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GHOST SHIPS AND RECYCLING POLLUTION: SENDING AMERICA'S TRASH TO EUROPE

Viola Blayre Campbell

I. INTRODUCTION

After lurking in the foggy waters off the coast of England since November 28th, the fourth ghost ship in a series of thirteen arrived on December 3, 2003.¹ The *Compass Island*, the fourth ghost ship, was allowed to dock without the protest and media that the preceding three ghost ships had received.² The ships were approximately sixty years old and considered vulnerable to breaking up due to their fragile nature.³ Although the media labeled the ex-United States Navy ships as ghost ships, in reality, the ships were not haunted with ghosts or demons at all, but contained a large quantity of toxins.⁴ The toxins aboard ranged from lead and mercury to asbestos and polychlorinated biphenyls,⁵ which are

† J.D., University of Tulsa College of Law, Tulsa, Oklahoma, May 2005; B.A. Political Science and Speech Communication, Texas State University, San Marcos, Texas, May 2001. The author would like to dedicate this comment to her mother Sylvia Campbell-Gomez, who has constantly provided encouragement and inspiration. The author thanks McLaine Dewitt Herndon, Cara Collinson, and John Paul Truskett for their assistance in editing, support, and understanding. The author would also like to thank Professor Marla Mansfield for her helpful comments to the draft. Finally, in writing this paper the author would like to note that *pacta privata iuri publico derogare non possunt*.

1. *Fourth 'ghost ship' docks*, Dec. 3, 2003, BBC NEWS, at <http://news.bbc.co.uk/1/hi/england/tees/3287375.stm> (last visited Sept. 19, 2004) [hereinafter *Fourth ghost ship*].

2. *Id.*

3. *Q & A: Ghost ships*, Jan. 7, 2004, BBC NEWS, at <http://news.bbc.co.uk/1/hi/england/3377417.stm> (last visited Sept. 19, 2004) [hereinafter *Q & A*].

4. *Fourth ghost ship*, *supra* note 1.

5. *Q & A*, *supra* note 3.

potentially disastrous to the local environment where the ships now reside.⁶

The ex-United States naval ships originated from the James River in Virginia⁷ and made the 4,000-mile plus journey after Able UK, a British company, won a \$17,846,338.40⁸ contract.⁹ The Maritime Administration (MARAD),¹⁰ a part of the U.S. Department of Transportation, contracted with Able UK to recycle thirteen ships in total, four of which were part of a pilot program authorized by the United States Congress.¹¹ MARAD developed the assertive ship disposal plan to eliminate high-priority ships from the James River due to environmental concerns.¹² Prior to 2003, very few ships had left the James River.¹³ Now MARAD is working quickly because it has a statutory deadline to dispose of the obsolete ships¹⁴ still in the James River by September 30, 2006.¹⁵ MARAD must try to dispose¹⁶

6. *Id.*

7. *Fourth ghost ship*, *supra* note 1.

8. MARITIME ADMINISTRATION, AWARD CONTRACT (effective July 25, 2003) available at <http://www.marad.dot.gov/Headlines/announcements/2003/DTMA1C03010%20-%20PRP%20Contract.pdf> (last visited Sept. 19, 2004) [hereinafter CONTRACT].

9. *Second 'ghost ship' arrives*, Nov. 13, 2003, BBC NEWS at <http://news.bbc.co.uk/1/hi/england/tees/3266243.stm> (last visited Sept. 19, 2004) [hereinafter *Second ghost ship*].

10. The Maritime Administration (MARAD) is a United States government organization, which "advises and assists the Secretary of Transportation on commercial maritime matters, the U.S. maritime industry, and strategic sealift. The Maritime Administrator also maintains liaison[s] with public and private organizations concerned with the U.S. maritime industry." *U.S. Maritime Administration - Maritime Administrator*, MARITIME ADMINISTRATION at <http://www.marad.dot.gov/Offices/MAR-100.html> (last visited Sept. 13, 2004).

11. *Two More Ships Depart James River*, Oct. 16, 2003, MARITIME ADMINISTRATION at <http://www.marad.dot.gov/Headlines/announcements/2003/marad101703.htm> (last visited Sept. 19, 2004) [hereinafter *Two More Ships*].

12. *Id.*

13. *Id.*

14. As of 2000, there were 39 obsolete ships needing to be disposed of by MARAD. Pub. L. No. 106-398 §§ 3502(b)-(f), 114 Stat. 1654 (2000).

15. National Maritime Heritage Act, 16 U.S.C.A. § 5405(c)(1)(A) (West 2004).

16. Before a ship can be disposed of, the Navy ship must be stricken from the Naval Vessel Register. There are several ways to dispose of the ship once it has been stricken, which include scrapping, foreign transfer donation, and transfer to MARAD. *Disposed*, NAVAL VESSEL REGISTER, available at http://www.nvr.navy.mil/stat_10.htm (last visited Aug. 17, 2004). Each of the four ships in the United Kingdom were disposed of by transferring the Navy title to the Maritime Administration; see *Canisteo (AO 99)*, NAVAL VESSEL REGISTER, available at <http://www.nvr.navy.mil/nvrships/details/AO99.htm> (last visited Sept. 19, 2004); see *Caloosahatchee (AO 98)*, NAVAL VESSEL REGISTER, available at <http://www.nvr.navy.mil/nvrships/details/AO98.htm> (last visited Sept. 19, 2004); see *Compass*

of the “ships in a manner that provides the best value to the government and without predisposition for foreign or domestic facilities.”¹⁷ Thus, vessels may be sold or scrapped in foreign markets approved by the Secretary of Transportation.¹⁸

The four ships sent to the United Kingdom as part of the pilot program are the Caloosahatchee, the Canisteo, the Canopus, and the Compass Island.¹⁹ Both the Caloosahatchee and the Canisteo were Underway Replenishment Oilers and were commissioned in 1945.²⁰ Underway Replenishment Oilers provide fuel to United States Navy ships and aircraft carriers at sea.²¹ The Canopus, commissioned in 1965, was a submarine tender ship,²² which furnished “maintenance and logistic support for nuclear attack submarines.”²³ The Compass Island was commissioned in 1956 as a break bulk cargo ship, but soon thereafter, it was converted into a research ship.²⁴ Specifically, the Compass Island was utilized to develop and evaluate navigation systems.²⁵

As of 2003, MARAD awarded six contracts for the removal of twenty-four ships.²⁶ Able UK was the only foreign company awarded a contract.²⁷ However, Able UK also received the most lucrative contract.²⁸ “Marine Metals of Brownsville, Texas, was awarded a contract for” the removal of one ship worth approximately \$414,768.00.²⁹ The second most

Island (AG 153), NAVAL VESSEL REGISTER, available at

<http://www.nvr.navy.mil/nvrships/details/AG153.htm> (last visited Sept. 19, 2004); see *Canopus*

(*AS 34*), NAVAL VESSEL REGISTER, available at

<http://www.nvr.navy.mil/nvrships/details/AS34.htm> (last visited Sept. 19, 2004).

17. *Two More Ships*, *supra* note 11.

18. Shipping Act, 46 App. U.S.C.A. § 1160(i) (West 2004).

19. *Fourth ghost ship*, *supra* note 1.

20. *Caloosahatchee (AO 98)*, NAVAL VESSEL REGISTRY, available at

<http://www.nvr.navy.mil/nvrships/details/AO98.htm> (last visited Sept. 19, 2004); see also *Canisteo*

(*AO 99*), NAVAL VESSEL REGISTRY, available at

<http://www.nvr.navy.mil/nvrships/details/AO99.htm> (last visited Sept. 19, 2004).

21. *Underway Replenishment Oilers - T-AO*, UNITED STATES NAVY FACT FILE, available at

<http://www.chinfo.navy.mil/navpalib/factfile/ships/ship-tao.html> (last visited Oct. 1, 2004).

22. *Canopus (AS 34)*, NAVAL VESSEL REGISTER, available at

<http://www.nvr.navy.mil/nvrships/details/AS34.htm> (last visited Sept. 19, 2004).

23. *Submarine Tender - AS*, UNITED STATES NAVY FACT FILE, available at

<http://www.chinfo.navy.mil/navpalib/factfile/ships/ship-as.html> (last visited Aug. 17, 2004).

24. *Two More Ships*, *supra* note 11.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

valuable contract was given to Resolve Marine Group, of Florida, for one ship in the amount of \$3,465,799.00.³⁰ The only other company awarded multiple ships besides Able UK was Bay Bridge Enterprises, of Virginia, for five ships and the aggregate price of \$2,763,082.00.³¹ The award of contracts to domestic companies demonstrates that the United States has both the technology and facilities to dispose of its own ships.³²

This transaction between Able UK and MARAD raises two concerns. The first concern is whether the ships filled with hazardous waste should be recycled or dismantled in the country from which they originated (the United States).³³ Environmentalists argue the ships are in such bad condition due to corrosion and wastage that a regular hammer blow would penetrate the ship's hull.³⁴ Taking into consideration the bad condition that the ships are in, environmentalists argue the risk of sinking or leaking the toxic substances substantially escalates when they are moved.³⁵

Furthermore, Teesside, where the ships have docked in England, is an environmentally sensitive area.³⁶ The location is protected under European and British law as a Site of Special Scientific Interest (SSSI).³⁷

30. *Two More Ships*, *supra* note 11.

31. *Id.*

32. *See id.*

33. Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, *opened for signature* Mar. 22, 1989, UN Doc. UNEP/IG.80/3, 1673 U.N.T.S. 28911, *available at* <http://www.basel.int/text/con-e.pdf> (last visited Sept. 12, 2004) [hereinafter *Basel Convention*].

34. BASEL ACTION NETWORK, *NEEDLESS RISK: THE BUSH ADMINISTRATION'S SCHEME TO EXPORT TOXIC WASTE SHIPS TO EUROPE 9* (Oct. 20, 2003), *available at* <http://www.ban.org/Library/Needless%20Risk%20FinalA4.pdf> (last visited Sept. 12, 2004) [hereinafter *NEEDLESS RISK*].

35. *Id.*

36. Press Release, Friends of the Earth, Friends of the Earth Ghost Ship Court Victory, (Dec. 8, 2003), *available at* http://www.foe.co.uk/resource/press_releases/friends_of_the_earth_ghost.html (last visited Sept. 12, 2004) [hereinafter *Ghost Ship Victory*].

37. *Id.* *See also*, United Kingdom Environmental, Health and Safety Regulations 2002 No. 2127 (W.214) § 5 (13). The Wildlife and Countryside Act of 1981 defines SSSI. *Id.* The 1981 Act was enacted to address the problem of habitat loss and species protection. It does not prohibit activities on SSSIs. The designation of a SSSI is a procedural matter. The notification is based on scientific grounds and does not carry any bars on the land's use. However, penalties for damaging SSSIs are not completely lacking. The government may fight a negligent landowner by enacting a Nature Conservation Order on the SSSI, which provides additional protection and penalties for damaging the SSSI. *The History of Conservation Legislation in the UK*, *available at* <http://www.naturenet.net/status/history.html> (last visited Sept. 12, 2004).

