Transboundary Movement of Hazardous Waste for the Purpose of Dumping at Sea

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LAWS OF THE SEA

Transboundary Movement of Hazardous Wastes for the Purpose of Dumping at Sea

Within a limited number of years, transboundary movement of hazardous waste has evolved from a virtually lawless activity where anything goes, to an activity covered by a number of norms which are at least the starting points of an elaborate regime.

The key component of this regime is the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, developed within the framework of UNEP. The Basel Convention intends on the one hand to reduce the existing movements of waste, and on the other hand requires that transfrontier movements that do take place are controlled. Valuable as the Convention is, it obviously is a compromise and it has its lacunae. For one thing, it does not cover radioactive waste. Radioactive wastes are excluded from the scope of the Basel Convention, and the need for a supplementary regime is thus obvious. To close this lacuna, in September 1990, the IAEA adopted the Code of Practice on International Transboundary Movement of Hazardous Wastes. The Code is advisory: it serves as a set of guidelines for states for the harmonization of their policies and laws in this field. Although not binding, it can be assumed that it will be taken seriously into account, as other IAEA standards, by states and thus will play an important role.

Another shortcoming of the Basel Convention which has been put forward is the limited degree of protection it offers to developing states. Its content reflects some sort of balance between the interests of developing countries—some of which support a total ban, and which require assistance in the handling of waste—and industrialized countries—which do have a legitimate interest to move waste to another state where environmentally sound management is possible. Dissatisfaction with the compromise of the Basel Convention elicited developing countries to opt for a more stringent regime. This objective is reflected in the 1989 Lome IV Convention between the EEC and the 68 ACP (African, Caribbean, and Pacific) countries. Art. 39 of this Convention bans hazardous waste exports from the EEC to the ACP countries, and bans in addition all imports of hazardous waste trade to the ACP countries from any state. The specific interests of developing countries can even better be seen in what is the most recent contribution to the regime: the Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted on 29 January 1991 at the OAU Pan-African Conference on Environment and Sustainable Development in Africa, meeting in Bamako, Mali. The *raison d'être* of the Bamako Convention is reflected in art. 4(1), which accommodates the failure of the Basel Convention to provide for a total ban. Art. 4(1) provides that all parties shall take appropriate measures within the area under their jurisdiction to prohibit the import of all hazardous wastes into Africa from non-Contracting Parties. Such import shall be deemed illegal and a criminal act. The ban on the import of hazardous waste from outside Africa is supplemented by a system for control of transboundary movement and management of hazardous wastes within Africa.

A final element of the regime, still in preparation, is a Proposed Regulation of the EEC. On 10 October 1990 the Commission submitted a Proposal for a Council Regulation on the Supervision and Control of Shipments of Waste within, into, and out of the European Community. This Regulation is intended to adapt Community rules to the 1989 Basel Convention and the 1989 Lome IV Convention, and would replace EEC Directive 84/631 on the transfrontier shipment of hazardous waste.

Transboundary movement of waste and the law of the sea

A major part of the issues dealt with in the regime for transboundary movement of hazardous waste is situated in the realm of the law of the sea. A significant part of all transboundary movements is carried out through shipment. This leads on a number of questions, two of which are of particular significance. A forthcoming article will discuss the transit of waste through the territorial sea or exclusive economic zone of other states. This article discusses the relation between the regime for transboundary movement of hazardous waste and the regime for dumping.

Transboundary movements of waste and dumping or incineration at sea (hereinafter both referred to as dumping, unless otherwise stated) are not necessarily related, but in practice the one may follow the other. Although the export of waste for the purpose of dumping at sea appears to be rare, there have been frequent cases of transboundary movement of wastes for incineration at sea. It is probably for this reason that the 1989 Basel Convention, although being primarily concerned with the actual transboundary transport of waste, does include provisions which may relate to the dumping of wastes. Each party shall require that hazardous wastes or other wastes, to be exported, are managed in an environmentally sound manner (art. 4(8)). As management covers also the disposal of hazardous waste (art. 2(2)), and disposal covers both dumping and incineration at sea (art. 2(4) jo. Annex IV), the requirement of environmentally sound management applies to dumping and incineration operations.

