The Transboundary Movement of Hazardous Waste in the Mediterranean Regional Context**

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I.
Two Cases Involving Italy before the Adoption of the Basel Convention

Despite some loopholes and ambiguities, the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989)[1] should be considered a major achievement in international environmental law.[2] One of its main merits is the establishment of the concept of prior informed consent, according to which the State of export must previously notify any intended movement of hazardous waste to the State of import.[3] The Basel Convention put an end to the previous NIMBY ("Not in my Backyard") and OSOM ("Out of Sight, Out of Mind") practices which seem hardly compatible

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1. Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, http://www.unep.ch/basel/text/text.html [hereinafter Basel Convention].

2. *See generally*, G. Handl & Robert Lutz, Transferring Hazardous Technologies And Substances: The International Legal Challenge (1989); Katharina Klummer, *The Basel Convention: Ten Years On*, Rev. Eur. Community & Int'l Envtl. L. 227 (1998); Katharina Klummer, International Management of Hazardous Wastes (1995); Transboundary Movements And Disposal of Hazardous Wastes in International Law (Kwiatkowska & Soons ed., 1993).

3. Similarly, the concept of prior informed consent formed the basis of the recent Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, http://www.fao.org/ag/agp/agpp/pesticid/pic/dipcon.htm. In addition, the concept is likely to play a fundamental role in a future protocol on the international transfer of genetically modified organisms, which is presently being negotiated within the framework of the Convention on biological diversity.

with the principles of cooperation, transparency and good neighbourliness that should inspire international relations.

As examples of what the situation was before the adoption of the Basel Convention, two cases which involved Italy may be recalled.[4] Of course, Italy and its nationals have not been the only protagonists of the transboundary traffic of hazardous waste. Several other industrialized countries and their nationals could be cited as well.[5] Nevertheless, the two cases in question have highlighted the need for both a new domestic and an international regime and have prompted the adoption of the relevant instruments.

a. *The Seveso Drums*

The Seveso incident, so called after the most affected locality, is a well known case of serious pollution by harmful substances, where the contamination extended beyond the limits of a chemical plant and involved a densely populated area located in four Italian municipalities.

On 10 July 1976 the safety valve of a reactor used in a chemical plant run in Meda, Italy, by the corporation ICMESA,[6] for the production of trichlorophenol burst. Blown by the winds, a cloud containing the highly toxic substance TCDD (tetrachlorodibenzoparadioxin, commonly known as dioxin) polluted an area of 1,807 hectares. The damage caused by the accident was estimated at about 121 billion Italian liras (of that time), without taking into consideration compensation paid to people who suffered physical injuries.[7]

After the rehabilitation of the site, it turned out that on 10 September 1982, 41 drums containing soil polluted by the Seveso dioxin had crossed the border between Italy and France at Ventimiglia. It is likely that the customs officers did not realize that the drums actually contained the dioxin of the Seveso incident.[8]

4. *See* Tullio Scovazzi, *The Transboundary Movements of Hazardous Waste: The Italian Practice*, ESSAYS IN HONOUR OF WOLFGANG BURHENNE 223 (1994).

5. *See* Vallette, LE COMMERCE INTERNATIONAL DES DÉCHETS - UN INVENTAIRE DE GREENPEACE (4th ed. 1989).

6. ICMESA was an Italian subsidiary of the Swiss transnational corporation Givaudan-Hoffmann La Roche.

7. Report of the Parliamentary Commission of Inquiry on the Seveso accident, deposited on 28 July 1978.

8. According to later newspaper reports, the customs declaration specified that the drums contained "Derivati alogenati degli idrocarburi aromatici (scarti di lavorazione industriale, contaminati tossici e non biodegradabili destinati alla

For several months there was no trace of the drums at all, despite the extensive efforts made by the governments concerned. The private companies involved in the movement kept silent. Articles about the mystery of the "wandering drums" were published in periodicals.