This area is important because it is a feeding ground to over 20,000 birds.³⁸ “Nearby mudflats are winter feeding grounds for dunlin, oyster catcher, ringed plover, curlew, bar-tailed godwit, lapwing, grey plover and turnstone.”³⁹ The pollution likely to result from recycling these ships could damage the area. Additionally, the noise created as a result of the work might frighten the wildlife away from its feeding ground.⁴⁰

The pollutants, as mentioned earlier consist of Polychlorinated Biphenyls (PCBs), asbestos and oily water.⁴¹ Environmentalists have argued that the ships sent to the United Kingdom contain over 2,100 barrels of unusable fuel.⁴² While the actual contract between MARAD and Able UK is silent with respect to the quantity of the various pollutants on board each ship,⁴³ it does list possible hazardous materials on board and delegates the disposal of the pollutants to Able UK.⁴⁴

Specifically, the contract states that PCBs may be found in “electrical components and cables, vent duct and misc[ellaneous] gaskets, thermal and acoustical insulation materials, adhesives, paint, various rubber and plastic components.”⁴⁵ Asbestos, another possible pollutant on board may be located in “bulkhead and pipe insulation; bulkhead fire shields; electrical cable materials; brake linings; floor tiles and deck underlay; steam, water and vent flange gaskets.”⁴⁶ A third possible hazardous substance aboard the ghost ships include petroleum, and specifically “fuel oil, lube oil, hydraulic oil, lubricants/greases/sludges, bilge water, standing waste water on board at the time of delivery, oily water, and sump oil.”⁴⁷

Of the above-mentioned pollutants, PCBs are probably the most nebulous to the average person. PCBs are a synthetic organic chemical.⁴⁸ Prior to 1977, PCBs were used industrially and commercially in electrical and hydraulic equipment.⁴⁹ PCBs were also used in “paints, plastics and

38. Ghost Ship Victory, *supra* note 36.

39. *Id.*

40. *Id.*

41. *Q & A*, *supra* note 3.

42. NEEDLESS RISK, *supra* note 34, at 34.

43. CONTRACT, *supra* note 8, at 10.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Polychlorinated Biphenyls (PCBs): Welcome to the PCB Home Page at EPA*, EPA, available at <http://www.epa.gov/opptintr/pcb> (last visited Sept. 19, 2004) [hereinafter *PCB Home Page*].

49. *Id.*

rubber products; in pigments, dyes and carbonless copy paper.”⁵⁰ The United States produced over 1.5 billion pounds of PCBs prior to their prohibition by Congress.⁵¹

The Environmental Protection Agency (EPA)⁵² has listed PCBs as a probable human carcinogen.⁵³ Although the EPA states that its studies linking PCB exposure and disease are inconclusive, it does state that the inconclusive finding does not mean that PCBs are safe.⁵⁴ PCB studies did find increased rare liver cancers and malignant melanoma among PCB workers.⁵⁵ However, “the types of PCBs likely to be bioaccumulated in fish and bound to sediments are the most carcinogenic PCB mixtures.”⁵⁶ The EPA further states:

It is very important to note that the composition of PCB mixtures changes following their release into the environment. The types of PCBs that tend to bioaccumulate in fish and other animals and bind to settlements happen to be the most carcinogenic components of PCB mixture. As a result, people who ingest PCB-contaminated fish or other animal products and contact PCB-contaminated sediment may be exposed to PCB mixtures that are even more toxic than the PCB mixtures contacted by workers and released into the environment.⁵⁷

The EPA has also concluded that PCBs are capable of adversely affecting the immune system, reproductive system, endocrine system, and causing various skin diseases in animals and possibly in humans.⁵⁸

Due to the sensitive nature of the area in which four of the ghost ships now reside, MARAD included paragraph H.11 in the contract for the disposal of the ships to address the concern of moving the fragile ghost ships, which are full of toxins, across the Atlantic Ocean.⁵⁹ Paragraph H.11 states that MARAD has the responsibility of removing and disposing of

50. *Id.*

51. *Id.*

52. The Environmental Protection Agency (EPA) is a United States government organization that was created by Congress to address environmental concerns. *About EPA*, EPA, available at <http://www.epa.gov/epahome/aboutepa.htm> (last visited Sept. 12, 2004).

53. *Polychlorinated Biphenyls (PCBs) – Health Effects of PCBs*, EPA, available at <http://www.epa.gov/opptintr/pcb/effects.html> (last visited Sept. 12, 2004) [hereinafter *PCB Health Effects*].

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. CONTRACT, *supra* note 8, at 33.

any PCBs found on board, or easily removable from the ship, before transferring the ships to Able UK.⁶⁰ However, MARAD also has the discretion not to remove any PCBs, if it determines that removal would cost too much.⁶¹

The second concern raised by the transaction between MARAD and Able UK, is that Able UK did not have the proper facilities or permits to undertake the work.⁶² The facilities allegedly had moveable dock gates that facilitated pumping the dock dry so that scrap metal could be recovered.⁶³ However, Able UK did not in fact have the moveable dock gates nor the dry dock before the ghost ships reached England.⁶⁴ Because of the danger, Friends of the Earth⁶⁵ and the Environment Agency⁶⁶ filed an injunction to prevent Able UK from beginning work on the ships.⁶⁷

Able UK claimed that dismantling the ex-United States Navy ships would not be more dangerous than working on any other sea going vessel.⁶⁸ An Able UK press release quoted the United Kingdom Environment Secretary, Margaret Beckett, in support of the proposition that the ships were as safe as other sea going vessels.⁶⁹ Beckett stated that “[t]he ships in this consignment do not come into a special category of toxicity. Like all ships, they contain some hazardous materials, but they are not inherently dangerous and are not carrying any toxic cargo.”⁷⁰ The Environment Agency also stated that the ships were basically empty and

60. *Id.*

61. *Id.*

62. *Q & A, supra* note 3.

63. ENV'T AGENCY, US WASTE SHIPS – BACKGROUND INFORMATION, ¶¶ 16-17, *available at* http://www.environment-agency.gov.uk/commondata/105385/efra_com_evidence_630119.pdf (last visited Sept. 1, 2004) [hereinafter BACKGROUND INFORMATION].

64. *Id.* at ¶ 16.

65. Friends of the Earth is an environmental group, which claims to have the “largest international network of environmental groups in the world - represented in over 70 countries.” Friends of the Earth is also a charity that funds research, provides educational information, and continuously fights various governments on environmental issues. *About Us*, FRIENDS OF THE EARTH, *at* http://www.foe.co.uk/about_us/ (last visited Oct. 29, 2004).

66. The Environment Agency is the enforcing authority in relation to England and Wales as prescribed by the Environmental Protection Act, 1990, c. 43, §1(7) (Eng.).

67. Ghost Ship Victory, *supra* note 36.

68. *Third ‘ghost ship’ Arrives*, BBC NEWS, Nov. 27, 2003, *at* <http://news.bbc.co.uk/1/hi/england/tees/3242832.stm> (last visited Sept. 1, 2004).

69. Able UK Press Releases, Company Welcomes Exposure of ‘Cynical Scare Campaign,’ Nov. 9, 2003, *at* <http://www.ableuk.com/ableshiprecycling/press-able-031109.htm> (last visited Sept. 1, 2004) [hereinafter Company Welcomes Exposure].

70. *Id.* (quoting Margaret Beckett, Environment Secretary).

did not contain barrels of toxins, as environmentalists had suggested.⁷¹ Additionally, the hazardous materials, which remained on board, could not be removed until the ship was dismantled because they could only be found in the components of the ship.⁷²

Able UK stated that allegations concerning the hazardous nature of the ghost ships were nothing more than a “cynical campaign of deceit and distortion’ mounted by Friends of the Earth and others over the company’s contract to recycle redundant US vessels.”⁷³ Moreover, Able UK hoped that the people would “come to recognise that they have been misled and manipulated by the scaremongers.”⁷⁴ The contract between Able UK and the United States created 200 new jobs.⁷⁵ If Able UK were completely prevented from working on the contract, it would cost over £3 million⁷⁶ “as well as millions of pounds worth of future business.”⁷⁷

However, in December 2003, two judicial reviews in the United Kingdom ruled that Able UK did not have the required permission to dismantle the ghost ships.⁷⁸ As of January 2004, Able UK had submitted a new waste management license application to meet the necessary requirements to begin dismantling the ghost ships.⁷⁹ However, the Environment Agency still has the discretion to send the ghost ships back to the United States if Able UK cannot obtain permission to dismantle the ships.⁸⁰ The outcome of the remaining nine ships remains uncertain until the hearing before the United States District Court set for April 2004.⁸¹

71. ENV'T AGENCY PRESS OFFICE, BREAKDOWN OF WASTE CONTAINED IN THE SHIPS CURRENTLY

EN ROUTE TO UK, Nov. 6, 2003, available at http://www.environment-agency.gov.uk/commondata/105385/us_ships_waste_rev_592307.pdf (last visited Sept. 1, 2004) [hereinafter BREAKDOWN OF WASTE].

72. *Id.*

73. Company Welcomes Exposure, *supra* note 69 (quoting Peter Stephenson, managing Director of Able UK).

74. *Id.*

75. *Fourth ghost ship*, *supra* note 1.

76. Approximately \$5,422,800.00 in U.S. dollars calculated using the exchange rate (\$1.8076 to £1.00) provided by the Wall Street Journal. *Exchange Rates*, WALL ST. J., Mar. 26, 2004, at B6.

77. *Second ghost ship*, *supra* note 9.

78. *Update*, ENV'T AGENCY, Jan. 6, 2004, available at http://www.environment-agency.gov.uk/regions/northeast/588494/639056/639074/?version=1&lang=_e (last visited Sept. 19, 2004) [hereinafter *Update*].

79. *Id.*

80. *Id.*

81. BACKGROUND INFORMATION, *supra* note 63, at ¶ 38. On June 2, 2004, MARAD decided to temporarily delay sending the remaining nine ghost ships to Able UK.

The controversy regarding the ghost ships raises several interesting issues. First, Basel Action Network (BAN),⁸² the environmental group suing in the United States, is seeking to enforce compliance with the Basel Convention.⁸³ However, as of September 1, 2004, the United States has not ratified the Basel Convention.⁸⁴ Why does BAN feel compelled to involve itself in a controversy not implicating the Basel Convention? Furthermore, the Basel Convention was drafted to protect developing countries from exploitation by developed countries.⁸⁵ The two countries involved in this transaction, the United States and the United Kingdom, are not developing countries. Additionally, the waste aboard the ghost ships is not separate from the ship but is a part of its composition.⁸⁶ Do the current laws, treaties, and regulations addressing transboundary shipment of waste take into account waste not individually contained but comprised with other materials?

