Transboundary Movement of Hazardous Waste: The Position of Transit States

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and it is hoped that such legislation would be in operation within three years.

Britain

A UK national marine environment club is being established by Marinetech NorthWest as part of the Department of Trade and Industry's Wealth from the Oceans programme. Aimed at companies offshore and inshore interests, the Enviro-Marine Club will encourage environmental improvements, with emphasis on a collaborative approach to identified threats and opportunities. Functions will include formulation of research proposals as well as keeping members informed of legislative and technological developments. Subscription is £300 per annum.

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LAWS OF THE SEA

Transboundary Movement of Hazardous Wastes

The Position of Transit States

The development of international regimes for the regulation of transboundary movement of hazardous waste (see *Mar. Poll. Bull.* **22**, 00–00) has brought a number of latent legal issues to the fore. One of these issues is the legal position of transit states. During shipment of waste from a state of export to a state of import, ships may have to pass through sea areas under the jurisdiction of third states, i.e. states of transit. In these cases, the question arises how the rights of these states of transit in regard to their waters up to the 200 mile limit are related to the rights of states of export to see their ships moving through the jurisdiction of the states of transit. There are three aspects to this relationship: are states of export required to notify a state of transit of their intention to ship waste through the jurisdiction of that state, if so, is the state of transit allowed to deny the proposed transit and if so, is that state allowed to enforce that right?

The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa and the 1984 EEC Directive 84/631 on transfrontier shipment of hazardous waste, as well as the proposed EEC Regulation of 1990, all deal explicitly with the position of transit states. This does however not mean that the legal situation is one of great transparency.

This contribution will introduce the main legal aspects which are involved here; in view of the complexity of the subject-matter much more than an introductory analysis is not possible within the limits of this column. Subsequently four cases will be dealt with:

- the situation where neither the state of export or the state of transit is a party to a conventional regime;
- the situation where both the state of export and the state of transit are parties to the Basel Convention or the Bamako Convention;
- the situation where the state of transit is a party to one of these Conventions but the state of export is not; and
- the situation where the state of transit is not a party to one of these Conventions but the state of export is.

Case 1: two non-parties

If neither the state of transit nor the state of export is a party to one of the waste agreements, we must fall back on general international law. On the basis of the 1982 UN Convention on the Law of the Sea, the protection offered to transit states is rather meagre, in particular in the exclusive economic zone but also in the territorial sea.

As regards the territorial sea, art. 23 of the 1982 LOS Convention does envisage that under international agreements special precautionary measures are applied to ships carrying nuclear or other inherently dangerous or noxious substances. This article in itself would leave little room for unilateral measures of a coastal state. What then are these international agreements? The Secretariat of IMO noted in a study on the implications of the 1982 LOS Convention for IMO (doc. LEG/MISC/1 of 27 July 1987) that at present there was little that could qualify as such, and that IMO could consider what role it could play in the development and elaboration of the necessary agreements. The Basel Convention and Bamako Convention could very well qualify as agreements in the sense of this article, but this does not bring us farther as in this first case both states are not a party to those convention.

We could then turn to the art. 21(1)(f) of the LOS Convention, that is to say: if we assume that the special provision of art. 23 leaves the applicability of this more general article untouched. Art. 21(1)(f) provides that coastal states may adopt laws and regulations, in conformity with the provisions of the Convention and other rules of international law, relating to innocent passage, in respect to the preservation of the environment of the coastal state. The clause 'in conformity with this Convention' should be taken to refer *inter alia* to art. 211(4)

of the LOS Convention, which provides that coastal states may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels exercising the right of innocent passage. This provides coastal states in principle with the unilateral power to legislate for the passage of ships through the territorial sea. It is true that neither art. 21, nor art. 211 do explicitly provide for the possibility of requiring prior notification or authorization. But transit states could claim on the other hand that neither the LOS Convention (nor customary law) does *prohibit* its requirement of prior notification or even authorization. They would however have to reckon with the major limitation upon their unilateral power: the requirement of art. 211(4) that such laws and regulations shall not hamper innocent passage of foreign vessels, and in particular of art. 24(1)(a): the coastal state shall not impose requirements upon foreign ships which have the practical effect of denying or impairing the right of innocent passage. In view of this requirement the case for authorization starts to tumble, in particular if it is taken into account that the requirement of prior authorization makes only sense if there is at least a remote chance of denying passage. This would mean that at least on the basis of the LOS Convention, non-party coastal transit states could not against non-parties deny passage through their territorial sea, or, alternatively attach conditions to passage which would have the practical effect of denying the right of innocent. Notification may seem less likely to hamper passage. The text of the LOS Convention provides little support to object notification. But it should be stressed that the LOS Convention cannot be equated with customary law. There is a powerful support for the view that the right of innocent passage through the territorial sea is incompatible with either prior notification or authorization. A recent statement of this view can be found in the Uniform Interpretation of Rules of International Law Governing Innocent Passage as adopted in a Joint Statement by the USA and the USSR:[1]