On 19 May 1983 the drums were finally located - sealed in a perfectly safe manner- in an abandoned slaughterhouse in the French village of Anguilcourt-le-Sart, were they had been deposited in the expectation of a final disposal.[9]

The facts prompted the Council of the European Economic Community[10] to adopt the directive No. 84/631 of 6 December 1984 (called the "Seveso II directive"), which established a regime for the control of transboundary movements of hazardous wastes within the Community.[11] Two aspects of the directive deserve particular attention: *a*) the principle of transparency, as any movement is subordinated to a previous communication to the States of import and transit; *b*) the principle of consent, as the States of import and transit can object to the movement. Under the directive, the two principles apply also in the case of movements from a Community member State to a third State.[12]

The same facts also prompted the Council of the Organization for Economic Co-operation and Development (OECD) to adopt the decision/recommendation of 1 February 1984 on transfrontier movements of hazardous waste and the decision/recommendation of 5 June 1986 on exports of hazardous wastes from the OECD area.[13] These instruments set forth some precise obligations of OECD member States,[14] namely: to ensure that the competent authorities of the States concerned are provided with

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eliminazione all 'estero'.) (halogenated derivatives of aromatic hydrocarbons (industrial waste, contaminated toxics and nonbiodegradable materials defined for disposal abroad). CORRIERE DELLA SERA, Nov. 16, 1993, at 50

9. It appears that the content of the drums was finally disposed by Givaudan in Basel between November 1984 and June 1985.

10. This international organization is today called the European Community.

11. 1984 O.J. (L 326). More recently, a new European Union regime on the transboundary movements of wastes has been established. Council Regulation No. 259/93 of Feb. 1, 1993 O.J.

12. The Fourth ACP-EEC Convention (Lomé, 1989), signed by the EEC and its 12 member States, on the one side, and 68 African, Caribbean and Pacific (ACP) States, on the other, prohibits all direct or indirect export of hazardous and radioactive wastes from the EEC member States to the ACP States.

13. *See OECD and the Environment*, OECD Doc. at 78, 86 (1986).

14. OECD Council decisions are binding on member countries. OECD Convention, Dec. 14, 1960, art. 5a, http://www.oecd.org//about/origins/convention/index.htm.

adequate and timely information on the movements; to prohibit movements without the consent of the import State; to prohibit movements to a non-member country unless the wastes are directed to an adequate disposal facility.

b. *The Waste that, after Having Left Italy, Returned to Italy*

In 1987, world public opinion was struck by several cases of covert traffic of hazardous waste from industrialized to developing countries. Some of the ships involved in the traffic -for example, *Karin B*, *Zanoobia*, *Jolly Rosso*, *Deep Sea Carrier* - sailed from Italian ports carrying wastes produced or shipped in Italy. The wastes were abandoned in the territory of certain developing countries (including Venezuela, Nigeria, and Lebanon). In the case of the Koko incident, about 4,000 tons of toxic wastes were dumped in a delta area of Nigeria under a deal arranged between an Italian trader and a Nigerian national, who received US$100 a month.[15] When the wastes were discovered, the government of Nigeria protested to the Italian government and adopted a retaliatory measure. An Italian ship, which had nothing to do with the traffic of waste, was prevented from leaving a Nigerian port.

Italy agreed to take the wastes back and provide for the rehabilitation of the sites where the waste had been abandoned.[16] The action was undertaken at the expense of the Italian Ministry of Foreign Affairs, without prejudice to any legal action that it might bring in order to be refunded by the persons found liable.[17]

This result can be seen as a good, although not explicitly admitted, instance of application of the rules of international law governing State responsibility to the field of protection of the en-

15. *See* Edna Eguh, *Regulations of Transboundary Movements of Hazardous Wastes: Lesson from Koko*, AFR. J. INT'L & COMP. L. 131 (1997).

16. *See, e.g., The Order of the Minister for the Coordination of Civil Protection*, Jul. 19, 1988, Gazz. Uff., Jul. 21, 1988, No. 170.

17. Under the legislation which was adopted in Italy immediately after the Koko incident (Decree-Law No. 397, Sept. 9, 1988 became Law No. 475, Nov. 9, 1988, Gazz. Uff., No. 264, Nov. 10, 1988) transfrontier movement of waste is subordinated to a deposit made by the waste holder of an appropriate guarantee in order to warrant the reimbursement of any expenses sustained by the State for waste disposal and environmental rehabilitation. Such expenses, including those incurred with regard to waste exported abroad, are to be jointly and severally charged to the producer and the carrier of the waste. The banking guarantee deposit must also cover any possible expenses arising from the international responsibility incurred by Italy vis-à-vis other States.

vironment.[18] It is assumed that there is a rule of customary international law prohibiting a State to use its territory in order to create serious harm to the territory of another State (in other words, a rule prohibiting transfrontier pollution). If this rule is violated - for instance, because a State has failed to control private companies shipping abroad and to inform the other States concerned - the responsible State is obliged to re-establish the situation which existed before the wrongful act (*restitutio in integrum*) and to provide compensation for the damage.[19] More or less, this is what happened in the case in question.