This comment will discuss the above issues. Specifically, Part II will discuss the litigation concerning the ghost ships in the United States, providing an overview of the statutes BAN referenced in its argument, specifically the Toxic Substance Control Act, the National Maritime Heritage Act, and the National Environmental Policy Act.

The United Kingdom litigation concerning the ghost ship controversy will be discussed in Part III. There are two cases that affected the ghost ships and Able UK. The first section discusses *Friends of the Earth, Ltd. v. the Environment Agency and Able UK*, which determined whether Able UK had the correct waste management license. The next section discusses whether Able UK had the permission from the city of Hartlepool to undertake disposing of the ships.

MARAD stated that, “[i]n view of delays preventing the company from beginning work on vessels currently berthed at Able UK’s reclamation and recycling center in Graythorp,” Linda Roeder, *Hazardous Waste: Planned ‘Ghost Ship’ Export Shelved; Negotiations with U.S. Recyclers Continue*, 35 BNA ENV’T REP. 1206 (June 4, 2004). Managing Director of Able UK in a statement made May 28 stated that “it is clear that it would not be practicable to transfer other vessels during this summer’s ‘weather window.’” *Id.* However, MARAD is planning on future transfers in 2005.

82. Basel Action Network (BAN) is an international network of environmental organizations. Specifically, BAN attempts to influence countries to follow and ratify the Basel Convention, an international treaty which prohibits the export of hazardous waste between certain countries. *About the Basel Action Network*, BASEL ACTION NETWORK, at http://www.ban.org/about_BAN.html (last visited Sept. 19, 2004).

83. *Id.*

84. *Parties to the Basel Convention*, SECRETARIAT OF THE BASEL CONVENTION, at <http://www.basel.int/ratif/convention.htm> (last visited Sept. 19, 2004).

85. Basel Convention, *supra* note 33.

86. BREAKDOWN OF WASTE, *supra* note 71.

Part IV will discuss the Basel Convention. The first section will look at environmental principles to provide a background for interpreting the Basel Convention. Specifically, the first section will address the principles of no harm, precaution versus prevention, and common but differentiated responsibilities. The second section will provide a breakdown of the text of the Basel Convention, while incorporating the previously discussed environmental principles. Furthermore, it will look to see if the Basel Convention addresses the problem of toxins amalgamated with useful materials. The next section discusses the Organization for Economic Cooperation and Development (OECD), its adoption of the Basel Convention, and the United States' involvement with the OECD. The fourth section will discuss the Resource Conservation and Recovery Act (RCRA), which is the United States legislation that incorporates several terms of the OECD. The following section discusses the United Kingdom legislation that incorporates the Basel Convention into its domestic law, the Transfrontier Shipment of Waste (TFS). Finally, Part V will conclude and summarize this comment.

II. THE GHOST SHIP CONTROVERSY IN THE UNITED STATES

As the reader may have already noticed, the controversy regarding the ghost ships is taking place on two fronts. The parties to the United States litigation are the BAN and the Sierra Club⁸⁷ (environmental organizations) versus the MARAD and the EPA. The parties to the British court battle are Friends of the Earth and citizens of the city of Hartlepool versus Able UK, the Environment Agency, and Hartlepool's City Council.⁸⁸ This Part discusses the United States situation between BAN and MARAD, and it considers relevant statutes and regulations discussed within the case.

Plaintiffs, BAN and the Sierra Club, filed a motion for a Temporary Restraining Order (TRO) against defendants MARAD and the EPA to enjoin MARAD from exporting the thirteen ships to the United Kingdom.⁸⁹ BAN had three main arguments arising under each of the following acts: 1) Toxic Substance Control Act, 2) National Maritime Heritage Act, and 3) the National Environmental Policy Act.⁹⁰ The court considered each argument individually, in light of the standards required

87. The Sierra Club is an American grassroots organization, which endeavors to protect the environment and the planet. *Home Page*, SIERRA CLUB, at <http://www.sierraclub.org/> (last visited Sept. 1, 2004).

88. Ghost Ship Victory, *supra* note 36.

89. *Basel Action Network v. Mar. Admin.*, 285 F. Supp. 2d 58, 59 (D.C. Dist. Ct. 2003).

90. *Id.* at 60.

for a TRO.⁹¹ The plaintiff's argument regarding the National Environmental Policy Act was the only argument successful in the court granting the TRO.⁹²

A. Toxic Substance Control Act

BAN's first legal argument was that under the Toxic Substances Control Act (TSCA), exporting PCBs was prohibited unless the EPA granted an exemption through a formal rulemaking.⁹³ The TSCA states that "no person may process or distribute in commerce any polychlorinated biphenyl," unless the Administrator grants an exemption by rule.⁹⁴ The defendants acknowledge that the formal rulemaking requirement was not satisfied.⁹⁵ Nevertheless, the defendants argued that the EPA sent MARAD a letter, which stated it would not enforce the PCB restrictions, with the assumption that MARAD would meet various conditions.⁹⁶

Specifically, the EPA's letter stated that it granted MARAD's request to exercise enforcement discretion to allow MARAD to export thirteen ships to Able UK for dismantling.⁹⁷ The letter further stated that the EPA may terminate its exemption if any of the requirements within the letter are breached or for cause at any time.⁹⁸ The letter also states, as a finding of fact, that Able UK has a "24 acre basin that can be sealed and drained similar to a dry dock," and that Able UK "is permitted to manage and store hazardous materials by the UK's Environment Agency."⁹⁹ The court was concerned about whether MARAD must still obtain the exemption

91. *Id.* The four factors the court considers when granting or denying a temporary restraining order are: 1) whether the plaintiff has a substantial likelihood to succeed on the merits; 2) whether plaintiffs will suffer irreparable injury if the injunction is not granted; 3) whether an injunction will substantially injure another party; and 4) whether the public interest will be furthered by granting the injunction. *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 360 (D.C. Cir. 1999).

92. *Basel Action Network*, 285 F. Supp. 2d at 64.

93. *Id.* at 60; *see also* Toxic Substance Control Act, 15 U.S.C.A. § 2605 (e)(3)(B) (West 2004).

94. 15 U.S.C.A. § 2605(e)(3)(A)(ii), (e)(3)(B) (West 2004).

95. *Basel Action Network*, 285 F. Supp. 2d at 60.

96. *Id.* at 60.

97. *CONTRACT*, *supra* note 8, at 52.

98. *Id.* ¶¶ 13, 14, at 55.

99. *Id.* ¶ 8(a)-(b), at 53. These issues are not addressed by the court; however, they may be addressed in the upcoming trial to determine whether the discretion not to prosecute is equivalent to an exemption. If the court decides the two are equivalent, it will need to decide whether the letter is still viable based on the possible violations on Able UK's behalf.

regardless of whether the EPA decides to enforce the statute.¹⁰⁰ However, because the parties did not address the issue in their briefs, the court could not address it.¹⁰¹

The plaintiffs also claimed that the EPA's decision not to prosecute violated the Administrative Procedure Act (APA) based on TSCA.¹⁰² The EPA's grant of the PCB export ban exemption allegedly violated procedures required by the APA.¹⁰³ However, the APA only allows judicial review of final administration decisions, unless the agency action is considered within the agency's discretion.¹⁰⁴ The court agreed with defendants that the EPA's decision not to enforce the PCB restriction on MARAD was probably within its discretion.¹⁰⁵

The Court ultimately decided the alleged violation of TSCA based on a procedural matter.¹⁰⁶ Under TSCA, a plaintiff may not sue under the section regulating PCBs until the plaintiff has given a sixty-day notice of the alleged violation to the Administrator and the person who allegedly violated the TSCA.¹⁰⁷ The plaintiffs did not meet the notice requirement because they filed suit prematurely.¹⁰⁸ Thus, the court could not grant the TRO for the first issue.¹⁰⁹

B. National Maritime Heritage Act

The second issue raised by the plaintiffs arose under the National Maritime Heritage Act (NMHA).¹¹⁰ According to NMHA, the Secretary of Transportation must dispose of all vessels "in the manner that provides the best value to the Government, except in any case in which obtaining the best value would require towing a vessel and such towing poses a serious threat to the environment."¹¹¹ Plaintiffs argued that it was more economical to dispose of the ships within the United States.¹¹² Additionally, the plaintiffs claimed that trans-Atlantic towing was too

100. *Basel Action Network*, 285 F. Supp. 2d at 61-62.

101. *Id.* at 62.

102. *Id.* at 61.

103. *Id.*

104. Administrative Procedure Act, 5 U.S.C.A. § 701(a)(2) (West 2004).

105. *Basel Action Network*, 285 F. Supp. 2d at 61.

106. *Id.*

107. 15 U.S.C.A. § 2619(a), (b)(1)(A) (West 2004).

108. *Basel Action Network*, 285 F. Supp. 2d at 61.

109. *Id.* at 62.

110. *Id.* at 60.

111. National Maritime Heritage Act, 16 U.S.C.A. § 5405(c)(1) (West 2004).

112. *Basel Action Network*, 285 F. Supp. 2d at 62.

dangerous.¹¹³ Nevertheless, the court disagreed with the plaintiffs, and held that the plaintiffs did not have a “likelihood of success” on this issue.¹¹⁴ In support of its holding the court referenced the defendant’s evidence, which included professional surveys discussing the relative safety of the towing method and certificates from the Coast Guard stating the vessels were seaworthy.¹¹⁵

C. National Environmental Policy Act

The last issue raised by the plaintiffs was the lack of a valid Environmental Assessment or Environmental Impact Statement (EIS) by MARAD or the EPA,¹¹⁶ which is required by the National Environmental Policy Act (NEPA) prior to moving the ships.¹¹⁷ Particularly, NEPA states that:

all agencies of the Federal Government shall –

....

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

- (i) the environmental impact [EIS] of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,

113. *Id.*

114. *Id.*

115. *Id.*

116. The criteria a court should consider when reviewing an agency’s decision not to conduct an environmental impact assessment are:

- (1) whether the agency took a ‘hard look’ at the problem;
- (2) whether the agency identified the relevant areas of environmental concern;
- (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and
- (4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.

Sierra Club v. Peterson, 717 F.2d 1409, 1413 (D.C. Cir. 1983).

117. *Basel Action Network*, 285 F. Supp. 2d at 60.