> All ships, including warships, *regardless of cargo*, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which *neither prior notification nor authorization* is required. (emphasis added)

It has persuasively been argued that this interpretation of international law, at least as far as warships is concerned, could be doubted.[2] But the interpretation shows anyhow that the existing legal situation is not straightforward, and that a strict interpretation of the LOS Convention cannot do the job. Research of state practice would in this regard be highly valuable.

As for the enforcement powers, the coastal state has powers to investigate, arrest and prosecute vessels in its territorial sea when they have violated pollution laws of the coastal state, 'without prejudice' to the provisions on innocent passage (art. 220(2) LOS Convention). The legality of enforcement action against vessels not complying with requirements of prior notification or authorization would in the first instance depend on a clear answer as to the legality of these requirements themselves.

The limitations of the powers of the coastal state with respect to ships carrying hazardous wastes in the exclusive economic zone are more straightforward. Coastal states may adopt laws and regulations for the prevention, reduction and control of vessels, but these should conform to and give effect to 'generally accepted international rules and standards established through the competent international organization or general diplomatic conference.' (art. 211(5) of the LOS Convention). This leaves little discretion to the coastal state. The clause 'generally accepted international rules' always has been somewhat unclear, but it is safe to submit that the Basel Convention, in its present state of ratification (as of 1 April it has 10 ratifications), does not constitute such rules. The absence of international rules on the subject leaves little room for coastal states. Art. 58 provides that they have the jurisdiction for the protection and the preservation of the marine environment, but adds that they must have due regard to the rights of navigation of other states. It seems hardly possible to consider a requirement of prior authorization, which may result in denial, for passage of a ship carrying hazardous wastes as being lawful under these provisions. As there are no generally accepted international rules providing for notification, and in view of the basic characteristic of the exclusive economic zone to leave the rights of navigation as much as possible untouched, even the case for a requirement notification is weak. This is even more true for the enforcement power of the transit state. Art. 220(3) grants only powers to require a vessel relevant information, and not more than that, when there are clear grounds that the vessel concerned has committed a violation of applicable international rules, or national legislation conforming thereto. Even if a state would require notification, the LOS Convention does not provide support for any enforcement of a ship not complying with that requirement.

Again, it should be stressed that the guidance offered by an analysis of the provisions of the LOS Convention is limited. The provisions of the LOS Convention, even those on marine pollution, cannot be equated with customary international law, and the more detailed the provisions are the less safe it is to rely on them. Precisely because the LOS Convention has failed to get universal acceptance, there is clear pressure to extend the scope of some of its provisions and, what is relevant here, to strengthen the position of coastal states of transit. A perfect illustration of national legislation which seems to limit navigational powers beyond what is contained in the LOS Convention is the *Note Verbale* of Haiti of 18 February 1988[3] concerning passage through the territorial sea. This does away with any requirements

[1] Reproduced in Erik Franckx, Innocent Passage of Warships. Recent Developments in US-Soviet Relations, *Marine Policy*, November 1990, pp. 484–490 at pp. 489–490.

[2] See the overview of state practice by Barbara Kwiatkowska, Innocent Passage by Warships: A Reply to Professor Juda, *Ocean Development and International Law* **21**, 447–450 (forthcoming).

[3] Reproduced in Law of the Sea Bulletin, No. 11 (July 1988).

for notification, and just prohibits passage. The substantive part reads as follows:

> Shipping lines, owners and operators of vessels of any tonnage are hereby notified that entry into ports, territorial waters and exclusive economic zone of Haiti is strictly prohibited to any vessel transporting wastes, refuse, residues or any other materials likely to endanger the health of the country's population and to pollute the marine, air and land environment.