Similar problems are now resolved by the Basel Convention. Very clearly, the convention recognizes that every State has the right to ban the entry or disposal of foreign waste into its territory and that the export of hazardous wastes is in any case prohibited, if there is reason to believe that they will not be managed in an environmentally sound manner.[20]

II.
THE BASEL CONVENTION AND THE REGIONAL AGREEMENTS ON MOVEMENTS OF HAZARDOUS WASTES

As a treaty having a world sphere of application, the Basel Convention allows the parties to enter into regional agreements, provided that they stipulate to provisions which are not less environmentally sound than those of the Basel Convention itself. To be precise, Art. 11 of the Basel Convention (*Bilateral, Multilateral and Regional Agreements*) provides as follows:

> 1. Notwithstanding the provisions of Article 4, paragraph 5, Parties may enter into bilateral, multilateral or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties, provided that

18. Of course the topic of international responsibility for wrongful acts involving a breach of environmental rules deserves much more attention than is possible here. For a collection of studies on the topic *see* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM (Francesco Francioni & Tullio Scovazzi eds., 1991).

19. In principle, the lack of diligence on the part of the exporting State could be balanced with the lack of diligence on the part of the importing State, which does not adequately control what enters into its territory. This type of "complicity" does not however occur in the case of wastes traveling from an industrialized country to a developing country, where there are no sufficient financial and technological means to ensure adequate controls.

20. In 1995, the Basel Convention was amended in order to ban the transfer of hazardous waste from member States of the OECD, European Union and Liechtenstein to other countries.

> such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.
> 2. Parties 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 wastes and other wastes as required by this Convention.

Thus, room is left open for agreements which meet special conditions of certain areas of the world. In fact a number of regional agreements have been concluded, namely: the Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 1991),[21] the Regional Agreement on the Transboundary Movement of Hazardous Wastes (Panama, 1992), the Convention to Ban the Importation into the Forum Island Countries of Hazardous Wastes and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific (Waigani, 1995).[22]

This paper focuses on another recent regional agreement, the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal, opened to signature at Izmir, Turkey, on 1st October 1996.[23] Composed of 17 articles and 4 annexes,[24] this instru-

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21. Edna Eguh, *The Bamako Convention and the First Meeting of the Parties: A Glance at Implementation Strategies*, REV. EUR. COMMUNITY & INT'L ENVTL. L. 256 (1998).

22. *See* Van Hoogstraten & Lawrence, *Protecting the South Pacific from Hazardous and Nuclear Waste Dumping: The Waigani Convention*, REV. EUR. COMMUNITY & INT'L ENVTL. L. 268 (1998).

23. Hereinafter *Mediterranean Protocol*. The Protocol and the Final Act of the Izmir Conference are published in U.N. Doc. UNEP(OCA)/MED/IG.9/4 Annexes (1996). The Protocol will enter into force on the thirtieth day following the deposit of the sixth instrument of ratification, acceptance, approval or accession (Art. 17, para. 6). *See* Pablo Cubel, *Transboundary Movements of Hazardous Wastes in International Law: The Special Case of the Mediterranean Area*, 12 INT'L. J. MARINE &

ment is the sixth and most recent among the protocols adopted within the framework of the Convention on the Protection of the Mediterranean Sea against Pollution, which was opened to signature in Barcelona in 1976 and amended in 1995.[25]

The Mediterranean Protocol is a marine instrument, even if its sphere of territorial application does not seem fully clear. If the definition of "transboundary movement" is literally understood,[26] it could seem that the protocol applies also to movements that occur only on land, within the territories of the parties,[27] or even through the sea, but without taking place in Mediterranean waters.[28] This broad and rather unreasonable interpretation should however be rejected after a careful reading of the text of the Protocol as a whole. One of the general obligations of the parties is to prevent, abate and eliminate pollution of the Protocol Area by transboundary movements of hazardous wastes (Art. 5, para. 1). Under Art. 2, the Protocol Area is the area as defined in Art. 1 of the Barcelona Convention, i.e. an area of "maritime waters."[29] It can thus be inferred that the Pro-

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COASTAL L. 447 (1997); Tullio Scovazzi, *The Mediterranean Hazardous Wastes Protocol*, EUR. ENVTL. L. REV. 244 (1997).

