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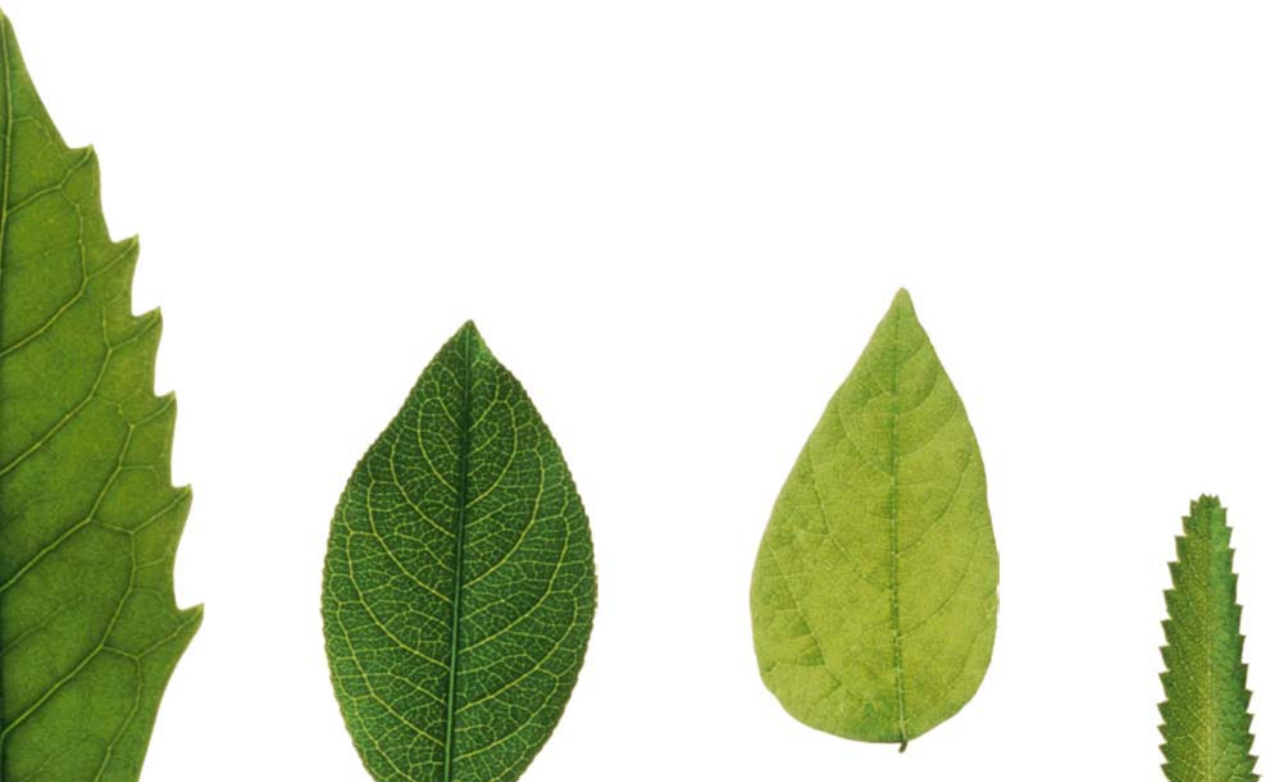
Thaqal S. Al-Ajmi



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1 INTRODUCTION

Trading in environmentally damaging materials whether hazardous wastes, radioactive substances, or any inherently dangerous articles has become a prosperous business. In fact, more than 50 per cent of all cargo shipped by sea, whether solid, liquid, or gas consists of hazardous or noxious substances.[1]

The reasons that shipping of these substances has become so frequent include the following:

One obvious reason, especially if these substances contain materials that can be used as a source of energy whether recycled or not, is that such export means gaining huge financial profits for the exporter. The importer will also possess an important source of energy that can be, to a certain extent, used as a clean and cheap substitute to oil which is subject to daily fluctuations of price.

Other reasons that states, industrial states in this case, export hazardous wastes include the following:

First, these states, by exporting these hazardous wastes to other states, free themselves of potential danger that can be caused to their people and the environment.[2] Secondly, by sending these hazardous wastes overseas for disposal, these states or the local companies save a tremendous amount of money that would have been required if they had decided to dispose these hazardous wastes locally. For example, incinerating wastes in the United States may cost more than $2,000 per ton, whereas in developing countries it costs no more than $40 per ton.[3] Therefore, these states or their local companies choose the least expensive way by sending these hazardous wastes overseas. Thirdly, in many cases the decision by the local companies to export hazardous wastes might be made to avoid the strict environmental regulations in the producing countries for the local disposal. Thus, these companies choose to export these hazardous wastes to countries with loose regulations or less effective monitoring systems.[4] Lastly, by exporting hazardous wastes to developing countries, where environmental regulations are toothless, exporting companies will evade any liability[5] when such disposal causes pollution, and therefore, damage to the people or the environment of the country in which the wastes have been disposed.