This *Note Verbale* reflects the view that vessels transporting certain types of wastes or substances could not make use of the freedom of navigation. It is the same view which underlies the IAEA Code of Practice concerning radioactive waste. The divergence in state practice it reflects clearly calls for a uniform global regime. Whether the entry into force of the LOS Convention would be sufficient to provide such a regime, given the developments of interests perceived by coastal states to protect areas under their jurisdiction, can be doubted. The balance of interests of 1982 between coastal states with respect to the protection of the marine environment and navigational rights may well turn out to be not the balance of 1991.

Case 2: two parties

In case both the state of export and the state of transit are a party to either the Bamako Convention or the Basel Convention, the legal situation is much more transparent. Both Conventions follow similar solutions. Art. 6(1) of both Conventions provides that the State of export shall notify, or shall require the generator or exporter to notify, the competent authorities of states of transit of any proposed transboundary movement of hazardous wastes. Transboundary movement of hazardous wastes is defined in art. 2(3) of the Basel Convention and art. 2(4) of the Bamako Convention as "any movement of hazardous wastes or other wastes from an area under the national jurisdiction of another state or to or through an area not under the national jurisdiction of another State, provided at least two States are involved in the movement." On the response of the State of transit, art. 6(4) provides that:

> Each State of transit which is a party shall promptly acknowledge to the notifier receipt of the notification. It may subsequently respond to the notifier in writing, within 60 days, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. The state of export shall not allow the transboundary movement to commence until it has received the written consent of the State of transit.

It should be noted that the requirement of art. 6(1), and thus also the right of art. 6(4), does only apply to hazardous wastes, as defined in art. 1 of the Basel Convention and art. 2 of the Bamako Convention. For other wastes, also covered by the Conventions, these duties and rights do not apply. But for the hazardous wastes, the ensuing legal situation is clear. All Parties from which a transboundary movement of hazardous wastes is planned to be initiated (states of export) are obliged to notify all states through whose jurisdictional areas the movement will pass. These transit states may refuse the transit to take place, may allow it or may allow it under conditions.

A complication might be seen in the fact that art. 6(1) and 6(4) are balanced by art. 4(4)(c) of the Bamako Convention, comparable to art. 4(12) of the Basel Convention, which reads as follows:

> This Convention recognizes the sovereignty of States over their territorial sea, waterways, and air space established in accordance with international law, and 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 navigation rights and freedoms as provided for in international law and as reflected in relevant international instruments.

A comparable construction is contained in the 1990 Code of Practice on International Transboundary Movement of Radioactive Waste adopted by the IAEA in September 1990. Art. III(5) thereof provides that every state should take the appropriate steps necessary to ensure that the international transboundary movement of radioactive waste takes place only with the prior notification and consent of the sending, receiving the transit states. In a footnote it is provided that nothing in the Code prejudices or affects in any way the exercise by ships of all States of maritime navigation rights and freedoms under customary international law "as reflected in the 1982 United Nations Convention on the Law of the Sea, and other relevant international legal instruments".

If we confine ourselves to the Basel and Bamako Conventions, the question now arises what are the 'navigation rights and freedoms as provided for in international law and as reflected in relevant international instruments', and whether these are compatible with the powers of art. 6(4) grants to coastal states of transit? Some maritime powers states share the view that these are not compatible, and that prior notification or authorization cannot be considered applicable for navigation through the territorial sea or the exclusive economic zone. This can be seen from a number of declarations made by states at the time of the adoption of the Basel Convention. The best example is the declaration of Japan, par. 1 of which reads as follows:

> The Government of Japan understands that nothing in this Convention shall be deemed to require notice to or consent of any state for the mere passage of hazardous wastes on a vessel exercising its navigation rights under international law.