The question arises how this all is related to existing obligations concerning dumping operations, which are both contained in regional conventions dealing with dumping (at present the 1972 Oslo Convention, the 1976 Protocol to the Barcelona Convention and the 1986 Protocol to the 1986 Noumea Convention) as well as the global London Dumping Convention (LDC). In principal, this discussion will confine itself to LDC. The question as to the compatibility of the two regimes can be approached from two sides, which will subsequently be dealt with. On the one hand, the question is how does a dumping operation carried out under the Basel Convention relates to the requirements of LDC. On the other hand: how does export of waste for the purposes of a dumping operation to be carried out under LDC relate to the requirements of the Basel Convention? It may be noted that the question of compatibility gains weight as the two conventions overlap considerably. The Basel Convention covers 'hazardous waste' and 'other waste' as defined in art. 1 and Annexes I and II. The London Dumping Convention is, in principal, concerned with all wastes, but provides under Annex I and II for different requirements for wastes with different degrees of hazards (a more detailed analysis of this point is contained in the study of the Secretariat of LDC, referred to below).

Transboundary movement of waste and dumping: the view from the Basel Convention

The recognition of a possible tension between the two regimes induced the Basel Conference to adopt Resolution 2. This Resolution invites the Contracting Parties to LDC to consider the need for a review of existing rules, regulations, and practices with respect to dumping of hazardous wastes and other wastes at sea in the light of the Basel Convention, in order to recommend additional measures within the London Dumping Convention, including its annexes, so as to control and prevent dumping of hazardous and other wastes at sea. Following contact between the LDC and the Interim Secretariat for the Basel Convention, the Secretariat of LDC submitted a report to the Twelfth Consultative Meeting of the Contracting Parties to LDC in 1989 (LDC 12/Inf. 7 of 5 October 1989). The report contains an extensive overview of points of contact between the two Conventions.

In its conclusion, the report submits an observation which leads to the core of the matter. The Secretariat notes that it "would have been very appropriate" if the Basel Convention would have included a requirement to take into account established agreements on the control of marine pollution by waste disposal at sea. A similar requirement has been included with respect to internationally accepted transportation requirements (art. 4(7)(b)), and indeed one might wonder why a provision referring to LDC was not included. On the basis of the present text there are basically two ways out.

The least fruitful way out might be found in art. 9(1)(e) of the Basel Convention. This article provides that any transboundary movement of hazardous wastes or other wastes "that results in a deliberate disposal (*e.g.* dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of law, shall be deemed to be illegal traffic". In a submission of the USA to the Thirteenth Consultative Meeting of LDC (October 1990), it is noted that articles 194 and 210 of the 1982 Law of the Sea Convention incorporate general principles of international law respecting marine pollution. This does not seem a fruitful way out. Arts. 194 and 210 are in part based on the general principles of the LDC (LDC 13/8 of 2 August 1990). Even if these articles would qualify as 'general principles of law' in the meaning of art. 9(1)(e) of the Basel Convention, they can, exceptional cases excluded, hardly be considered specific enough to judge whether a given dumping operation is illegal. If that were the case, not only the discussion on the assessment procedure in LDC but probably even the entire regulatory framework of LDC would be superfluous.

A much better way out might therefore be found in art. 11(2) of the Basel Convention. This provides that the Basel Convention shall not effect transboundary movements which take place pursuant to agreements for the purpose of controlling transboundary movements of hazardous wastes which have entered into force prior to the Basel Convention, "provided that such agreements are compatible with the environmentally sound management of hazardous wastes and other wastes as required by this Convention". In its submission to the Thirteenth Consultative Meeting of LDC, the United States claims that LDC qualifies indeed as an article 11(2) agreement. For states which had become parties to LDC prior to the entry into force of the Basel Convention, LDC would be the exclusive regulatory regime. Whereas there is little doubt as to the entry into force of LDC before the Basel Convention and it being related to disposal of waste after transboundary movements, some controversy has arisen as to whether LDC is compatible with the requirements of environmentally sound management. Environmentally sound management under the Basel Convention is defined as "taking all practical steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes" (art. 2(8)). At the first meeting of the parties technical guidelines shall be established for the environmentally sound management of wastes subject to the Convention (art. 4(8)). During the Thirteenth Consultative Meeting of LDC, the representative from UNEP stated as UNEP's view that LDC does not qualify as an art. 11(2) agreement, taking into account the definition of environmentally sound management (LDC 13/15, par. 8.5).