Hence, it is not surprising that a large quantity of the approximately 400 million tons of hazardous wastes produced every year is transported to underdeveloped and developing countries, some of which are more than half way across the globe from the place where the wastes are produced.[6]

This results in vessels carrying environmentally damaging materials passing through the territorial seas of various states, straits and canals, and calling at ports of other states, therefore creating severe risks to these coastal states and to the marine environment in general.

For this reason, this paper will discuss the issue of transportation of these environmentally damaging

1 *See* Robert S. Sehuda, 'The International Maritime Organisation and the Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea: An Update on Recent Activity', 46 *University of Miami Law Review* 1010 (1992).

2 Statistics show that the world produced five million metric tons of hazardous wastes in 1947. By 1990, this amount had increased to 300 millions. As of 1997, these estimates had risen to over 400 million metric tons of hazardous wastes. *See* Sejal Choksi, 'The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: 1999 Protocol on Liability and Compensation', 28 *Ecology Law Quarterly* 512 (2001).

3 *See* Choksi, note 2 above at 513.

4 *See* Alexandre Kiss, 'The International Control of Transboundary Movement of Hazardous Waste', 26 *Texas International Law Journal* 529 (1991). *See* also Choksi, note 2 above at 512. An example of a national law that is very strict on the issue of the local disposal of hazardous wastes is the US Resource Conservation and Recovery Act of 1976. For more details about this Act *see* Theodore Waugh, 'Where Do We Go from Here: Legal Controls and Future Strategies for Addressing the Transportation of Hazardous Wastes Across International Borders', 11 *Fordham Environmental Law Journal* 483-84 (2000).

5 *See* Choksi, note 2 above at 512.

6 For example, the US industries alone export over 160,000 tons of hazardous wastes each year. *See* Andrew Webster-Main, 'Keeping Africa out of the Global Backyard: A Comparative Study of the Basel and Bamako Conventions', 20 *Environs Environmental Law and Policy Journal* 67 (2002). *See* also Muthu S. Sundram, 'Basel Convention on Transboundary Movement of Hazardous Wastes: Total Ban Amendment', 9 *Pace International Law Review* 4 (1997).

materials and will present the rules stated in international law in this regard. This paper consists of two parts: The first part argues that the exporting states have the full right, in accordance with the international law, to export these materials and have no restriction in this respect. The other part of this paper seeks to prove that transportation of any materials that may have any adverse effects whether on the marine environment of the coastal states or on the marine environment in general, has a special status, and thus the right is not unlimited.

2 FREE NAVIGATION IS ALWAYS FREE

States shipping these materials may argue that they have the right to export hazardous materials overseas and such a right is absolute and cannot be banned. This argument can be based on the following:

2.1 Freedom of Navigation

One of the most common arguments that shipping states hold is that the high seas are open to all states. No state has any sovereignty over them and, therefore, it cannot prevent other states from sailing into these areas. This argument is as old as the Roman saying which holds that oceans were *communis omnium naturali jure* (open to all persons by the operation of natural law).[7]

The famous scholar Hugo Grotius also spoke about this freedom and said that oceans belong to no one; they are free to any one who wishes to cross them.[8] This principle has been reflected in Article 2 of the Geneva Convention on the High Sea of 1958,[9] Article 87 and Article 90 of the United Nations Convention on the Law of the Sea of 1982 (hereinafter UNCLOS).[10]

7 Thomas A. Clingan, *The Law of the Sea: Ocean Law and Policy* 10 (London: Austin & Winfield, 1994).

8 Hugo Grotius, *The Freedom of the Seas, or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (New York: Oxford University Press, 1916).

9 Convention on the High Sea, Geneva, 29 April 1958, 450 *United Nations Treaty Series* 82, Article 2.

10 United Nations Convention on the Law of the Sea (hereafter UNCLOS), 1982, Geneva, 16 November 1994, 21 *Int'l Leg. Mat.* 1261 (1983), Articles 87(1) and 90.

2.2 The Right of Innocent Passage

Not only has international law given the right to shipping states to freely sail in high seas as stated above, but it has given them the right to sail in the territorial waters of coastal states which have sovereignty over them. This is because this sovereignty has been restricted by rules of international law as articulated very clearly in UNCLOS, most provisions of which are considered by many writers of international law as a codification of customary international law.[11] According to UNCLOS, it is not only coastal states that have the right of access to territorial waters. Other states also have the right of innocent passage. This right means that ships of all states shall 'enjoy the right of innocent passage through the territorial sea' of the coastal states for the purpose of '(a)- traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b)- proceeding to or from internal waters or a call at such roadstead or port facility'.[12]

However, not all passages through the territorial waters of the coastal states are considered to be innocent. The innocent passages are those which are not prejudicial to the peace, good order or security of the coastal states.[13] Hence, the question here is whether a passage of a ship carrying hazardous materials or substances through the territorial waters of the coastal states ought not be considered an innocent passage because it is prejudicial to the peace, good order or security of the coastal states.

