monitors, and printers, pouring into the New Territories region of Hong Kong. Almost all of it is being exported under the guise of reuse and only a tiny fraction of it is being reused, and then only for parts, with the rest scrapped, resulting in the illegal transfer of massive volumes of hazardous waste to developing countries in the name of reuse.

R2's "Proof" of Export Consent is not Legally Required Proof

To avoid persons using non-authoritative information to declare shipments to be legal, or attempt to interpret complicated laws themselves, the Basel Convention established in every Basel country, an officially designated Competent Authority to be the final arbiter of whether trade is allowable or not for each sovereign nation.

The Basel Convention states: "*Competent Authority means one governmental authority designated by a Party to be responsible, within such geographical areas as the Party may think fit, for receiving the notification of a transboundary movement of hazardous and other wastes, and any information related to it, and for responding to such a notification, as provided in Article 6.*"



Communications between Competent Authorities are the only legally-valid means to get legal consent for a transboundary movement (export and import) under international law. Why then does R2:2013 not clearly limit the proof of legal documents required by R2 to a country's Competent Authority? Even non-Parties like the United States have a competent authority equivalent. Instead, the R2:2013 standard states the following:

Under the trade rules of the Basel Convention which is the law of over 180 countries around the world, no hazardous e-waste can be placed onto a ship and move from or to a Basel country without having first been approved by a designated Competent Authority of every country involved. R2 ignores this binding obligation. Copyright BAN, 2008.

"Prior to shipment, the recycler shall identify the countries that are receiving or transferring such shipments, obtain documentation demonstrating that each such country legally accepts such shipments, and demonstrate compliance of each shipment with the applicable export and import laws."

And in the R2 Guidance Document, R2 provides examples of the kinds of documentation that can be provided. The added underlining below identifies unacceptable documentation, based on existing international law:

"Documentation to show conformance might include, but are not limited to:

- *Downstream vendor permit to operate that shows imported material is processed*

- *Downstream vendor permit that lists accepted material and from which broker(s)/companies/countries accept such materials*
- *Downstream vendor license to import materials*
- *Letters from the importing country's Competent Authorities*
- *Letters from the importing country's local enforcement agency*
- *Copy of a law from the importing country that states the import is legal*
- *Permission to import documents for material loads*
- *Broker license from importing country"*

All bulleted items except the 4th bullet point are very serious departures from the legally correct authority defined in existing international law. However, even the 4th bullet point is not fully correct in that the letter must be part of a government-to-government communication for specific shipments. All other examples given by R2 invite criminal trafficking. The notion that a broker license may be considered by an R2 auditor or recycler as a "proof" of legality is especially concerning, or that a local operating permit (1st bullet point) has anything to do with legal imports crossing national borders. If R2 was intent on avoiding illegality, why did they provide these obvious false "proofs" of legality?

Failure to Mention the US No-Go List

Further, if R2 was truly concerned about its certified recyclers following the Basel Convention and the laws of importing countries, they would have placed into the text, or at least in the Guidance Document, the list of countries which prohibit the import of hazardous waste from the United States because it is not a Party to the Convention.

This list is comprised of 150 countries (the 184 Basel Parties^{iv} minus the 34 nations of the Organization for Economic Cooperation and Development (OECD))^v that cannot legally accept hazardous e-waste from the US because the Convention disallows Parties from trading with non-Parties, unless they are part of a special separate treaty such as the OECD treaty. This list includes most developing countries, including those that have been shown to be receiving the bulk of exported US e-waste, such as: China, India, Vietnam, Pakistan, and all African countries and all Latin American and Caribbean countries other than Chile and Mexico.

As these countries are off-limits from the start, why is this not even mentioned in R2 text or guidance for implementation by all R2 recyclers that are based in the US? Instead, R2 mentions nothing of the Basel Convention whatsoever, nor the illegality of trade in hazardous electronic waste from the US to the 150 non-OECD countries.

The R2 Built-in Double Standard: Any R2 Company can Export with Impunity

Another outrageous export loophole stems from the fact that R2 does not require a multi-sited company to certify all of its facilities in one country. Thus, a corporation with both certified and uncertified facilities can "greenwash" themselves and fly the R2 flag on its website, while doing its exporting from their non-certified sites. They can offer customers two prices, one no-export, and another export all while claiming correctly to be an R2 company.

If SERI truly cared about the matter of illegal exportation, they would have closed this loophole a long time ago.

Keeping the R2 Problems in the R2 Closet

Finally, SERI's enforcement and public reporting record has been worrisome. For example, they retained Intercon Solutions as R2 certified for years, even after BAN, with the help of the Hong Kong Environmental Protection Department, proved they had exported illegally. Further, R2 has not publicized the failings of its own egregious violators even when they are suspended. While SERI has recently created a partial list^{vi} of companies that are non-certified, this list supplies no other information about why they are not.



Diversified Recycling was an R2 company in Florida but their Georgia facility was not certified. A BAN investigation found evidence that they were involved in local CRT dumping as well as export to Hong Kong. Following BAN's investigation, they faced Federal Prosecution. R2 responded to the discovery by saying that they were not R2 certified in Georgia. Here, a picture from BAN stakeout of a truckload of CRTs leaving Diversified for the downstream company that smashed the monitors and dumped them in a construction landfill. Copyright BAN, 2014.

When an R2 certified company is caught out violating, as when BAN caught out Diversified Recycling, very little information is published as to the nature of the violation. This does not serve the community of customers that need to know who is trustworthy and who is not. Such a policy protects their membership, but risks failing to protect human health and the environment and a customers' need to know of this failing.

Conclusion

By its very design, the R2 standard takes pains to skirt the Basel Convention and thus encourages illegal waste export in multiple ways. Its use, therefore, can place companies and customers at risk of prosecution and scandal while harming communities and the environment around the world.

If you are a recycler/refurbisher that is exporting material following the requirements set forth in the R2 standard and its Guidance Document, there is a high risk that you and your trading partners could be found in violation of international law and the national laws of importing countries that are Basel Parties.

If you are an enterprise company or institution using such a recycler/refurbisher and steps have not been taken to ensure e-Stewards Certification or to add additional requirements in your contractual

agreements, then you can easily be inveigled into what is considered by Basel Parties and thus Interpol as criminal trafficking in waste.

Environmental laws exist for a reason. Beyond the very real possibility of prosecutorial action or public relations damage to your brand -- perhaps your most valuable asset, is the very real damage done by toxic exposure to our earth and the communities when great care is not taken to control trade in toxic waste.

Such harm is hardly worth the few dollars saved by utilizing standards designed to skirt existing international environmental law.



Environmental law exists for a reason. One of the latest destinations for e-Waste trade now is Pakistan. Already pollution and occupational disease is being documented in the Pakistan market areas that are receiving e-Wastes from North America. It's time that all Certifications respect international waste trade law. Copyright Reuters.

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ⁱ <https://sustainableelectronics.org/news/2016/07/27/r22013-and-exports>

ⁱⁱ Basel Convention, Annex I, <http://www.basel.int/>

ⁱⁱⁱ <http://www.basel.int/Implementation/Publications/TechnicalGuidelines/tabid/2362/Default.aspx#>, see especially the Glossary.

^{iv} https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XXVII-3&chapter=27&clang=en

^v Organization for Economic Cooperation and Development. <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm>

^{vi} <https://sustainableelectronics.org/inactive-recyclers>