This issue is extremely difficult to settle. The concepts which have been developed by UNEP have a different perspective than those of LDC and they not readily fit each other. Whereas waste disposal at sea under the Basel Convention is seen as about the last step in the entire process of waste management, in LDC this step has traditionally been the exclusive focus. Nonetheless, once the test of environmentally sound management is applied to LDC, the better argument

appears to be that LDC should qualify as an art. 11(2) agreement. The objective of LDC is to prevent all pollution of the sea by dumping of waste. Dumping of wastes containing substances contained in Annex I is banned, so there is no problem here. But as noted, there are wastes which qualify as hazardous under the Basel Convention but which are not covered by Annex I of LDC. These are covered by the requirement of special permits (Annex II) or general permits (all other substances). Annex III of LDC contains criteria which are to be used to evaluate whether or not a permit to dump should be issued. A strict look at these provisions might be misleading, however. In recent years the view has gained ground within LDC that LDC is far from being environmentally sound. Both the strength of the regime itself (the requirements for dumping operations) and the enforcement of the provisions of LDC are open to criticism. The discussions held during the last few Consultative Meetings on the application of the precautionary principle, the development of a new assessment procedure and the development of waste management strategies (see *Mar. Pollut. Bull.* **22**, 56–58) all indicate that the Parties share the general feeling that LDC has not operated sufficiently effectively to attain its overall objective to prevent all pollution of the sea from dumping, and probably has in the past not qualified as environmentally sound management of waste. But it should be added that much has improved in recent years. The current requirements (states are required to make an analysis showing that land-based options are not to be preferred to sea options and should apply certain measures for cases where sea-disposal is the preferred option) clearly go beyond the mere guidance of dumping. Adoption of the draft new assessment procedure, which will integrate all requirements, and the possible introduction of waste management procedures would go a long way to environmentally sound management of waste in terms of the Basel Convention. Although the discussion continues, somewhere along the road there is a point where all practicable steps have been taken "to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes" and where consequently LDC qualifies as an environmentally sound waste management procedure. It may be added that for regional conventions, in particular the 1972 Oslo Convention, this argument gains even more weight. The procedures contained therein, in particular the Prior Justification Procedure, go, in terms of guarantees for a sound decision-making process, beyond those of LDC.

In view of the current requirements and developments to strengthen the regime, there is no good reason why the Basel Convention should not refer to LDC as the applicable set of rules on dumping. It is highly unlikely that the Basel Convention could on a similar scale develop rules for dumping which would go beyond those of LDC, if only because of the fact that the source of these rules would have to be identical: the current practice of states. In addition, the fact that at present LDC is not a perfect example of environmentally sound management should not hamper reference by the Basel Convention to LDC for the applicable rules for dumping. In this context, a clear analogy exist with art. 4(7)(b) of the Basel Convention, which refers for the applicable transportation requirements to the relevant IMO Conventions. In IMO, however, it has been recognized that the various applicable rules might need considerable adaptation to meet the requirements for transboundary movements of waste (see the overview in LDC 13/8/4 of 14 September 1990). There is no reason why LDC, even if it should be adjusted, could not fulfil a comparable function.

To close the circle, the procedures and criteria as they will be used in LDC should be transplanted in the Basel Convention. The guidelines for environmentally sound management of waste, which have to be established at the first meeting of the Contracting Parties of the Basel Convention and which obviously have a much broader scope than requirements for dumping, should then take into account the procedures and criteria of LDC. As long as these criteria have not been established, some form of cooperation and consultation between LDC and the Basel Convention would have to prevent the criteria from diverging. Once the criteria of the Basel Convention, as far as they are concerned with disposal at sea, have been established on the basis of the criteria and procedure of LDC, this would also solve the problem of transboundary movement of waste with the purpose of dumping in case one or more of the parties to the Basel Convention concerned is not a party to LDC. These states would then be bound by the guidelines of the Basel Convention, and, through those, by the guidelines of LDC. For non-parties to the Basel Convention, the applicable rule is contained in art. 4(5) of the Basel Convention: transboundary movement is then prohibited. The exceptions in art. 11(1) and art. 11(2) are both related to the need for an environmentally sound management.