Looking through the relevant provisions of UNCLOS, one may say that carrying hazardous materials on board of a ship traversing the territorial waters of coastal states cannot be considered as a non-innocent passage per se. This is due to two reasons:

The first reason is that carrying hazardous materials only for the purpose of passing the territorial waters of coastal states is not among the acts enumerated in Article 19 (2) of UNCLOS, which make such passing as prejudicial to peace, good order and security of the coastal states, therefore not innocent passage. One of

11 *See* Lawrence Marin, 'Oceanic Transportation of Radioactive Materials: The Conflict between the Law of the Seas' Right of Innocent Passage and Duty to the Marine Environment', 13 *Florida Journal of International Law* 362-78 (2001).

12 *See* UNCLOS, note 10 above, Article 18.

13 Article 19 UNCLOS, note 10 above.

the acts that are listed in this article for the protection of the marine environment, and which have been used by some writers when discussing the issue of ships carrying hazardous materials, is the act mentioned in Subparagraph (h) of Article 19 (2) of UNCLOS which states that 'any acts of wilful and serious pollution contrary to this Convention'.[14]

Nonetheless, this provision is about intentional and serious pollution and does not apply to the mere passage of hazardous materials on board of a ship destined to another state for commercial reasons and has no intention whatsoever to cause any pollution to any coastal state.

The other reason is that the drafters of UNCLOS have foreseen such a scenario and still consider the case to be a case of innocent passage. According to Article 23 of UNCLOS ships carrying 'nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures [e.g. sea lanes] established for such ships.'[15]

2.3 The Right of Transit Passage

Though the concept of transit passage can be considered as part of the general principle of freedom of navigation mentioned above, it has some special features since it is only applicable to straits 'which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an economic exclusive zone'.[16]

Pursuant to this right, shipping states may argue that all ships must enjoy unimpeded freedom of navigation when traversing international straits. Hence, any procedures or measures contemplated by coastal states must include this right and not, in any manner, hamper it. Nonetheless, this right must be conducted in a way that does not harm the environment as will be discussed later.

2.4 The Right of Secrecy

One more argument that can be cited by states shipping hazardous materials, especially against the requirement of prior notification to transit states, is that such a disclosure will expose such shipments, including nuclear shipments, to possible terrorist attacks,[17] which would undermine the security of the shipping states. This argument may be valid especially nowadays, when acts of terrorism are wide-spread and many states have been accused of being involved in terrorist activities.

In this respect, reference can be made to Article 302 of UNCLOS, which acknowledges this fact and stipulates that 'nothing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security'.[18]

Another international instrument that also admits the importance of secrecy in some cases, is the Convention on the Physical Protection of Nuclear Materials of 1980.[19] According to Article 6 (1) of this Convention, States Parties 'shall take appropriate measures consistent with their national laws to protect confidentiality of any information which they receive … through participation in any activity carried out for the implementation of this Convention'.[20]

One more recent international instrument, though not yet in force can be considered, if not a codification of customary international law, at least it is a reflection of the desired international law in relation to the environment. This instrument contains the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities adopted by the International Law Commission in its fifty-third session (2001) (hereinafter ILC Draft Articles). Article 14 of the ILC Draft Articles

14 Raul A. F. Pedrozo, 'Transport of Nuclear Cargoes by Sea', 28 *Journal of Maritime Law and Commerce* 223 (1997).

15 *See* UNCLOS, note 10 above, Article 23. *See* also Marin, note 11 above at 362; Maki Tanaka, 'Lessons from the Protracted MOX Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea', 25 *Michigan Journal of International Law* 350 (2004).

16 *See* UNCLOS, note 10 above, Article 37.

17 Jon M. Van Dyke, 'The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials', 33 *Ocean Development and International Law* 77-108 (2002).

18 *See* UNCLOS, note 10 above, Article 302.

19 Convention on the Physical Protection of Nuclear Material, Vienna, 26 October 1979, 18 *Int'l Leg. Mat.* 1422 (1979).

20 *Id*, Article 6 (1).

states that 'data and information vital to the national security of the State of origin…may be withheld'.[21] The right to withhold what is considered to be secret information for the protection of national security has been relied upon by the United Kingdom against Ireland in the MOX Plant Case.[22]

3 FREEDOM OF NAVIGATION IS NOT ALWAYS FREE

There is an argument which says that although the right of free navigation is well established, this right is not always absolute. Instead, it is restricted in some cases where transportation of hazardous materials is involved. These restrictions are set as a result of the following obligations:

3.1 The Obligation to Protect the Environment

One of the most persuasive arguments that can be held against the right of unlimited freedom of navigation is that such a right must not be exercised in a way that would cause damage or harm to the environment. The reason this obligation is very significant, with regard to the issue of the transportation of hazardous materials, is that this action takes place in the oceans. These oceans by their nature are in constant flow and their currents spread throughout the earth. Therefore, unlike the incidents in the land which can be controlled, incidents in the oceans cannot be easily traced.[23]

Although some writers of international law think that under UNCLOS the balance between the right of free navigation and the obligation to protect the environment is not always clear,[24] I think that the obligation to protect the environment supersedes the right of free navigation based on these reasons, some of which are included in UNCLOS:

(A)- All provisions of UNCLOS which address the right of the maritime state of freedom of navigation, innocent passage or transit passage had been conditioned by the requirement of not causing any harm to the environment of other states whether coastal or not. For example, Article 87 which deals with the freedom of the high seas, states in its concluding paragraph that 'this freedom [i.e. freedom of navigation] shall be exercised by all States with due regard to the interest of other States'.[25] Clearly, having unpolluted marine environment is one of these interests. A similar provision can be found in Article 2 of the 1958 Convention on the High Seas.[26]

Any act of wilful and serious pollution of the territorial sea of the coastal state will make the passage of a foreign ship prejudicial to the peace, good order or security of that state, therefore non-innocent passage.[27] Should this happen, the coastal state concerned may take all the necessary measures in its territorial sea to prevent such a passage that is not innocent.[28] The same rule is applicable to the right of transit passage, that is the transit ships shall 'comply with generally accepted international regulations, procedures and practice for the prevention, reduction and control of pollution from ships ...'[29]

(B)- Not only had the drafters of UNCLOS conditioned the rights of the maritime state as stated above, but they also added in very clear terms that protection of the marine environment is an obligation upon all States

21 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities Adopted by the International Law Commission at its Fifty Third Session (2001), UN GAOR, 56th Session, Supplement No. 10 at 370-436, UN Doc. A/56/10 (2001).

22 *Ireland* v. *United Kingdom of Great Britain and Northern Ireland* (MOX Plant case), International Tribunal for Law of Sea (ITLOS - 2001), available at http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=10&lang=en.

23 *See* Marin, note 11 above at 366.

24 *See* Marin, note 11 above.

25 *See* UNCLOS, note 10 above, Article 87 (2)

26 Another example of a treaty that requires its States Parties to pursue their goals, but taking into account the environment, is the North America Free Trade Agreement (NAFTA). During the development of this treaty, many thought that the attraction of investment will prevail over any other matter. However, the preamble of NAFTA requires its States Parties to pursue trade objectives in a manner consistent with environmental standards. Also, Article 1114 prohibits the relaxation or waiver of environmental standards in order to attract foreign investment. *See* Waugh, note 4 above at 510-11.

27 *See* UNCLOS, note 10 above, Article 19.

28 *Id.*, Article 25.

29 *Id.*, Article 39 (2) 'b'.

Parties to the Convention.[30] UNCLOS even goes further to explain this obligation by stating that States Parties shall take all measures, in accordance with their capabilities, to prevent, reduce and control pollution in the marine environment.[31] Consequently, the question as to whether the coastal state has the right to protect its marine environment should not be considered the main issue here, since, as stated above, it has become an international obligation upon all States Parties to UNCLOS.

(C)- Recognising that the obligation to protect the marine environment must be implemented by States Parties by means of national laws and regulations, UNCLOS has given coastal states the right to adopt laws and regulations for the sole purpose of protecting their marine environment. At the same time, it requires all States Parties to comply with these laws and regulations 'provided that they are compatible with UNCLOS and other rules of international law'.[32]

Accordingly, many States Parties to UNCLOS have adopted laws and regulations requiring prior notification from the state exporting the hazardous materials, as will be discussed later, before their ships pass through the territorial waters of these states. Furthermore, no State Party to UNCLOS has yet brought any claim against states requiring prior notification, and this can be taken as an implicit approval from the exporting states that such rules and regulations adopted by the coastal states conform with the provisions of UNCLOS and other rules of international law.

(D)- In addition, practices of some states support the argument that the obligation to protect the marine environment supersedes the right of free navigation: first, the Torrey Canyon case of 1969, which represents a precedence of action taken by the a coastal state to protect its marine environment, when Britain bombed and destroyed the Liberian oil tanker after it ran aground in the English Channel.[33] Another example was Canada's use of force in 1995 to seize a Spanish fishing vessel in the high seas because of its over-fishing activities of stocks that straddle Canada's exclusive economic zone.[34] One more example is Chile's forced expulsion of the British ship (Pacific Pintail) loaded with radioactive plutonium wastes and heading for Japan out of its economic exclusive zone (EEZ) in 2005.[35]

These kinds of actions can be based on Article 221 (1) of UNCLOS, which gives states the right to 'take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their… interests, including fishing, from pollution or threat of pollution'.[36]

Another provision that also contemplates such measures can be found in Article 1 of the 1973 Protocol Relating to Intervention on the High Seas in Cases of Substances Other than Oil. This article entitles coastal states to take aggressive action in high seas to prevent or mitigate 'grave and imminent danger to their coastline or related interests from pollution by substances other than oil following upon a maritime casualty or acts related to such a casualty which may reasonably be expected to result in harmful consequences'.[37] Although the aggressive action taken by the coastal states may be based on the inherent right of self-defence, this Protocol, which was adopted after the Torrey Canyon disaster, allows states concerned to intervene on the high seas to prevent damage to their coastal marine resources. Also, it can be said that this Protocol is applicable to situations where damage has not occurred yet, but is foreseen because the ship carrying hazardous materials has not taken some precautionary measures, one of which, is to have prior consultation with the coastal states. Therefore, such states are allowed to intervene on order to block this shipment.[38]