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.¹¹⁸

The purpose of an EIS is to provide the authorities with relevant information regarding the possible environmental effect of a specified activity before granting authorization.¹¹⁹ NEPA applies to "major Federal actions significantly affecting the quality of the human environment."¹²⁰ The court determined that exporting four ships was probably not a major federal action because it was provided for by statute.¹²¹ The Bob Stump National Defense Authorization Act of 2002 stated that MARAD was to carry out the pilot program during fiscal year 2003 of "a total of not more than four vessels."¹²² The other nine ships were not a part of the pilot program and the court held that movement of those ships for dismantling may rise to the level of a major federal action in need of an environmental assessment.¹²³

The defendants asserted that they did not have to conduct an additional environmental assessment because there were previous EISs from 1994 and 1997, which should suffice to cover the transaction in 2003.¹²⁴ Additionally, the defendants asserted that according to prior case law,¹²⁵ the 1994 and 1997 reports could serve as a functional equivalent for a 2003 EIS in connection with the necessary findings required by the pilot program.¹²⁶ Because the pilot program already requires an environmental assessment,¹²⁷ it would be redundant procedurally and substantively to require the EPA to comply with NEPA as well in this situation.¹²⁸

118. National Environmental Policy Act, 42 U.S.C.A. § 4332(2)(C) (West 2004).

119. PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 130 (2d ed. 2002).

120. *Basel Action Network*, 285 F. Supp. 2d at 62 (quoting 42 U.S.C. § 4332(2)(C) (2004)).

121. *Id.* at 63 n.5.

122. Bob Stump National Defense Authorization Act For Fiscal Year 2003, Pub. L. No. 107-314, § 3504(c)(2)(B), 116 Stat. 2458 (2002).

123. *Basel Action Network*, 285 F. Supp. 2d at 63 n.5.

124. *Id.* at 60.

125. *See Amoco Oil Co. v. EPA*, 501 F.2d 722 (D.C. Cir. 1974).

126. *Basel Action Network*, 285 F. Supp. 2d at 63.

127. Bob Stump National Defense Authorization Act For Fiscal Year 2003, Pub. L. No. 107-314, § 3504(c)(2), 116 Stat. 2458 (2002).

128. *Basel Action Network*, 285 F. Supp. 2d at 63; *see also Amoco Oil Co.*, 501 F.2d at 749 (holding that the requirements of the Clean Air Act to be the functional equivalent to compliance with NEPA).

The court ultimately held that “[b]eyond the statutory authorization for the Pilot Program . . . there is no statute to excuse MARAD’s failure to conform fully to the nation’s environmental laws while exporting the remaining [nine] ships.”¹²⁹ Thus, the court concluded that the plaintiffs demonstrated a “likelihood of success” regarding the export of the nine ships not accounted for by the pilot program.¹³⁰ The court then went on to analyze the remaining elements required to grant a TRO.¹³¹

In discussing the second element for granting a TRO, irreparable injury to one of the parties, the court held that the defendant would not be substantially injured.¹³² MARAD had originally planned to export six ships in 2003 and the TRO would only detain two of those ships from its goal.¹³³ However, in balancing the injuries, the plaintiffs may suffer severe harm if contamination occurs while exporting the ships.¹³⁴ Therefore, the court decided in favor of the plaintiffs on this element.¹³⁵ In resolving the third element of a TRO (public policy concerns) the court held that requiring MARAD to prepare an EIS for the nine ships not included in the pilot program would be in the public’s interest.¹³⁶ The final outcome was that the Court granted plaintiff’s motion for a TRO for any ships above those allowable by the pilot program until the court ruled on the plaintiff’s motion for a preliminary injunction, based on the lack of a supplemental EIS.¹³⁷

III. THE GHOST SHIP CONTROVERSY IN THE UNITED KINGDOM

The United Kingdom litigation consisted of two cases brought before the High Court of Justice Queen’s Bench Division, the Administrative Court. This section discusses the facts and legal issues surrounding each case. The first case involved Able UK’s waste management license to dismantle ships from the UK Environmental Agency (EA), while the second case concerned Able UK’s permission granted from the City of Hartlepool, where the ships are now located.

129. *Basel Action Network*, 285 F. Supp. 2d at 63.

130. *Id.*

131. *Id.* at 63-64.

132. *Id.* at 63.

133. *Id.*

134. *Id.* at 63-64.

135. *Basel Action Network*, 285 F. Supp. 2d at 64.

136. *Id.*

137. *Id.*

*A. Friends of the Earth Limited (FOE) v. The Environment Agency and Able UK Ltd.*¹³⁸

The issue in *FOE v. Able UK* was whether the EA properly modified Able UK's waste management license.¹³⁹ The license was originally issued in 1997 and subsequently modified in 1999, 2002, and 2003.¹⁴⁰ Prior to the most recent modification, Able UK only had permission to store approximately 24,500 tons of waste.¹⁴¹ Furthermore, Able UK could not hold waste which was classified as ships or vessels.¹⁴² It was not until September 2003 that Able UK obtained permission to hold ships/vessels and had the total amount of waste allowable raised to 200,000 tons.¹⁴³

FOE's main concern with the modification of Able UK's license was that it allowed Able UK to dismantle the ships in a wet or dry dock.¹⁴⁴ However, in assessing the modification requested by Able UK, the EA did not consider the environmental implications of dismantling the ships in a wet dock.¹⁴⁵ Thus, the conclusion that Able UK's proposal would not have a significant effect on the environment was unsupported if the dismantling took place in a wet dock.¹⁴⁶

According to European Community Law,¹⁴⁷ which is incorporated into the United Kingdom's Law,¹⁴⁸ the EA is under the obligation to assess the impact of Able UK's proposal because Teesside is a special area of conservation¹⁴⁹ (SAC).¹⁵⁰ Specifically, "[a]ny plan or project . . . likely to

138. *Friends of the Earth Ltd. v. The Env't. Agency*, [2003] EWHC 3193 (Q.B.D. Admin. Ct.).

139. *Id.* at ¶ 2.

140. *Id.* at ¶¶ 3, 6.

141. *See id.* at ¶ 4.

142. *See generally id.* at ¶¶ 3, 5.

143. *Id.* at ¶ 6.

144. *Friends of the Earth Ltd.*, [2003] EWHC 3193 at ¶¶ 38, 39 (Q. B. D. Admin. Ct.).

145. *Id.* at ¶ 40.

146. *See id.* at ¶ 42.

147. Council Directive 92/43/EEC, art. 6, 1992 O.J. (L 0043) 7 [hereinafter *Habitat Directive*].

148. The *Habitat Directive* was incorporated into British Law in 1994. Conservation Regulations, (1994) SI 1994/2716, art. 3(1) [hereinafter *Conservation Regulations*].

149. A special area of conservation is defined as:

a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated.

Habitat Directive, *supra* note 147, art. 1(1).

have a significant effect thereon . . . shall be subject to appropriate assessment of its implications” in light of environmental concerns.¹⁵¹ Approval is only granted once the competent authority¹⁵² has found that the project will not adversely affect the SAC.¹⁵³ Once approval is granted, the competent authority may grant a waste management license according to the Environmental Protection Act.¹⁵⁴

According to the United Kingdom Environmental Protection Act, a person is not allowed to deposit controlled waste on any land unless that person has a waste management license.¹⁵⁵ A waste management license is granted by the waste regulation authority, and it is required before any business is allowed to accept or treat waste.¹⁵⁶ Furthermore, a person cannot “treat, keep or dispose of controlled waste” in a manner that may cause harm to the environment or human health.¹⁵⁷ If a person fails to abide by this law, the punishment can range from a maximum prison term of two years to a maximum fine of £20,000.¹⁵⁸ However, before the waste management license can be granted, the EA must complete its assessment of the proposal.

The assessment is generally carried out in four stages.¹⁵⁹ In stage one, the EA must determine whether the proposal is within a certain distance to the SAC.¹⁶⁰ If the EA concludes that it is, then in stage two it must

150. See generally *Friends of the Earth Ltd.*, [2003] EWHC 3193 ¶¶ 18, 19 (Q.B.D. Admin. Ct.).

151. Habitat Directive, *supra* note 147, art. 6(3).

152. Competent authority is defined as “any Minister, government department, public or statutory undertaker, public body of any description or person holding a public office.” Conservation Regulations, *supra* note 148, art. 6(1).

153. Habitat Directive, *supra* note 147, art. 6(3).

154. Conservation Regulations, *supra* note 148, at 84.

155. Environmental Protection Act 1990, ch. 43, § 33(1)(a) (Eng.).

156. *Id.* at § 33.

157. *Id.* at § 33(1)(b).

158. *Id.* at § 33(8). The statute does allow for some safe harbors, or provisions which protect companies from liability. The first safe harbor is if the person or company took all reasonable precautions and exercised due diligence. *Id.* at § 33(7)(a). Another safe harbor includes the defense of vicarious liability, or that the person acted under instructions of his or her employer and did not know, nor had reason to know he or she was breaking the law. *Id.* at § 33(7)(b). The last possible safe harbor is that the actions were performed during an emergency to avoid danger to human health. Environmental Protection Act 1990, ch. 43, § 33(7)(c). To use the last defense, the person or company must demonstrate that it took all action reasonably practical to minimize the pollution, and that the person notified the waste regulation authority as soon as reasonably practical. *Id.* at § 33(7)(c)(i)–(ii).

159. *Friends of the Earth Ltd.*, [2003] EWHC 3193 ¶ 31 (Q.B.D. Admin. Ct.).

160. *Id.* at ¶ 32.

determine whether the proposal would have a significant or far-reaching effect on the protected species.¹⁶¹ The stage two assessment is supposed to be based on “realistic worse case scenarios, data and assumptions.”¹⁶² If stage two results in a negative prognosis, then in stage three the EA should conduct a more detailed investigation. FOE argued that because the EA did not evaluate the proposal in light of dismantling the ships in a wet dock, it did not completely satisfy Stage two.¹⁶³ The EA agreed with FOE and wanted to invalidate or quash the modification of Able UK’s license.¹⁶⁴ Able UK objected to the invalidation.¹⁶⁵

Able UK’s argument against the invalidation of its license was that the modification of a waste management license was not a “plan or project” that would need an environmental assessment.¹⁶⁶ A “plan or project” would encompass the preliminary granting of a license; however, once that had been obtained a new assessment would be unnecessary.¹⁶⁷ Able UK furthered its argument by stating that modifications would not differ materially from the original license.¹⁶⁸ Furthermore, if the EA concluded that the modification did differ materially, they could require the licensee to apply for a new license to encompass the changes.¹⁶⁹

The Court refused to accept Able UK’s narrow interpretation of “plan or project.”¹⁷⁰ It further stated that “[t]he words should be given a broad interpretation, consistent with the underlying purpose of the Habitats Directive to protect [SACs].”¹⁷¹ In support of its interpretation, the Court cited to European Court (EC) cases.¹⁷² In *World Wildlife Fund*

161. *Id.*

162. *Id.* at ¶ 33.