24. *See* U.N. Doc. UNEP(OCA)/MED/IG.9/4 Annexes (1996). Annex I: Categories of wastes subject to this Protocol; Annex II: List of hazardous characteristics; Annex III: Disposal operations; Annex IV (A): Information to be provided on notification; Annex IV (B): Information to be provided on the movement document.

25. On the new developments within the so called "Barcelona system", *see* MARINE SPECIALLY PROTECTED AREAS: THE GENERAL ASPECTS AND THE MEDITERRANEAN REGIONAL SYSTEM Ch. 7 (Tullio Scovazzi ed., 1999); EVANGELOS RAFTOPOULOS, STUDIES ON THE IMPLEMENTATION OF THE BARCELONA CONVENTION: THE DEVELOPMENT OF AN INTERNATIONAL TRUST REGIME (1999); José Juste Ruiz, *Le plan d'action pour la Méditerranée vingt ans après: la révision des instruments de Barcelone*, *in* COLLECTION ESPACES ET RESSOURCES MARITIMES 249 (1995); Tullio Scovazzi, *The Recent Developments in the 'Barcelona System' for the Protection of the Mediterranean Sea against Pollution*, INT'L J. MARINE & COASTAL L. 95 (1996).

26. "'Transboundary movement' means any movement of hazardous wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement." Basel Convention, Art. 1, f.

27. *E.g.*, a land movement from Milan (Italy) to Paris (France) passing through the Alpes.

28. *E.g.* a movement from La Coruña (Spain; on the Atlantic coast) to St. Pierre-et-Miquelon (France; in the vicinity of the Canadian mainland).

29. "For the purposes of this Convention, the Mediterranean Sea Area shall mean the maritime waters of the Mediterranean Sea proper, including its gulfs and seas, bounded to the west by the meridian passing through Cape Spartel lighthouse, at the entrance of the Straits of Gibraltar, and to the east by the southern limits of the

tocol applies to movements, which besides being transboundary, take place through the Mediterranean waters or overfly them.

III.
THE INNOVATIONS IN THE MEDITERRANEAN PROTOCOL

As there would be no purpose to repeat on a regional scale what has already been provided for on the world level, there must be some differences between the Mediterranean Protocol and the Basel Convention which make the former different from, but not less environmentally sound than, the latter. In fact, some innovative solutions can be found in the Mediterranean Protocol (and perhaps explain why some of the participants to the negotiation were not able to sign the text of the protocol).[30] The main differences between the two instruments relate to the following characteristics.

A. *The Broad Definition of Waste*

The Mediterranean Protocol contains a broader defintion of the concept of waste. While the Basel Convention does not apply to radioactive wastes,[31] the Mediterranean Protocol covers also "all wastes containing or contaminated by radionuclides, the radionuclide concentration or properties of which result from human activity" (Annex I, A, Y0).[32] During the negotiations this extension was opposed by the European Community, France and Israel. France, in particular, made a declaration "on the question of transboundary movements of radioactive wastes, which should be dealt with by the competent international organizations at the global level, namely, IMO and IAEA, which have developed and are developing relevant rules in this area."[33]

Straits of the Dardanelles between Mehmetcik and Kumkale lighthouses." Basel Convention, Art. 1, para. 1.

30. The Protocol was signed by Algeria, Egypt, Greece, Italy, Libya, Malta, Monaco, Morocco, Spain, Tunisia and Turkey. The Protocol was not signed by Bosnia and Herzegovina, Croatia, the European Community, France, Israel, Slovenia.

31. The scope of the Basel Convention does not include "wastes which, as a result of being radioactive, are subject to other international control systems, including international instruments, applying specifically to radioactive materials." Basel Convention, Art. 1, para. 3.

32. Radioactive wastes are covered by two other regional treaties, namely the Bamako Convention and the Panama Agreement.