This declaration of Japan appears to reflect the same point of view as that has been contained in the Uniform Interpretation of the USA and the USSR quoted above: innocent passage through the territorial sea is incompatible with prior notification or authorization. Even if that would be the case under customary international law, it could not mean that states cannot by agreement deviate from this general rule. The disclaimer of art. 4(4)(c) of the Bamako Convention goes only as far as it goes. The recognition of the right of transit states to deny or control transit from other parties can, if they are to have some meaning, only mean that this right is

not incompatible with "the exercise by ships and aircraft of all States of navigation rights and freedoms as provided for in international law and as reflected in relevant international instruments." Any other conclusion would undermine one of the main rationales of the Basel Convention and the Bamako Convention: the protection of states of transit. Art. 4(2)(2) of the Bamako Convention and art. 4(12) of the Basel Convention can thus not be interpreted to limit the application of the duty for prior notification and the right of a transit state to prevent passage or make that conditional. In this respect, the Basel Convention goes beyond legislations of for instance the USA, but also EEC Directive 84/631, which both make transit of waste shipments not dependent upon prior consent of the transit state. Of course, a state of transit might consider it, from a pragmatic point of view, sufficient if ships carrying hazardous waste comply with normal prescription on the use of sea lanes etc., and consider prior notification of states superfluous. In this respect it may be noted that, in view of the volume of transfrontier shipments of hazardous waste within the OECD, and the fact that requirement for consent of transit states could be disruptive as it could delay or interfere with shipments, it has been suggested that different rules for shipments outside are applied than those within the OECD.[4] Member States to the Basel Convention can in this case make use of the possibility opened in art. 6(4) to waive the requirement of notification. The Bamako Convention does not contain a similar explicit possibility.

The powers of the coastal transit state would seem not to be limited to prescriptive powers. The same argument that leads to the conclusion that coastal states have the power to require notification and prior authorization (being necessary to attain one of the objectives of the convention), could also be taken to support the view that it is necessary to grant to the coastal state the powers to enforce their prescriptions.

This being so, the question remains as to the status of declarations such as that of Japan. The Basel Convention, to retrict us to that agreement, contains no possibility for reservations or exceptions (art. 26(1)). It does leave open the possibility of declarations, provided however that "such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State." The declaration of Japan could be interpreted to have that purport with respect to art. 6(1) and 6(4). If so, its legality could be questioned.

It should be added that the legal situation gets much more complicated is the flag state of the vessel transporting the waste is not the same state as the state of export. The Conventions do not contain any provisions on this (possibly somewhat hypothetical) situation. While the obligation of the state of export to notify remains untouched, complications concern in particular the powers of enforcement. Although this point cannot be elaborated here, it seems safe to submit that a coastal state of transit cannot exercise enforcement powers against a ship flying another flag than that of the state of export, if the state of export has not complied with its obligations under one of the two the Convention.

Case 3: only the state of transit is a party

A different situation arises in case the state of export is not a Party to the Basel Convention or the Bamako Convention. In this case that state has not agreed to the duty to notification and the right of the state of transit to refuse transit or make it conditional. No duty to notify would be imposed by the convention. The question whether coastal transit states have nonetheless the power to require such notification and even to require authorization can be disposed of quickly. The situation is in principal identical to that of the first case. Although as far as the coastal state is concerned there are now international rules as envisaged in art. 23 on the powers of the coastal state in the territorial sea, these rules would only be applicable if also the state of export is a party to the convention containing these special rules. Consequently, we would fall back again on general international law.

Case 4: only the state of export is a party

A wholly different question is concerned with the transit of waste through sea areas under the jurisdiction of a non-party. Here the Basel Convention and the Bamako Convention show an interesting difference. Art. 7 of the Bamako Convention provides that art. 6(4) applies also to transboundary movements of hazardous wastes from a Party through a State or States which are not Parties. This *stipulation pour autrie*, the conferment of rights on third parties is remarkable. It means that all parties to the Convention have not only accepted the duty to notify proposed transboundary movements to states of transit, Party to the Convention, and the right of those states to refuse transit, but have accepted these rights and duties *vis-à-vis* all States. Unless third states have indicated not to assent to this right, they are in a position to enforce the right to be notified and the right to refuse passage or make it conditional. This follows from art. 36 of the Vienna Convention on the Law of Treaties, which creates a presumption as to the existence of an assent of the third state: the right indeed arises from the treaty as long as it has not been indicated that a third state does not assent.

In contrast, art. 7 of the Basel Convention does only make art. 6(2), concerned with states of import, applicable to states which are not Parties. There is nothing in the Basel Convention on the rights of transit states which are not a Party. For those states the remarks made above on the situation under general international law apply, and the legal transparency of the situation under the Bamako Convention turns clouded.

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[4] See David P. Hackett, An Assessment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *Am. U.J. Int'l L. &Poly* 5 (1990), 310.