163. *See generally id.* at ¶ 41. Mr. Peters, the EA’s biodiversity technical officer in charge of conducting the investigation, approved the proposal based on the assumption that a cofferdam would be constructed once the first four ships were secured; dismantling would be carried out in a dry dock once the cofferdam had been constructed, and permanent dock gates would replace any temporary structure. *Friends of the Earth Ltd.*, [2003] EWHC 3193 ¶ 35 (Q.B. D. Admin. Ct.). At the time of this decision, Able UK did not have the proper permission to build the cofferdam from the city. Furthermore, Able UK stated that if it could not resolve the dispute with the city, it would continue its dismantling plans in a wet dock. *Id.* at ¶ 42.

164. *Id.* at ¶ 42.

165. *Id.* at ¶¶ 52, 55.

166. *Id.* at ¶ 52.

167. *Id.*

168. *Friends of the Earth Ltd.*, [2003] EWHC 3193 ¶ 54 (Q.B.D. Admin. Ct.).

169. *Id.*

170. *Id.* at ¶ 60.

171. *Id.*

172. *Id.*

v. Autonome, the EC found that a Member State would exceed the limits of its discretion, if it were to establish a criteria in which “an entire class of projects would be exempted in advance from the requirement of an impact assessment”¹⁷³ . . . unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such [detrimental] effects.”¹⁷⁴ Able UK’s interpretation would fail *World Wildlife Fund’s* requirements because significant changes requested within a modification of a license could be seriously damaging to a SAC.¹⁷⁵

Furthermore, according to Able UK’s own argument, the EA would still have to quash Able UK’s permit if it found the requested modifications materially different from the original license.¹⁷⁶ Due to the proposed increase in the amount of waste at Able UK’s facilities, it was reasonable to classify the modification as significantly and materially different from its original license.¹⁷⁷ The result was that the Court quashed the modification of Able UK’s license.¹⁷⁸

*B. Gregan v. Hartlepool Borough Council and Able UK*¹⁷⁹

The issue in *Gregan v. Hartlepool* concerned whether the city permission granted to Able UK included dismantling ships.¹⁸⁰ This issue arose because Able UK’s permission, which dated back to 1997, was for the “dismantling/refurbishment of redundant marine structures & equipment.”¹⁸¹ The answer to the issue depended on whether a “marine structure” encompassed in its definition the word “ships” or “vessels.”¹⁸² The claimants argued that it did not.¹⁸³ On the other hand, Able UK argued that as a matter of ordinary English “marine structures” included “ships.”¹⁸⁴ Further, Able UK relied on various statutes in which a ship may be considered a marine structure.¹⁸⁵ Using agreed upon legal principles,¹⁸⁶

173. Case C-435/97, *World Wildlife Fund v. Autonome Provinz Bozen*, 1 C.M.L.R. 149 ¶ 38 (1999).

174. *Id.* at ¶ 45.

175. *Friends of the Earth Ltd.*, [2003] EWHC 3193 ¶ 64 (Q.B.D. Admin. Ct.).

176. *Id.* at ¶ 69.

177. *See generally id.* at ¶ 64.

178. *Id.* at ¶ 71.

179. *Gregan v. Hartlepool Borough Council*, [2003] EWHC 3278 (Q.B.D. Admin. Ct.).

180. *Id.* at ¶ 16.

181. *Id.* at ¶ 18.

182. *Id.* at ¶ 28.

183. *Id.*

184. *Id.* at ¶ 29.

185. *Gregan*, [2003] EWHC 3278 ¶¶ 30, 31 (Q.B.D. Admin. Ct.).

the court thoroughly examined the application submitted by Able UK and the permission granted to Able UK to resolve the issue.¹⁸⁷

The court enthusiastically rejected the premise that a marine structure included ships as a matter of ordinary English.¹⁸⁸ In particular, the Court stated that in “ordinary English one calls a ship a ship, just as one calls a spade a spade In ordinary language, a ship is no more described as a ‘marine structure’ than a car is described as a ‘highway structure.’”¹⁸⁹ The court concluded that an investigation of the supporting documents did not indicate that ship dismantling was ever contemplated.¹⁹⁰

To support its proposition, the court articulated two reasons.¹⁹¹ The first reason was that within the application and permission, ships were referenced separately from marine structures: examples include “[m]arine structures, vessels . . . barges and cranes.”¹⁹² The Court stated that the reference to each would have been unnecessary if marine structure referred to ships.¹⁹³ The second reason the court expressed concerned the purpose of the permission granted.¹⁹⁴ The purpose or need for granting the permission was to refurbish and dismantle offshore structures.¹⁹⁵ The market for disposal of these types of structures was continuous due to the gradual prohibition of deep sea disposal.¹⁹⁶

Furthermore, there are environmental impact statements which consider the effect on the environment from offshore structures,¹⁹⁷ such as oil and gas production facilities.¹⁹⁸ Conversely, the environmental assessments do not contain descriptions of any environmental impact

186. The Court used four agreed upon legal principles for interpreting whether marine structures included ships. The four principles are: 1) when dealing with a clear and unambiguous document, only the document itself may be considered during interpretation; 2) extrinsic evidence will not be allowed unless it is incorporated by reference; 3) there must be more than a mere reference to the extrinsic document in order for it to be incorporated; and 4) if the document to be interpreted is ambiguous and unclear, then extrinsic evidence may be allowed to resolve any discrepancies. *Id.* at ¶ 17.

187. *Id.* at ¶ 18.

188. *Id.* at ¶ 35.

189. *Id.*

190. *Id.* at ¶ 39.

191. *Gregan*, [2003] EWHC 3278 at ¶ 70 (Q.B.D. Admin. Ct.).

192. *Id.* at ¶¶ 70, 71.

193. *Id.* at ¶ 71.

194. *Id.* at ¶ 73.

195. *Id.* at ¶ 65.

196. *Gregan*, [2003] EWHC 3278 ¶ 65 (Q.B.D. Admin. Ct.).

197. *Id.* at ¶ 67.

198. *Id.* at ¶ 65.

dismantling of ships may have on the environment.¹⁹⁹ Due to the lack of discussion of ship dismantling coupled with the detailed discussion of other activities, the court held the permission granted in regards to marine structures did not contemplate ships.²⁰⁰ Thus, Able UK did not have proper permission from the city, and Able UK was prevented from “carrying out . . . any work to the ships (other than work necessary to make and keep them safe).”²⁰¹

C. Conclusion and Result of the Two Cases

In conclusion, the High Court determined that Able UK neither had a proper waste management license²⁰² nor the city’s permission.²⁰³ In January 2004, Able UK began discussing with Hartlepool Borough Council (HBC) the actions that would be necessary to obtain the city’s permission.²⁰⁴ Able UK commenced its environmental assessment and hoped to have it completed by late February.²⁰⁵ HBC and the EA will have four months to consider Able UK’s application for a license and permission.²⁰⁶ Able UK hopes to be approved by June 2004.²⁰⁷ Because of Able UK’s delay in recycling the ships it currently possesses, MARAD decided on July 2, 2004 to postpone sending any more ships during the year 2004.²⁰⁸

199. *Id.* at ¶ 73.

200. *Id.* at ¶ 76.

201. *Id.* at ¶ 88. In a final note, the Court expressed grave concern over the fact that for more than a month, at the time of the decision, the ships had been moored in Teesside without proper permission or a waste management license. *Gregan*, [2003] EWHC 3278 at ¶ 89. The other concern was that all this time, there had never been a proper environmental assessment conducted. *Id.* at ¶ 90. In spite of all that, Able UK continued to give MARAD assurances that it had complied with UK laws. *Id.* Due to the highly unsatisfactory situation, the Court hoped that the UK agencies would “conduct a thorough investigation into the decision-making processes that have so conspicuously failed to prevent this . . . situation from arising.” *Id.* at ¶ 92.

202. See generally *Friends of the Earth Ltd.*, [2003] EWHC 3193 (Q.B.D. Admin. Ct.).

203. See generally *Gregan*, [2003] EWHC 3278 (Q.B.D. Admin. Ct.).

204. Update, *supra* note 78.

205. *Able Ship Recycling*, ABLE UK, at

<http://www.ableuk.com/ableshiprecycling/terrcplanning.htm> (last visited Sept. 12, 2004).

206. *Id.*

207. *Id.*

208. Roeder, *supra* at 81, at 1206.

IV. BASEL CONVENTION

The Basel Convention is the multilateral treaty that governs the transfrontier shipment of waste. Although the ships are not carrying toxic waste per se, the inference is that the ships are waste in and of themselves. This Part includes discussion of the text of the Basel Convention, as well as a discussion of United States and United Kingdom laws that incorporate the provisions of the Basel Convention.

A. Reoccurring Environmental Principles Implicated in the Basel Convention

Throughout environmental law and treaties, there are reoccurring principles appearing in most treaties. The principles are not binding in interpretation but rather provide a framework for each country to implement into its domestic policy.²⁰⁹ Although there are many environmental principles, this paper only discusses a few relating to the Basel Convention. These environmental principles are: 1) the no harm principle; 2) precaution versus prevention; and 3) common but differentiated responsibilities.

1. The No Harm Principle

The first common principle to environmental law is found in principle two of the Rio Declaration, an international environmental declaration.²¹⁰ Principle two declares that:

[s]tates have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.²¹¹

A classic example of this principle in application is the Trail Smelter Arbitration from 1941, between the United States and Canada.²¹² The controversy arose from claims involving air pollution from a smelter

209. See generally BIRNIE & BOYLE, *supra* note 119, at 144.

210. *Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development*, U.N. GAOR, Annex 1, at Principal 2, U.N. Doc.

A/CONF.151/26 (Vol. I) (1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (last visited Nov. 17, 2004) [hereinafter *Rio Declaration*].

211. *Id.*

212. See generally BIRNIE & BOYLE, *supra* note 119, at 115.

factory in Trail, Canada, crossing the border into Washington.²¹³ The smelter factory emitted sulfur-dioxide fumes into the air and caused significant damage to privately owned agriculture and forestlands.²¹⁴ The arbitrators found Canada liable and stated that “no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another.”²¹⁵ In other words, countries had an obligation not to cause environmental harm outside of its borders.²¹⁶

2. Precautionary Principle versus Prevention

A second principle normally included in environmental treaties is the idea of precaution versus prevention. The precautionary principle involves the idea that humans may not know the exact results of their actions on the environment but should take precaution regardless.²¹⁷ Principle fifteen of the Rio Declaration states that “[i]n order to protect the environment, the precautionary approach shall be widely applied Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”²¹⁸ This principle comes into application because some States claim they are not responsible for environmental risks until there is clear and convincing evidence.²¹⁹ However, obtaining clear and convincing evidence when measuring risks can be very difficult because it entails judgments about the probability and scale of harm, as well as “the effects of the activities, substances, or processes in question, and their interaction over time.”²²⁰

3. Developed Countries versus Developing Countries

Another reoccurring principle is the idea of common but differentiated responsibilities. This principle comes into play when discussing the duties of both developing and developed countries. Developing countries are those countries that may lag behind in technology and resources.²²¹ In other words, the application of

213. *Transnational Environmental Law*, LUDWIG –MAXIMILIANS-UNIVERSITÄT MÜNCHEN, at <http://www.jura.uni-muenchen.de/einrichtungen/ls/simma/tel/case8.htm> (discussing the “Trail Smelter” case of 1938) (last visited Sept. 19, 2004).