33. Similar declarations were made by the European Community and Israel.

Moreover, the Mediterranean Protocol, unlike the Basel Convention, applies also to "hazardous substances that have been banned or are expired, or whose registration has been cancelled or refused through government regulatory action in the country of manufacture or export for human health or environmental reasons, or have been voluntarily withdrawn or omitted from the government registration required for use in the country of manufacture or export" (Art. 3, para. 1, d).[34] The regime of wastes is thus extended to hazardous substances which could not be considered as wastes in a strict sense, because they are intended to be used (even if abroad) and not to be disposed.[35] This extension was opposed by France and the European Community, which made specific declarations in order to emphasize their position.

b. *The Rights of the Coastal Transit State*

Another important innovation is that the Mediterranean Protocol addresses the delicate political and legal question[36] regarding the rights of the coastal State if a foreign ship carrying hazardous wastes is passing through its territorial sea.[37]

In principle, the Basel Convention, which applies to both land and marine transboundary movement of hazardous wastes,[38] provides that the transboundary movement of hazardous wastes only

34. Similar, although not identical, provisions can be found in the Bamako Convention at Art. 2, para. 1, d and Panama Agreement at Art. 1, para. 1.

35. For example, DDT that, while being prohibited for use in a certain State, is there produced to be exported abroad.

36. On this question, *see* Laura Pineschi, *The Transit of Ships Carrying Hazardous Wastes Through Foreign Coastal Zones, in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 299 (Francesco Francioni & Tullio Scovazzi eds., 1991); Iwona Rummel-Bulska, *The Basel Convention and the UN Convention on the Law of the Sea, in* COMPETING NORMS IN THE LAW OF MARINE ENVIRONMENTAL PROTECTION 83 (Henrik Ringbom ed., 1997); Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials, in* OCEAN DEVELOPMENT AND INTERNATIONAL LAW 379 (1996).

37. The same question becomes even more complex if, besides innocent passage through the territorial sea, transit passage in international straits and freedom of navigation in the exclusive economic zone are also taken into consideration, as the case involving shipments of nuclear power plant wastes from France to Japan clearly shows. *See* Jon M. Van Dyke, *Sea Shipment of Japanese Plutonium under International Law, in* OCEAN DEVELOPMENT AND INTERNATIONAL LAW 399 (1993).

38. *See* the relevant definitions: "Transboundary movement" means any movement of hazardous wastes from an area under the jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area under the national jurisdiction of any State, provided at least two States are involved in the movement. Basel Convention Art. 1, f. "Area under the national jurisdiction of a State, means any land, marine area or airspace within which a State exercises administrative and regulatory responsibilities in accordance with interna-

takes place with the prior written notification by the State of export to both the State of import and the State of transit and their prior written consent (Art. 5, para. 3). However, as far as the sea is concerned, the Basel Convention includes a disclaimer provision which simultaneously protects two potentially conflicting elements, namely sovereign rights and jurisdiction of coastal States, on the one hand, and the exercise of navigational rights and freedoms by third States, on the other:

> *Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments. (Art. 4, para. 2) .*

Because of its ambiguous wording,[39] this provision is open to different interpretations and, indeed, has been interpreted in opposite ways by States inclined to give priority to either one or the other element. For example, on 30 March 1990 Italy made the following declaration:[40]

> *The Government of Italy (. . .) considers that no provision of this Convention should be interpreted as restricting navigational rights recognized by international law. Consequently, a State party is not obliged to notify any other State or obtain authorization from it for simple passage through the territorial sea or the exercise of freedom of navigation in the exclusive economic zone by a vessel showing its flag and carrying a cargo of hazardous wastes.*[41]

The declaration made by Egypt on 31 January 1995 goes in the opposite direction:

> *In accordance with the provisions of the Convention and the rules of international law regarding the sovereign right of the State over its territorial sea and its obligation to protect and preserve the marine*

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tional law in regard to the protection of human health or the environment." Basel Convention, Art. 1.

39. "The solution was found literally at the last moment of negotiations and the negotiating parties almost risked breaking the Convention because of their different views as to the rights and obligations of a transit state." Iwona Rummel-Bulska, *supra* note 36, at 90.

40. The declaration was made by Italy as an objection to the declarations made by Colombia, Mexico, Uruguay ans Venezuela, "as well as other declarations of similar tenor that might be made in the future."