The Bamako Convention takes a different approach to the dumping of wastes at sea. Whereas the compatibility of dumping with the Basel Convention is dependent on a number of steps of interpretation, the Bamako Convention takes the easy way out. Art. 4(2) stipulates that parties shall prohibit the dumping at sea of hazardous wastes, including their incineration at sea and their disposal in the seabed and sub-seabed.

> Any dumping of hazardous wastes at sea, including incineration at sea as well as seabed and sub-seabed disposal, by Contracting Parties, whether in internal waters, waterways, territorial seas, exclusive economic zones or high seas shall be deemed to be illegal.

As the category of wastes which qualify according to art. 2 as hazardous wastes does not overlap with Annex I of LDC, the Bamako Convention clearly goes beyond the requirements of LDC. For other wastes no specific regulation has been included in the Bamako Convention. Dumping of other wastes is covered by art. 4(3)(k), which stipulates that each party shall ensure that hazardous wastes to be exported are managed in an environmentally sound manner in the State of import and transit. Just as in the case of the Basel Convention,

technical guidelines for the environmentally sound management of wastes subject to the Convention shall be decided by the Parties at their first meeting. Here the same remarks apply as with respect to the relation between the Basel Convention and LDC or any regional conventions which may in the future deal with dumping.

Dumping and transboundary movement of waste: the view from LDC

While this is all concerned with the question of the regulation of dumping from the point of view of the Basel Convention, the issue can also be approached from the side of LDC. The question then is slightly different: how does a regulatory system for dumping deal with the problem of transboundary movements. While being overloaded with provisions, LDC does not contain requirements concerning the export of transboundary movements of waste for the purpose of dumping. The loophole is evident: wastes containing substances covered by Annex I or II of LDC could be exported to non-parties, whereafter they could be disposed without more ado. This is in particular a problem as LDC has a participation problem. At present it has 64 parties and it is generally recognized that too many developing states are not a party. To address this problem, in 1986 the Twelfth Consultative Meeting adopted Resolution LDC.29(10). This calls upon Contracting Parties not to export wastes for sea disposal to States not Party to the Convention or to an appropriate regional convention "unless there are both compelling reasons for such export and clear evidence that the wastes would be disposed of in compliance with the requirements of the London Dumping Convention and such regional conventions." A comparable Resolution has been adopted in the framework of the Oslo Convention. At its Fourteenth Meeting (1988), the Commission adopted Oscom Recommendation 88/1 Concerning the Export of Wastes for Disposal at Sea. The Recommendation calls for a prohibition of exports of waste and provides in addition for a prior notification procedure. With respect to incineration, the Eleventh Consultative Meeting of LDC called in Resolution LDC.35(11) on incineration of noxious liquid wastes at sea upon Parties not to export noxious liquid wastes from coastal states which are to be incinerated at sea to any state not party to the Convention. These Recommendations obviously cannot compete with the Basel Convention. Apart from their non-legal status, there are only general requirements for prior notification and the role of the transit state is left completely undefined.

An improvement is Resolution LDC.42(13), proposed by Mexico, adopted at the Thirteenth Consultative Meeting of LDC. This Resolution calls upon Contracting Parties to prohibit or not to permit the export of wastes for dumping at sea to States not Party to the Convention. As the problem of the applicability of detailed procedures for export of waste for the purposes of dumping between parties remains, the Recommendation urges all Contracting Parties to LDC to also become Parties to the Basel Convention. In addition, an *ad hoc* Group of Legal Experts on Dumping is requested to elaborate standards compatible to those imposed by the Basel Convention for the export for dumping at sea of wastes containing substances referred to in Annexes I and II of LDC. Finally, it is recommended that the Parties consider including agreed standards in the Convention or an Annex thereto itself in order to strengthen their status. If implemented, these steps should do to ensure compatibility between these two conventions on this point.

Conclusion

In conclusion it might be noted that mutual compatibility between regimes for transboundary movements and regimes for ocean dumping would require, on the one hand, the adoption of guidelines within the Basel Convention or regional waste conventions referring to LDC or regional dumping Conventions as far as dumping is concerned and, on the other hand, the adoption of standards within LDC or regional dumping conventions referring to the Basel Convention or relevant regional agreements as far as transboundary movements or incorporating comparable standards. It is only then that the now existing loopholes would be closed.

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