214. *Id.*

215. *Id.*

216. *See id.*

217. *See generally* BIRNIE & BOYLE, *supra* note 119, at 117.

218. *Rio Declaration*, *supra* note 210, at Principal 15.

219. *Id.* at 115.

220. *Id.*

221. *Id.* at 81.

environmental principles is not always the same depending on a State's capabilities and circumstances.²²² Historically, less-developed countries were given special consideration because poverty and the necessity of economic development outweighed concerns of pollution.²²³

Additionally, because developing countries are not as advanced, some believe that they do not create as much of the world's pollution.²²⁴ Thus, they may not have as much of a burden in preventing or fixing pollution.²²⁵ Alternatively, developed countries do have the resources and technology to prevent pollution.²²⁶ Due to the magnitude of industry in developed countries, arguably, they create most of the pollution.²²⁷ Therefore, developed countries have more responsibility when it comes to fixing the environment.²²⁸ Developed countries should also take the responsibility of transferring the technology and resources to developing countries.²²⁹ The theory of common but differentiated responsibilities is the idea that all people want to protect the environment; however, it would be unfair to impose the same burden on a developing country, as those placed on the developed country, by reason of the differences in the two discussed above.²³⁰

B. Basel Convention Text Overview

The Basel Convention is a multi-lateral treaty; it was adopted on March 22, 1989 and went into effect May 5, 1992.²³¹ This treaty is important because it is binding on approximately 159 parties.²³² "In general, the Basel Convention increases the responsibility of exporting countries" to safely manage waste until its disposal, as well as provide assistance, such as waste management education and technology, to developing countries.²³³ The preamble articulates the goals and intentions of the parties while drafting the treaty.²³⁴ Throughout the preamble, the

222. *Id.*

223. BIRNIE & BOYLE, *supra* note 119, at 81.

224. *Id.* at 101.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. BIRNIE & BOYLE, *supra* note 119, at 102.

230. *Id.* at 101.

231. Basel Convention, *supra* note 33.

232. *Id.*

233. William N. Doyle, *United States Implementation of the Basel Convention: Time Keeps Ticking, Ticking Away . . .*, 9 TEMP. INT'L & COMP. L.J. 141, 143 (1995).

234. Basel Convention, *supra* note 33, at pmb1.

authors intertwined human health and the environment as an inseparable combination.²³⁵ Almost every paragraph emphasizes the importance of protecting human health and the environment.²³⁶

Unlike TSCA, which only regulates hazardous waste within the United States,²³⁷ the Basel Convention is an attempt to control the transboundary movement of waste on an international level.²³⁸ Article one defines the substances that the convention regulates.²³⁹ It does not include radioactive waste or ship discharge because these wastes are governed by other treaties.²⁴⁰ Under the Basel Convention, the definition of hazardous waste takes two approaches.²⁴¹ The first approach identifies waste according to its hazardous characteristics, which are specifically enumerated within the Convention.²⁴² The hazardous characteristics include, but are not limited to, explosive, flammable, poisonous, infectious and corrosive materials.²⁴³ Substances specifically included within the Convention are wastes containing PCBs, asbestos, and waste oils/water mixtures.²⁴⁴ The second approach allows individual countries to add to the list of waste if not included in the Convention.²⁴⁵

The Basel Convention incorporates the environmental principles discussed *supra in Part IV(A)*. It asserts State sovereignty by allowing the State that receives the pollution to determine the acceptable impact on its territory.²⁴⁶ The idea from the Trail Smelter arbitration regarding the no harm principle is incorporated by recognizing the State's right to control the activities within its territory, in addition to "the responsibility of exporting States for activities within their jurisdiction which may harm other States."²⁴⁷ Further support for the State sovereignty principle comes from the fact that violating the Basel Convention is to be made a criminal offense by the signatory States.²⁴⁸ Jurisdiction over the violation of the Basel Convention, or criminal activity, remains in the hands of the injured

235. *Id.*

236. *Id.*

237. 42 U.S.C.A. § 2611 (West 2004).

238. Basel Convention, *supra* note 33, at pmb1.

239. *Id.* at arts. 1(1), (2).

240. *Id.* at arts. 1(3), (4).

241. Doyle, *supra* note 233, at 144.

242. Basel Convention, *supra* note 33, at art. 1(1)(a).

243. *Id.* at Annex III.

244. *Id.* at Annex I, Y10, Y36, Y9.

245. *Id.* at art. 1(1)(b).

246. BIRNIE & BOYLE, *supra* note 119, at 407.

247. *Id.* at 430.

248. Basel Convention, *supra* note 33, at art. 4(3).

State.²⁴⁹ Although an exporting State has the right to exploit its resources, it will be held accountable for injury caused to other States.²⁵⁰

The idea of common but differentiated responsibilities is also in the Basel Convention. Developing countries need extra protection in this situation because they may have lower standards of waste disposal.²⁵¹ Furthermore, developing countries may accept hazardous waste that other countries prohibit just to boost the economy.²⁵² Although developing countries may not have the same technology to deal with the disposal of waste, the Basel Convention holds developing countries just as responsible as developed countries for handling waste in an environmentally sensitive manner.²⁵³ Countries that cannot meet the standard must either ban the import of the waste or rely on the principles for international cooperation and ask for assistance.²⁵⁴ Nevertheless, the exporting country maintains responsibility for the waste until it is completely disposed.²⁵⁵

Environmentally sound management of hazardous waste is broadly defined as "taking all practicable steps to ensure that hazardous wastes . . . are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes."²⁵⁶ This standard prohibits the transfer of waste if either the importing country or exporting country has a "reason to believe that the wastes in question will not be managed in an environmentally sound manner."²⁵⁷ The dichotomy between developed countries and developing countries may be further implicated by the level of sound environmental management, which varies depending upon the technology available to the country.²⁵⁸ The inference may be drawn that it would not be

249. BIRNIE & BOYLE, *supra* note 119, at 437.

250. *Id.* at 433.

251. BIRNIE & BOYLE, *supra* note 119, at 405.

252. *Id.* One example involves Guinea-Bissau, which had agreed to accept twelve million tons of hazardous waste from 1988-1993, for \$120 million per year. At the time, Guinea-Bissau's gross national product was only \$150 million per year. Although Guinea-Bissau had the right to control activities within its borders, it eventually cancelled the contract due to environmental concerns and political pressure. Peter D.P. Vint, *The International Export of Hazardous Waste: European Economic Community, United States, and International Law*, 129 MIL. L. REV. 107, 112 (1990).

253. *Id.* at 433.

254. *Id.*

255. *Id.*

256. Basel Convention, *supra* note 33, at art. 2(8).

257. Doyle, *supra* note 233, at 145 (quoting Basel Convention, *supra* note 33, at art. 4(2)(e)).

258. BIRNIE & BOYLE, *supra* note 119, at 433.

environmentally sound for a State with high standards of waste disposal to export to a country without the technology.²⁵⁹

The precautionary principle is also apparent in the Basel Convention.²⁶⁰ The Basel Convention demonstrates a strong preference for prior environmental assessment.²⁶¹ The environmental assessment is required through the prior informed consent provision.²⁶² The Basel Convention does not assume that waste disposal is acceptable unless proven otherwise.²⁶³ Instead, it places the burden of proof upon the exporter to show that significant harm to the environment will not result from the transfer of waste.²⁶⁴

C. Basel Convention & the Organization for Economic Co-operation and Development (OECD)

The OECD is a partnership of thirty countries,²⁶⁵ seeking answers to common problems through legally binding agreements or non-binding instruments.²⁶⁶ The partnership was born out of the Organization for European Economic Co-operation, which was originally organized by the United States and Canada to help administer aid to Europe after World War II.²⁶⁷ The OECD's aim initially was to build strong economies between its members, expand free trade, and help developing countries.²⁶⁸ President John F. Kennedy signed the OECD Convention²⁶⁹ into United States law on November 20, 1961.²⁷⁰

259. *Id.*

260. *Id.* at 406.

261. *Id.*

262. Basel Convention, *supra* note 33, at Annex V(A)(13).

263. BIRNIE & BOYLE, *supra* note 119, at 407.

264. *Id.*

265. Members of the OECD include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. *Overview of the OECD: What is it? History? Who does what? Structure of the organization?*, OECD, at

http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html (last visited Sept. 8, 2004) [hereinafter *Overview of OECD*].

266. *Id.*

267. *Id.*

268. *Id.*

269. The OECD convention establishes the OECD and elaborates on responsibilities between OECD Member countries. The convention required a minimum of fifteen signatories before it could come into force. Convention on the Organization for Economic

The OECD is relevant because it has adopted the Basel Convention.²⁷¹ As of March 2004, the OECD revised its decision regarding the transboundary movement of waste (the OECD decision) to better harmonize it with the Basel Convention.²⁷² The revision went into effect because none of the OECD Member countries objected to any of the amendments.²⁷³ Prior to the revision, the OECD classified hazardous waste into color categories (amber and green).²⁷⁴ Now, Appendix 1 of the OECD decision is identical to Annex 1 of the Basel Convention.²⁷⁵

The preamble to the decision states that the amendment to the OECD decision was drafted to continue the arrangement under Article 11.2 of the Basel Convention. Article 11.2 of the Basel Convention states:

[p]arties shall notify the Secretariat of any bilateral, multilateral or regional agreements or arrangements referred to in paragraph 1 and those which they have entered into prior to the entry into force of this Convention for them, for the purpose of controlling transboundary movements of hazardous wastes and other wastes which take place entirely among the Parties to such agreements. The provisions of this Convention shall not affect transboundary movements which take place pursuant to such agreements provided that such agreements are compatible with the environmentally sound management of hazardous waste and other wastes as required by this Convention.²⁷⁶

The parties to the OECD decision are not subject to the Basel Convention as long as the OECD decision maintains the standard of environmentally sound management of waste.²⁷⁷ However, the OECD decision is substantively identical to the Basel Convention.²⁷⁸ The question arises, whether the United States would be an indirect party to the Basel Convention, and thus accountable under its provisions through the United States' involvement with the OECD. Additionally, the United States

Cooperation and Development Convention, Dec. 14, 1960, 12 U.S.T. 1728, 888 U.N.T.S. 179 [hereinafter OECD Convention].