41. In the same sense see the declarations made by Germany, Japan, Singapore, the United Kingdom, the United States.

environment, since the passage of foreign ships carrying hazardous or other wastes entails many risks which constitute a fundamental threat to human health and the environment; and in conformity with Egypt's position on the passage of ships carrying inherently dangerous or noxious substances through its territorial sea (United Nations Convention on the Law of the Sea, 1982), the Government of the Arab Republic of Egypt declares that foreign ships carrying hazardous or other wastes will be required to obtain prior permission from the Egyptian authorities for passage through its territorial sea. Prior notification must be given of the movement of any hazardous wastes through areas under its national jurisdiction, in accordance with Art. 2.9 of the Convention.[42]

The two declarations reflect a radical alternative between two opposite schemes, namely "no notification and no authorization," on the one hand, and "notification and authorization," on the other.[43]

Regarding this controversial issue, the Mediterranean Protocol contains an intermediate and innovative solution, consisting of a "notification without authorization" scheme. This solution can also be explained in the light of the sphere of application of an instrument relating to a semi-enclosed sea which is particularly threatened by pollution and crossed by many routes of navigation.[44] To be precise, the Mediterranean Protocol provides that the obligations to give prior written notification to the State of transit and to obtain its prior written consent, required in general by Art. 6, para. 3, do not apply to conditions of passage through the territorial sea. This case falls under Art. 6, para. 4:

The transboundary movement of hazardous wastes through the territorial sea of a State of transit only takes place with the prior notifi-

42. *See also* the declaration made by Malta on 20 May 1993 upon ratification of the United Nations Convention on the Law of the Sea: "Malta is also of the view that such a notification requirement is needed in respect of nuclear-powered ships or ships carrying nuclear or other inherently dangerous or noxious substances. Furthermore, no such ships shall be allowed within Maltese internal waters without the necessary authorization."

43. The legal problems raised by foreign ships carrying hazardous wastes and passing through the territorial sea are not explicitly solved in other relevant treaties either. The Bamako Convention contains a provision open to different interpretations. (Art. 4, para. 4, c) The same can be said about Art. 2, para. 4, of the Panama Agreement, Art. 2, para. 4, of Waigani Convention, and, as regards nuclear waste, Art. 27, para. 3, of the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (Vienna, 1997).

44. During the negotiations for the Mediterranean Protocol Italy made changes with respect to the position taken in the statement made in 1990 relating to the Basel Convention.

cation by the State of export to the State of transit, as specified in Annex IV to this Protocol. After reception of the notification, the State of transit brings to the attention of the State of export all the obligations relating to passage through its territorial sea in application of international law and the relevant provisions of its domestic legislation adopted in compliance with international law to protect the marine environment. Where necessary, the State of transit may take appropriate measures in accordance with international law. This procedure must be complied with within the delays provided for by the Basel Convention.

At the conclusion of the Izmir Conference, critical declarations explicitly relating to the issue of passage of ships carrying hazardous wastes were made by the European Community and France:

The representative of the European Community declares hereby that it is the understanding of the European Community that the provisions of this Protocol do not affect in any way the exercise of navigational rights and freedoms as provided for in international law and, in particular, the law of the sea.

Accordingly, nothing in this Protocol requires consent of any State for the passage of hazardous wastes on a vessel under the flag of a Party exercising rights of passage through the territorial sea in accordance with international law.

It is also the understanding of the European Community that nothing in this Protocol requires notice to or consent of any State for the passage of vessels under the flag of a Party exercising freedom of navigation in an exclusive economic zone in accordance with international law. (. . .).

(. . .) France enters a reservation on the provisions in the Protocol affecting freedom of navigation in the exclusive economic zone, as defined in the United Nations Convention on the Law of the Sea of 1982, and freedom of navigation in fishing zones beyond the territorial sea.

France considers that the provisions of the Protocol do not affect the right of innocent passage through the territorial sea as defined in United Nations Convention of the Law of the Sea of 1982.

Nevertheless, the approach followed by the Mediterranean Protocol seems to strike a fair balance between the interests of navigation and those of the protection of the marine and coastal environment. On the one hand, the passage of ships carrying hazardous wastes cannot be prevented or delayed by an obligation to obtain prior authorization by the coastal State. On the other, the coastal State has the right to be notified. It consequently knows what occurs in its territorial sea and is prepared to

intervene in cases of casualties or accidents during passage which could endanger the environment.

The Mediterranean Protocol fully complies with the present trends in the international regulation of movements of hazardous wastes. The basic idea is that such movements, where they are permitted, must be made openly. In this field, secrets and mysteries are always likely to bring about undesirable consequences.[45] This is also the idea behind the Mediterranean Protocol.

In the context of international law of the sea, the "notification without authorization" scheme does not seem in conflict with the United Nations Convention on the Law of the Sea (UNCLOS), the treaty of codification opened to signature in Montego Bay on 10 December 1982 and entered into force on 16 November 1994. Under the UNCLOS section on innocent passage in the territorial sea (Arts. 17-32), passage must be innocent, i.e. "not prejudicial to the peace, good order or security of the coastal State" (Art. 19, para. 1). Any act of willful and serious pollution contrary to the UNCLOS is incompatible with the right of innocent passage (Art. 19, para. 2 h). Foreign ships have the right to pass (Art. 17), but the UNCLOS does not say that they have the right to pass secretly or covertly.