(E)- Last but not least, according to Principle 21 of Stockholm Declaration, states have 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 limit of national jurisdiction'.[39]

30 Article 192 of the UNCLOS provides that, 'States have the obligation to protect and preserve the marine environment'.
31 *See* UNCLOS, note 10 above, Article 194.
32 *Id.*, Article 58 (3). Also, Article 21, UNCLOS, note 10 above. *See also* Convention on the Territorial Sea and Contiguous Zone, Geneva, 29 April 1958, 516 U.N.T.S. 205 (1958), Article 17.
33 *See* Dyke, note 17 above at 100.
34 *Id.*, p. 101.
35 *See* Marin, note 11 above at 362.
36 *See* UNCLOS, note 10 above, Article 221 (1).
37 Protocol Relating to Intervention on the High Seas in Cases of Substances other than Oil, London, 2 November 1973, 13 *Int'l Law. Mat.* 605 (1973).
38 *See* Dyke, note 17 above.
39 Declaration of the United Nations Conference in the Human Environment, Stockholm (Stockholm Declaration), Stockholm, UN Doc. A/CONF. 48/14 (1972).

Consequently, the obligation not to cause harm to the environment — whether marine environment or not — is well established under international law upon all states whether maritime or not. As declared by many writers of international law this principle is considered to be common in international law. Indeed, this principle has been described as the 'cornerstone of international environmental law'.[40]

It is stated by the International Court of Justice in its 1996 advisory view on the Legality of the Threat or Use of Nuclear Weapons that 'the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'.[41]

Moreover, the drafters of UNCLOS took this general obligation into consideration and reincorporated it in Article 194 (2), which states that states must take 'all measures necessary to ensure that activities are under their jurisdiction or control and conducted so as not to cause damage by pollution to other States and their environment …'.[42]

3.2 The Obligation to Take Precautionary Measures

Another obligation that the maritime state must take into account, before making the decision to export hazardous materials via oceans, is that it has studied all possible consequences of such shipment to the marine environment according to its capabilities.[43] These precautionary measures are meant to protect the environment and therefore restrict, to a certain extent, the freedom of navigation of the maritime states. These measures include the following:

(A)- The shipping state must conduct an environmental impact assessment (EIA) before permitting the shipment of hazardous materials to launch. The EIA is a process to examine, analyse, and evaluate planned activities in order to attain sustainable development through environmentally informed decision-making.[44]

As stated in Principle 17 of Rio Declaration, the requirement to conduct an EIA for any 'proposed activity that are likely to have adverse impact on the environment'[45] has been widely adopted by many international instruments, including the following:

1- UNCLOS which states in Article 204 that 'States shall … endeavour, as far as practicable, directly or through the competent international organisations, to observe, evaluate and analyse, by recognised scientific methods, the risks or effects of pollution of the marine environment'.[46]

2- The Convention for the Protection of Natural Resources and Environment of the South Pacific Region, which in Article 16 requires States Parties to assess 'the potential effects of projects on the marine environment'.[47]

3- The Convention for the Protection of the Marine Environment of the Wider Caribbean Region (the Cartagena Convention), which in its Article 12 calls for the preparation and dissemination of EIA.[48]

4- The Caribbean's Protocol concerning Specially Protected Areas and Wildlife (SPAW) also mandates in Article 13 each State Party to prepare EIA on 'industrial and other projects

40 John H Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment', 96 *American Journal of International Law* 292 (2002).

41 International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *ICJ Rep.* 226, 241-42, 8 July 1996.

42 *See* UNCLOS, note 10 above, Article 194 (2).

43 Rio Declaration on Environment and Development (hereafter Rio Declaration), Rio de Janeiro, 13 June 1992, UN Doc. A/CONF. 151/26 (Vol. 1) (1992), Principle 15.

44 *See* Tanaka, note 15 above at 353.

45 *See* Rio Declaration, note 43 above, Principle 17.

46 *See* UNCLOS, note 10 above, Article 204 (1).

47 The Convention for the Protection of Natural Resources and Environment of the South Pacific Region, New Caledonia, 25 November 1986, 26 *Int'l Leg. Mat.* 38 (1987).

48 The Convention for the Protection of the Marine Environment of the Wider Caribbean Region (hereafter Cartagena Convention), Cartagena de Indias, 24 March 1983, 22 *Int'l Leg. Mat.* 227 (1983).

and other activities that would have a negative environmental impact'.[49]

5- The Espoo Convention requires its States Parties to assess the transboundary environmental effects of certain activities within their jurisdiction and communicate with other States that may be affected by such activities.[50]

6- The Organization for Economic Cooperation and Development (OECD) issued a document in 1995 requiring that 'projects and programs which could significantly affect the environment be comprehensively assessed from an environmental standpoint by Member States at the earliest Stage'.[51]

7- The ILC Draft Articles stipulate in Article 7 that decision to authorise any activity shall 'be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment'.[52]

(B)- Another precautionary measure that must be taken by the shipping state, and is indeed a direct result of the EIA, is that the shipping state must make available to all concerned states, including the transit states, all information it obtained from the EIA on the activities it is about to carry out.[53]