270. *Id.*

271. *Decision of the Council Concerning the Control of Transboundary Movement of Wastes Destined For Recovery Operations*, OECD Doc. C(2001)107/Final amended by C(2004)20, available at <http://www.oecd.org/dataoecd/37/49/30654501.pdf> (last visited Sept. 8, 2004) [hereinafter OECD Decision].

272. *Id.* at 4.

273. *See id.*

274. *Id.* at 7.

275. *Id.* at app. 1.

276. Basel Convention, *supra* note 33, at art. 11(2).

277. *See id.*

278. *See generally* OECD Decision, *supra* note 271.

implemented regulations under RCRA to promulgate the terms of the OECD decision.²⁷⁹ Thus, the United States would appear to be a party to the Basel Convention, first through the OECD acceptance and then by the RCRA legislation, even if not technically a member.²⁸⁰

For this analysis, it may be helpful to compare the Basel Convention and the OECD decision. Prior to the adoption of the harmonization of the Basel Convention with the OECD decision, there were many differences. One of the first differences is the way the two documents classify waste.²⁸¹ The previous OECD decision classified waste into three categories: red, amber, and green.²⁸² The Basel convention only classified the waste into separate annexes.²⁸³ The previous OECD decision also allowed presumed consent for amber listed wastes,²⁸⁴ while the Basel Convention required consent for all transactions regarding hazardous waste.²⁸⁵

The criteria for classifying the waste as hazardous or non-hazardous materials were also different.²⁸⁶ The previous OECD decision examined the waste's properties as well as the way it was typically managed.²⁸⁷ The evaluation of the properties included the way the waste was typically contaminated, the physical state of the waste, and the level of difficulty in cleaning up the waste if an accident occurred.²⁸⁸ When evaluating the management of the waste, the OECD looked at the history of adverse environmental occurrences taking place during transfrontier shipment and the overall environmental benefits from recycling that type of waste.²⁸⁹

279. Environmental Protection Agency Notices, 64 Fed. Reg. 44722, 44723 (Aug. 17, 1999) (noting that the Federal Register dates prior to the new regulations adopted by the OECD).

280. *See id.* at 44723.

281. *Id.* at 44724.

282. *Id.*

283. Basel Convention, *supra* note 33, at Annex 1.

284. Environmental Protection Agency Notices, 64 Fed. Reg. 44722, 44724.

285. Basel Convention, *supra* note 33, at art. 6.

286. Environmental Protection Agency Notices, 64 Fed. Reg. 44722, 44723.

287. *Id.*

288. *Id.* The Properties prong also asked the following questions:

(1) Does the waste normally exhibit any of the hazardous characteristics listed in Table 5 of OECD Council Decision C(88)90? Furthermore, it is useful to know if the waste is legally defined as or considered to be a hazardous waste in one or more member countries.

....

(5) What is the economic value of the waste bearing in mind historical price fluctuations?

Id. at 44722.

289. *Id.* The Management prong also asked the following questions:

The Basel Convention determines the hazardousness of the waste by its toxicity, flammability, and corrosive nature.²⁹⁰

A final difference in the previous OECD decision and the Basel Convention prior to harmonization was that the Basel Convention and the OECD decision did not have the same waste classified in the same way.²⁹¹ There were twenty-one entries on the OECD green waste list that did not correspond to the Basel Annexes.²⁹² Probably of more significance was the fact that nine of the wastes listed as hazardous in the Basel Convention did not correspond to the amber or red list of wastes in the previous OECD decision.²⁹³ Reasons for the differences given by the EPA were that 1) the waste left out of the previous OECD decision were not generally recycled, 2) the parties to each agreement disagree as to their hazardousness, or 3) different criteria for determining hazardousness will inevitably lead to different wastes being listed.²⁹⁴

The following paragraphs will look at similarities between the two documents after the efforts by OECD to harmonize the two. First, the OECD decision defines hazardous waste as:

- (i) Wastes that belong to any category contained in Appendix 1 to this Decision unless they do not possess any of the characteristics contained in Appendix 2 to this Decision; and
- (ii) Wastes that are not covered under sub-paragraph 2.(i) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Member country of export, import or transit. Member countries shall not be required to enforce laws other than their own.²⁹⁵

(6) Is there technological capability to recover the waste?

....

(8) Is the waste routinely traded through established channels and is that evidenced by commercial classification?

(9) Is the waste usually moved internationally under the terms of a valid contract or chain of contracts?

(10) What is the extent of reuse and recovery of the waste and how is any portion separated from the waste but not subject to recovery managed?

Id.

290. Environmental Protection Agency Notices, 64 Fed. Reg. 44722, 44723.

291. *Id.*

292. *Id.*

293. *Id.* at 44726.

294. *Id.*

295. OECD Decision, *supra* note 271, at 5.

The definitions are almost identical except for the last line of (ii), which states that Member countries are not “required to enforce laws other than their own.”²⁹⁶

Both documents require notification to the importing country and countries of transit.²⁹⁷ The notifications from both documents require almost identical information, such as the exporter name,²⁹⁸ possible dates of shipment of the waste,²⁹⁹ and a description of the waste.³⁰⁰ The numbering of the required information between the two documents even coincides with one another.³⁰¹ However, the OECD decision goes further than the Basel Convention by supplying a recommended form for the notification and movement of waste.³⁰²

Although the numbering, definitions of waste, and supplemental materials are close to identical, there are two main distinctions between the two documents. The first difference is that the OECD decision applies to recovery operations.³⁰³ The OECD decision defines recovery as any of the operations specified in Appendix 5.B.³⁰⁴ Appendix 5.B encompasses procedures which may use waste materials as fuel, or recycle the waste materials to retrieve metals, organic substances, or other inorganic materials.³⁰⁵ On the other hand, the Basel Convention, although not explicit, only regulates the disposal of waste.³⁰⁶ Disposal includes incineration, release into water, land treatment, and permanent storage.³⁰⁷ Although the means employed by each agreement are similar, the two agreements are working towards different ends.³⁰⁸

296. *Id.*

297. *Id.* at 11; *see also* Basel Convention, *supra* note 33, at art. 6(f). A country of transit is defined as “a Member country other than the country of export or import through which a transboundary movement of wastes is planned or takes place.” OECD Decision ch. II(A)(9).

298. OECD Decision, *supra* note 271, at 29; *see also* Basel Convention, *supra* note 33, at Annex VA(2).

299. OECD Decision, *supra* note 271, at 29; *see also* Basel Convention, *supra* note 33, at Annex VA(10).

300. OECD Decision, *supra* note 271, at 29; *see also* Basel Convention, *supra* note 33, at Annex VA(13).

301. *See* OECD Decision, *supra* note 271, at 29; *see also* Basel Convention, *supra* note 33, at Annex VA.

302. OECD Decision, *supra* note 271, at 31.

303. *Id.* at 4.

304. *Id.* at 5.

305. *Id.* at 25.

306. *See* Basel Convention, *supra* note 33, at pmbl.

307. *Id.* at Annex IV.

308. *See* OECD Decision, *supra* note 271; *See also* Basel Convention, *supra* note 33.

The second distinction is the mandatory language found in the Basel Convention.³⁰⁹ The Basel Convention states that “[e]ach Party *shall* take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention.”³¹⁰ Alternatively, the OECD decision states that “Member countries *may*, within their jurisdiction, impose requirements consistent with this Decision and in accordance with the rules of international law, in order to better protect human health and the environment.”³¹¹ The result is that the United States is not a party to the Basel Convention, which would require it to enact legislation consistent therewith. Nor is the United States required to enact legislation consistent with the Basel Convention through the OECD decision because the OECD decision appears to be nothing more than a “recommendation.”

D. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) is the chief legislation that controls hazardous waste in the United States and incorporates many requirements of the OECD Decision.³¹² RCRA follows the hazardous waste from its producer, to the transporter, and finally to the disposer.³¹³ This type of legislation is typically called “cradle to grave” legislation because it follows the trash for the duration of its existence, and each stage of the hazardous waste cycle is regulated by RCRA.³¹⁴ RCRA supplies standards for transporters of hazardous waste,³¹⁵ standards for facilities that hold, treat or dispose of the waste,³¹⁶ as well as a section specifically regulating the export of hazardous waste.³¹⁷

The definition of hazardous waste has been considered a problem among various environmentalists.³¹⁸ RCRA defines hazardous waste as:

309. See Basel Convention, *supra* note 33, at art. 4(4).

310. *Id.* (emphasis added).

311. OECD Decision, *supra* note 271, at 4 (emphasis added).

312. Doyle, *supra* note 233, at 147. It is interesting to note that the plaintiffs in the U.S. lawsuit did not use RCRA for any of its arguments, even though it is the chief legislation for hazardous waste movement. See *Basel Action Network*, 285 F. Supp. 2d at 60.

313. Julienne I. Adler, *United States' Waste Export Control Program: Burying Our Neighbors in Garbage*, 40 AM. U. L. REV. 885, 894 (1991).

314. *Id.*

315. 42 U.S.C.A. § 6923 (West 2004).

316. *Id.* at §§ 6924, 6925.

317. *Id.* at § 6938.

318. Lillian M. Pinzon, *Criminalization of the Transboundary Movement of Hazardous Waste and the Effects on Corporations*, 7 DEPAUL BUS. L. J. 173, 180 (1994).

a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may --

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.³¹⁹

There is no uniform definition of hazardous waste.³²⁰ RCRA only regulates and requires notice and consent for substances classified under the United States' definition of hazardous waste.³²¹ Thus, it may be possible for the United States to export waste without consent of the receiving country because the United States does not classify the waste as hazardous, even though the importing country does.³²² However, assuming the United States is subject to the OECD Decision, the United States is still accountable for shipments of waste that the OECD classifies as hazardous.³²³

RCRA's regulation of the export of hazardous waste is most important to the ghost ship controversy. Beginning in 1986, RCRA did not allow the export of hazardous waste unless specific conditions were met.³²⁴ The first condition was that the exporter had to provide notification to the Administrator.³²⁵ The notification must have included the name and address of the entity exporting the waste, the type and approximate quantity of hazardous waste that would be exported, and the manner in which the waste would be exported (if exported over time then the estimated frequency or rate at which it would be exported).³²⁶ The port of entry, name and address of importing country, and the method by which the waste would be transported was also information required in the notification.³²⁷

319. 42 U.S.C.A. § 6903(5) (West 2004).