An additional consideration leads to the conclusion that prior notification can be requested to foreign ships. Under Art. 22, paras. 1 and 2, of the UNCLOS certain particularly dangerous ships, that is "tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances may be required to confine their passage" to sea lanes designated or prescribed by the coastal State. An obvious question can be asked in this respect: how could a coastal State exercise its right to prescribe sea lanes for ships carrying noxious substances, if it were not even entitled to know that a foreign ship is carrying this kind of substance?[46]

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45. *See* Jon M. Van Dyke, *supra* note 37, at 418: The secrecy surrounding the voyage and in particular the refusal to disclose the proposed routes brings the Japanese government into conflict with the duty to inform and consult with countries along the route, because of the significant environmental harm that could occur in the case of an accident. The failure to consult and inform prevents affected countries from preparing for potential emergencies and coordinating with (or challenging) the Japanese government on the shipment.

46. *See* Pineschi, *supra* note 36, at 309: In the absence of an express provision, the claim of the coastal State to subject the passage of ships carrying hazardous wastes through its territorial sea to a prior authorization could be considered to be in con-

The Mediterranean Protocol does not deal with the question of freedom of navigation of foreign ships in the exclusive economic zone. For the time being, this question is only hypothetical, as such zones have not yet been established in the Mediterranean. In the final act of the Izmir Conference it is stated that the Conference noted that the Protocol had been drafted in the light of the present legal situation of the Mediterranean Sea. In the event of developments affecting this situation, the Protocol might have to be revised. The statement was intended to cover the possible future establishment of exclusive economic zones.

IV.
CONCLUDING REMARKS

For certain of its aspects, including some derogations to the Basel Convention regime, the Mediterranean Protocol can be seen as an environmentally sound adaptation to a regional sea of the principles embodied in the Basel Convention itself. However, not all questions are addressed. For example, on the complex subject of liability and compensation, the protocol only contains a provision which invites the parties to take action "as soon as possible"[47] (the expression is typically diplomatic and means from tomorrow to. . . the Greek calends). But the adoption of a generally acceptable regime on the same subject has proved to be a very difficult task on the world level as well. Only after six years of negotiations, a protocol to the Basel Convention on liability and compensation for damage resulting from the transboundary movements of hazardous wastes and their disposal has been opened at signature on 10 December 1999 in Basel.

From the political point of view, the future of the Mediterranean Protocol is uncertain. Some potential contracting parties have expressed their dissatisfaction with regard to the main innovations contained in the protocol. It is also uncertain whether

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trast with the rules of the Convention, according to which the right of the coastal State to regulate the passage of ships within its territorial sea is not to be exercised in such a manner as to hamper the exercise of the rights of navigation of other States. On the other hand, the case of a request of prior notification might be a little different. The claim cannot be considered to be an obstacle to innocent passage if the only effect of notification consists in excluding the secrecy of the passage and in making the coastal State aware of what will happen in its territorial sea, also in order to assess whether special precautionary measures (Article 23) are being observed.

47. "The Parties shall cooperate with a view to setting out, as soon as possible, appropriate guidelines for the evaluation of the damage, as well as rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes" (Art. 14).

other regional treaties will follow the innovation of the protocol and adopt a "notification without authorization" scheme.

An interesting instance in this direction may be found in States' practices. In ratifying in 1994 the UNCLOS Malta expressed the view that a prior notification requirement "is needed in respect of nuclear powered ships or ships carrying nuclear or inherently dangerous substances." In Feburary 2000 France submitted to the International Maritime Organization a memorandum on the strengthening of safety in international shipping. It states inter alia that "France will propose to its European Union partners that a system be established for reporting, at entry into the territorial waters of the Union, ships transporting oil, dangerous bulk cargo or certain particularly dangerous substances and passing through the territorial waters of the Union, without stopping in a port of the European Union."[48]

The present uncertainties should not however detract from the merits of an instument which seems acceptable to a number of Mediterranean countries and gives a good example of strengthened protection of the environment in a regional context.

48. International Maritime Organization Circular letter No. 2208 (February 29, 2000).