The dissemination of this information regarding the activities related to the shipping of hazards is required because of the following reasons: First of all, this dissemination will give assurance to all states concerned that such shipments are properly managed and have very limited risks or no risk at all either to the states concerned or to the environment in general.[54]

Furthermore, such dissemination of information will give all states concerned, especially those which are likely to be affected by these shipments, the chance to prepare and develop contingency plans for emergencies with or without the help of the shipping state.[55]

Finally, the dissemination of information may, in some situations especially those involving the transportation of nuclear materials, give the states concerned the right to prevent the transit of these materials in its territories or internal waterways, if they believe (based on the information they have) that these shipments are not properly managed.[56]

(C)- The third measure or action that the shipping state should take is to prevent export if the findings of the EIA gives the shipping state a reason to believe that the importing country does not have the necessary capability to deal with such hazardous shipments in a proper manner that would preclude any adverse effects on the environment. This has been taken into consideration by the drafters of the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their disposal (hereinafter Basel Convention) in Article 4 (2) 'c' which states that each State Party shall take the appropriate measure 'not to allow the export of hazardous wastes or other wastes to a state or a group of states … if it has a good reason to believe that the

49 The Caribbean's Protocol Concerning Specially Protected Areas and Wildlife, Kingston, 18 January 1990, UNEP(OCA)/CAR. I.G. 7/3 (1991). *See* also Article 2(2), Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (hereafter Bamako Convention), Bamako, 29 January 1991, 30 *Int'l Leg. Mat*. 773 (1991). *See also* Aboubacar Fall, 'Marine Environmental Protection Under Coastal States' Extended Jurisdiction in Africa', 27 *Journal of Maritime Law and Commerce* 281-91 (1996).

50 The Convention on Environmental Impact in a Transboundary Context (Known as the Espoo Convention), UN Economic Commission for Europe, 25 February 1991, 30 *Int'l Leg. Mat*. 800 (1991).

51 Jon M. Van Dyke, 'Applying the Precautionary Principle to Ocean Shipment of Radioactive Materials', 27 *Ocean Development and International Law* 381 (1996).

52 *See* ILC Draft Articles, note 21 above, Article 7.

53 *See* UNCLOS, note 10 above, Article 205.

54 *See* UN General Assembly Resolution 43/212, Responsibility of States for the Protection of the Environment, UNGA A/RES/43/212 (1988), which urges all States to 'prohibit [all transboundary movement of toxic and dangerous wastes] without prior notification in writing of the competent authorities of all countries concerned, including transit countries, and to provide all information required to ensure the proper management of the wastes and full disclosure of the nature of the substances to be received on transportation'.

55 *See* ILC Draft Articles, note 21 above, Article 8.

56 *See* Convention on the Physical Protection of Nuclear Materials, note 19 above, Article 4(3).

wastes in question will not be managed in an environmentally sound manner'.[57]

The Basel Convention even goes further by requiring States Parties to re-import the hazardous wastes, if they discovered after exportation that the importing country cannot manage the hazardous wastes in an environmentally sound manner.[58]

3.3 The Obligation to Give Prior Notification

As mentioned briefly above, the shipping state must transmit all relevant information it has about its shipment to all states concerned, including the transit states. The obligation to give prior notification regarding hazardous cargo will help in serving these objectives:

First, this notification will enable all states concerned to prepare contingency plans in order to deal with emergencies and accidents. Hence, if the notification is not included in all relevant information, the states concerned may solicit additional information. Secondly, such notification will give the states concerned, as stated in Article 6 (4) of the Basel Convention, the options whether to give consent or reject such a shipment. Thirdly, this notification will provide the states concerned the right to give consent with stipulated conditions for the purpose of protecting their marine environment.

The contention that the obligation to give prior notification to all the states concerned is in contravention of the shipping state's unrestricted right of free navigation cannot be sustained. This is because the obligation to give prior notification has become part of international law. The state's commitment to notify all states concerned can be found in numerous treaties, resolutions, and judicial decisions and at all international, regional, or national levels.

3.3.1 At the International Level

At the international level, there are many international instruments that have given consent to the shipping state's obligation to give prior notification to all the states concerned, including the transit states. Among these instruments are the following:

A- UNCLOS

According to this convention, to which almost all the states of the world are parties to (149 States Parties), a state is obliged to give notification where it is aware of any imminent danger of pollution (carrying hazardous materials can be considered as such) to 'other States it deems likely to be affected by such damage .../.[59]

B- Basel Convention

This Convention is considered by many scholars as the first truly global attempt to regulate the hazardous wastes trade and to set binding international standards for the protection of countries with inadequate hazardous wastes management systems.[60]

According to Article 6 (1) of this Convention the exporting State must 'notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the state of export, the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes …'.[61]

C- Principle 19 of Rio Declaration

Pursuant to this principle, which is widely considered as part of customary international law,[62] States are obliged to give 'prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary

57 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (hereafter Basel Convention), Basel, 22 March 1989, UN Doc. UNEP/WG. 190/4, Article 4 (2)c. *See also* Kimberly K. Gregory, 'The Basel Convention and the International Trade of Hazardous Waste: The Road to the Destruction of Public Health and the Environment is Paved With Good Intentions', 4 *Fordham Environmental Law Report* 80-89 (2001).