320. Pinzon, *supra* note 318, at 180.

321. Doyle, *supra* note 233, at 147.

322. *Id.*

323. OECD Decision, *supra* note 271.

324. 42 U.S.C.A. § 6938(a) (West 2004).

325. *Id.* at §§ 6938(a)(1)(A), 6938(c) (defining the Administrator as the Administrator of the EPA); *see also id.* at § 6903(1).

326. *Id.* at § 6938(c).

327. *Id.*

In addition to notification, the exporter must receive the consent of the importing country's government for substances that the United States has classified as hazardous.³²⁸ A copy of the consent must be attached to the manifest escorting each shipment of waste.³²⁹ A manifest is defined as the "form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage."³³⁰ The shipment also must conform to the conditions, if any, set forth by the consent.³³¹

One exception to the regulations set forth in the RCRA applies to when the United States has entered into an agreement with another country.³³² When the United States makes an international agreement with the importing country, the agreement supercedes the majority of the requirements in the RCRA.³³³ The only requirement the United States is still responsible for is to file a yearly report summarizing the "types, quantities, frequency, and ultimate destination of all such hazardous waste exported during the previous calendar year."³³⁴

In regards to the ghost ship controversy, MARAD appears to have fulfilled its obligations under RCRA.³³⁵ The EPA and the Coast Guard approved transferring the ships to the United Kingdom.³³⁶ Able UK also purported to have permission from the Environment Agency.³³⁷ It was not until the ships were in transit to the United Kingdom that MARAD received notice that the situation was not as Able UK had represented it to be.³³⁸

A major concern about RCRA that has not yet been implicated in the ghost ship controversy is a lack of appropriate enforcement mechanisms.³³⁹ First, the RCRA does not exhibit clear legislative intent that any of the requirements apply to activities outside the United States.³⁴⁰ Consequently, a United States company may be able to circumvent

328. *Id.* at § 6938(a)(1)(B).

329. 42 U.S.C.A. § 6938(a)(1)(C) (West 2004).

330. *Id.* at § 6903(12).

331. *Id.* at § 6938(a)(1)(D).

332. *Id.* at § 6938(f).

333. *Id.* at § 6938(a)(2).

334. *Id.* at § 6938(g).

335. See *Basel Action Network*, 285 F. Supp. 2d at 58.

336. *Id.*

337. *Friends of the Earth Ltd.*, [2003] EWHC 3193 (Q.B.D. Admin. Ct.).

338. *Id.*

339. Doyle, *supra* note 233, at 148.

340. *Id.*

responsibility for “their hazardous waste disposal activities outside the United States.”³⁴¹ Secondly, the RCRA does not address the concerns of transient countries or those country’s territories that the hazardous waste may pass through.³⁴² The RCRA only requires consent from the United States government, or EPA, and the importing government.³⁴³ A final concern is that the RCRA only regulates the handling of the waste while in the United States.³⁴⁴ Unlike the Basel Convention, the RCRA does not require the waste to be handled in an environmentally sound manner once outside the borders.³⁴⁵ Thus, the environment and people could be subject to dangerous conditions without the application of the RCRA.³⁴⁶

E. Transfrontier Shipment of Waste (TFS)

The TFS is the United Kingdom’s system of controlling “the shipment of wastes across national boundaries,” and it is the domestic legislation that incorporates the Basel Convention and OECD Decision.³⁴⁷ This statute attempts to protect the environment and human health by “prevent[ing] the unauthorised disposal of international waste shipments.”³⁴⁸ The Environment Agency states that it tries to accomplish its goals “without hindering the legitimate trade in waste.”³⁴⁹ Legitimate trade involves the idea that non-hazardous waste (green list waste) has economic value and represents a useful secondary source of raw materials.³⁵⁰ Green list waste includes substances,³⁵¹ such as waste collected from households or residues arising from incineration of these wastes.³⁵²

341. *Id.*

342. Robert M. Rosenthal, *Ratification of the Basel Convention: Why the United States Should Adopt the No Less Environmentally Sound Standard*, 11 *TEMP. ENVTL. L. & TECH. J.* 61, 73 (1992).

343. 42 U.S.C.A. § 6938 (West 2004).

344. Rosenthal, *supra* note 342, at 74.

345. *Id.*

346. *See id.*

347. *Net Regs - Transfrontier Shipment of Waste*, ENVIRONMENT AGENCY, available at http://www.environment-agency.gov.uk/netregs/275207/275512/?lang=_e®ion=C3%8 (last visited Sept. 2, 2004) [hereinafter *TFS*].

348. *Id.*

349. *Id.*

350. Environment Agency, *Shipment of non-hazardous waste (“green” list waste) to certain non-OECD Countries*, available at <http://www.europa.eu.int/comm/trade/miti/envir/waste.htm> (last visited Nov. 8, 2004) [hereinafter *Shipment*].

351. Council Regulation 259/93/EEC, Annex II, 1999 O.J. (L 3) 45.

352. Basel Convention, *supra* note 33, at Annex II.

However, green list waste is generally excluded from regulation because it does not present a high risk of harm.³⁵³

Other types of waste, which are similar to the OECD's classification of waste, include amber list and red list waste.³⁵⁴ These types of waste are generally controlled by legislation.³⁵⁵ Thus, parties must consult the TFS statute if they wish to transport waste into, out of, or through the United Kingdom.³⁵⁶ This statute breaks down into exports and imports.³⁵⁷ The general rule regarding importation of waste to the United Kingdom is that it should not be imported for disposal.³⁵⁸ However, there are a few exceptions to the general rule.³⁵⁹ The first exception is accomplished by a bilateral agreement between the United Kingdom and a country outside the European Union (EU).³⁶⁰ The country outside the EU must meet the following requirements: (1) it cannot reasonably acquire and cannot not presently possess the technical capabilities "to dispose of the waste in question," and (2) it must lack the facilities to properly dispose of the waste in an environmentally safe manner.³⁶¹ The country outside the EU may make an agreement either with the Environment Agency or with the Government of the United Kingdom.³⁶² The ghost ship controversy would not fall into this exception because the United States has both the technology and facilities to dispose of old ships.³⁶³

The second exception applies to countries within the EU that produce small amounts of hazardous waste.³⁶⁴ The hazardous waste produced is so miniscule that building the proper facilities would be too costly.³⁶⁵ Ireland and Portugal are examples of countries that fall under this second exception with the United Kingdom.³⁶⁶ Those countries are allowed "to export hazardous waste . . . for disposal by high temperature incineration"

353. *Shipment, supra* note 350.

354. *Id.*

355. *Id.*

356. *TFS, supra* note 347.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *TFS, supra* note 347.

363. *See Two More Ships, supra* note 11.

364. *TFS, supra* note 347.

365. *Id.*

366. *Id.*

in the United Kingdom.³⁶⁷ Clearly, the United States does not meet the second exception because it is not a member of the European Union.

Consequently, the United Kingdom's environmental policy prohibits waste from being exported from the United Kingdom for disposal.³⁶⁸ Interestingly enough, there are no exceptions to this statute.³⁶⁹ Disposal is defined as an operation, such as land treatment, landfill, or the release of solid waste into a water other than a sea or ocean.³⁷⁰ On the other hand, "recovery" is used synonymously for "recycle."³⁷¹ There are not as many restrictions on the import and export of waste for the purpose of recovery.³⁷² Recovery is the only category that the ghost ship controversy involves. Supporting this proposition is the Environment Agency's statement that iron and steel make up approximately ninety-four percent (94%) of vessel composition, after removing the toxins.³⁷³ Thus, a significant part of the ship is recyclable.

The United Kingdom permits the import of all waste for the purpose of recovery if the waste is from a member of the OECD.³⁷⁴ As already mentioned, the United States is a member of the OECD.³⁷⁵ Exports of hazardous waste are also allowed for the purposes of recovery to Member States (except for Hungary).³⁷⁶ Finally, green list waste for recovery may be exported to almost anyone, Member States and non-Member States of the treaty.³⁷⁷

V. CONCLUSION

The ghost ship controversy will likely be presented to the United States District Court for the District of Columbia by the end of 2004. With one transaction it seems odd that so many laws and conventions could be implicated. The ghost ship controversy demonstrates the expanding borders of commercial transactions and the importance of knowing international laws. The current interrelation of domestic laws with international treaties is confusing, especially when trying to conduct an

367. *Id.*

368. *Id.*

369. *Id.*

370. Council Directive 91/156/EEC, 1991 O.J. (L 78) 32.

371. *Id.*

372. *TFS*, *supra* note 347.

373. *BREAKDOWN OF WASTE*, *supra* note 71.

374. *Id.*

375. OECD Convention, *supra* note 269.

376. *TFS*, *supra* note 347.

377. *Id.*

international transaction. Efforts such as those by the OECD to harmonize its Decision with the Basel Convention should be commended. Furthermore, countries such as the United States and the United Kingdom should follow the OECD's lead by modifying their domestic laws to mirror the hazardous transboundary agreements they are already a party to.

An emerging trend is the idea of moving away from disposal and toward recycling and reusing. The trend can be illustrated by comparing the scope of the Basel Convention, disposal of waste, with the scope and purpose of the OECD Decision, recycling waste. Further, a statement released by the EPA proposed waiting to classify waste as "waste" until it had no intrinsic value.³⁷⁸ Thus, the material would be considered to have some value and could benefit the Earth more by reusing it, rather than allowing the material to build up.³⁷⁹ However, until the regulation of transboundary waste is harmonized globally (at least among developed countries) it will be hard to have any environmental impact as to whether something is recyclable or not.

In the end, the ghost ship controversy was probably more smoke than actual fire. The transaction did not involve moving hazardous waste cargo, other than the ships themselves.³⁸⁰ Both countries were dealing at arms length with each other, as developed countries. Neither the United States nor the United Kingdom was taken advantage of by the transaction, but rather, both received the benefit of their bargain. MARAD wanted to dispose of the ships, and Able UK wanted to do the work for money.³⁸¹

The parties involved were not trying to circumvent any of the treaties or laws of either country, but rather attempted to comply with the steps involved in transferring the ships.³⁸² The controversy only arose out of the confusion of which steps were completed under some laws, but not yet satisfied by other laws.³⁸³ To prevent environmental harm in the future, promote commerce, and avoid additional confusion, the developed countries should work closely together to solve this problem.

378. *Beyond RCRA: Waste and Materials Management in the Year 2020*, EPA, at <http://www.epa.gov/epaoswer/osw/vision.pdf> (last visited Nov. 8, 2004).

379. *Id.*

380. CONTRACT, *supra* note 8, at 52; see also BREAKDOWN OF WASTE, *supra* note 71.

381. CONTRACT, *supra* note 8, at 52.

382. See generally *Basel Action Network*, 285 F. Supp. 2d at 58.

383. *Id.*