58 *See* Basel Convention, note 57 above, Article 8. *See also* Choksi, note 2 above at 517.

59 *See* UNCLOS, note 10 above, Article 198.

60 David J. Abrams, 'Regulating the International Hazardous Waste Trade: A Proposed Global Solution', 28 *Columbia Journal of Transnational Law* 803 (1990). *See* also Waugh, note 4 above at 503; Valentine O. Okaru, 'The Basel Convention: Controlling the Movement of Hazardous Wastes to Developing Countries' 8 *Fordham Environmental Law Report* 138, 165 (1993).

61 *See* Basel Convention, note 57 above, Article 6 (1).

62 *See* Dyke, note 51 above.

environmental effect and shall consult with those States at an early stage and in good faith'.[63]

D- Principle 5 of the International Atomic Energy Agency (IAEA) Code of Practice

According to this principle every state should take all necessary measures to ensure that 'the international transboundary movement of radioactive wastes takes place only with the prior notification and consent of the sending, receiving and transit States in accordance with their respective laws and regulations'.[64]

Although this code is advisory, it can be taken as an evidence of a developing customary international law especially if coupled with states' practice. However, one may also say that the provision of this principle is only applicable to radioactive cargo, and therefore has no bearings on other hazardous materials. Though the latter argument is correct and the same can be said with regard to other instruments like the Basel Convention which is only applicable to hazardous wastes listed therein. These instruments will help to prove that the right of freedom of navigation is not absolute.

E- UNGA Resolutions

In various UNGA resolutions, the requirement to give prior notification to all states concerned, including the transit states, had been clearly stipulated. For example, in Resolution 43/212 (1988), the General Assembly 'urge all States…to prohibit such movement [transboundary movement of toxic and dangerous wastes] without prior notification in writing of the competent authority of all countries concerned, including transit countries ...'.[65]

F- ILC Draft Articles

According to ILC Draft Articles, which can be viewed as a reflection of the existing norms of international environmental law, states are required to provide 'the State likely to be affected with timely notification of the risks [of its activities]'.[66]

G- International Judicial Decisions

There are some of the international cases where the obligation to give notification can be inferred from:

(a)- The Corfu Channel Case in 1949, in which Albania was held to have had a duty to disclose the presence of mines in the Channel;[67] and

(b)- The Lac Lanoux Arbitration in 1957, in which France was required to consult in good faith with Spain over riparian rights.[68]

3.3.2 At the Regional Level

Not only have states resorted to multilateral instruments for the provision of the obligation to give prior notification, but also, for understandable reasons, included this obligation in many of their regional instruments which they have concluded. Examples of these regional instruments can be the following:

A- The Bamako Convention on the Ban of the Import in the African and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1992).

In addition to the total ban of the import of hazardous wastes into Africa, as the main focus of this Convention, Article 6 (4) of it proscribes that the exporting state must notify and receive the consent of all states concerned, including the transit states, before commencing the shipment of hazardous wastes.[69] Nonetheless, this provision is only applicable to States Parties and does not apply to non-States Parties and, of course, not applicable if the receiving state is outside the African continent.[70] However, this criticism should not be overvalued because African states are not among

63 *See* Rio Declaration, note 43 above, Principle 19.

64 General Conference Resolution on the Code of Practice in the International Transboundary Movement of Radioactive Waste, The International Atomic Energy Agency (IAEA), 21 September 1990, 30 *Int'l Leg. Mat.* 556 (1991), Principle 5.

65 *See* UN General Assembly Resolution 43/212, note 54 above. *See* also General Assembly Resolution 42/183, Traffic in Toxic and Dangerous Products and Wastes, UN Doc. A/RES/42/183 (1987).

66 *See* ILC Draft Articles, note 21 above, Article 8.

67 *United Kingdom v. Albania* (Corfu Channel Case), *ICJ Reports* 4 (1949).

68 Lac Lanoux Arbitration, 24 *I.L.R.* 101, 128 (1957). *See* also Dyke, note 17 above.

69 *See* Bamako Convention, note 48 above, Article 6(4). For detailed discussion *see* Main, note 6 above.

70 *See* Main, note 6 above at 83.

the main the hazardous wastes producers, rather they are among the main receivers of hazardous wastes disposals.

B- The convention to ban the import of hazardous and radioactive wastes into Forum Island Countries and to control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (1995) (known as the Waigani Convention).

According to Article 6 of this Convention, the exporting state must notify all states concerned of the intended transboundary movement of hazardous wastes and must give all full details of such shipment.[71]

C- The Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movement of Hazardous Wastes and Their Disposal, 1996, (Izmir Protocol)

Pursuant to Article 6 of this Protocol, the exporting state must notify the transit state and have its prior consent in writing before hazardous wastes can be moved into its territory.[72]

D- European Community Directives

According to the European Community Directive 84/631, the exporting state must notify all transit states that the ship carrying hazardous wastes will pass through. Moreover, this Directive was later amended in 1986 by Directive 86/279 in order to be equally applicable to movement of hazardous wastes leaving the European Community.[73]

Speaking about the European regulations with regard to hazardous wastes, one finds oneself obliged to mention the most unique and stringent international agreement on this subject that is the Convention on the Protection of the Environment Through Criminal Law, which was adopted by the Council of Europe on 4 November 1998.[74] This Convention has established a severe penalty system for environmental violations that occur in the transportation and disposal of hazardous wastes. For example, Article 2 and 3 of the Convention criminalise the unlawful transportation of hazardous waste that is likely to cause a severe human injury or environmental damage.[75] Furthermore, this Convention requires States Parties to impose imprisonment and financial sanctions for the most serious environmental offences. Last but not least, this Convention applies outside the territorial jurisdiction of States Parties as provided by Article 5, which states that offences committed on the ship or aircraft are subject to the Convention's requirements, even if the offence occurred outside the territorial jurisdiction of the State Party.[76]

3.3.3 At the National Level

In dealing with ships carrying hazardous materials, states can be divided into three groups:

a- The first group includes states that require prior notification before hazardous wastes' shipping vessels can pass through their territorial waters. These include, inter alia, Canada, Djibouti, Libya, Malta, Pakistan, Portugal, and United Arab Emirates.

b- The second group includes states that even go further and require prior authorisation for such passage. Examples of these states are: Egypt, Guinea, Iran, Malaysia, Oman, Saudi Arabia, Turkey, and Yemen.

c- The third group includes states that have taken the most extreme position with regard to ships that are carrying hazardous materials. These states strictly prohibit the passage of such ships through their territorial waters. Examples of these states are: Argentina, Haiti,

71 This Convention has been signed by 14 States and ratified by 4 States, and is still not yet enforceable. The text of this Convention is available at http://untreaty.un.org/English/UNEP/radioactive_english.pdf.

72 Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movement of Hazardous Wastes and Their Disposal, Izmir, 30 September-1 October 1996 (not yet in force). The full text of the Convention is available at http://www.unep.ch/regionalseas/main/med/medhaz.html.

73 29 *O.J. EUR. Comm.* (No. L 181) 13 (1986); *See also* Kiss, note 4 above at 531.

74 Convention on the Protection of the Environment through Criminal Law, Council of Europe, 4 November 1998, available at http://conventions.coe.int/Treaty/en/Treaties/Html/172.htm.

75 *Id.*, Article 1 and 2.

76 *Id.*, Article 5.

the Ivory Coast, Nigeria, the Philippines, and Venezuela.[77]

Other practices that can be cited here as follows: On 18 December 1997 Japan declared that it would announce the routes of its 1998 shipment the day after it left France. Also, Britain provided prior notification to the Panama Canal Commission regarding its 1998 shipment through the Canal.[78]

More recently, in the aftermath of the break-up of the oil tanker *Prestige*, Spain and France issued, in November 2002, a joint decree stating, inter alia, that 'all oil tanker traversing through these two countries' EEZ will have to provide prior notice to the coastal countries about the cargo, destination, flag, and operation' .[79]

Though this statement is about oil shipments, it can be applicable to hazardous shipment as well. This is simply because the latter shipment is even more dangerous than the oil shipment. Additionally, if these countries required prior notification before their EEZ, one would expect the same requirement for ships passing through their territorial waters.

4 CONCLUSION

It is very clear from the above that though the right of free navigation is guaranteed to all states, whether coastal or land-locked states, this right is not absolute. Rather, it is very restricted, especially when the use of such a right is in violation of the obligation to protect and preserve the environment, which takes higher priority over the right of free navigation.

Therefore, the right of free navigation, though indisputable, is accompanied by some conditions all of which are meant to protect the environment. These conditions (i.e. the obligation to take precautionary measures and the obligation to give prior notification of all states concerned) are vital when the transportation of an environmental damaging materials are involved. The reasons for the requirement of these conditions are very obvious: such a transportation carries a very potential risk to the environment in general and to the environment of the states concerned in particular.

As it has been explained, the practice at all levels whether international, regional or national show that the transportation of hazardous materials has been, in many cases, restricted by these conditions, especially with regard to the obligation to give prior notification to the states concerned, including transit states, for the sole purpose of protecting the environment.

The total prohibition of the export of hazardous materials is far from being accomplished because of many reasons, including the following:

First, such a prohibition is considered by some states, especially the United States, as in contradiction with the right of free trade and the freedom of contract; secondly, some states that produce such hazardous materials, like hazardous wastes, do not have the appropriate environmental conditions foe safe disposal, therefore they find export to be the only viable solution. An example of such a state is the Netherlands; and thirdly, some states rely on the import of hazardous wastes as a source of workable recycled resources.

Hence, it is better for all states concerned, whether exporting states, transit states or importing states and the environment in general to regulate this issue in a more universal manner, rather than leaving this issue for actions taken by states either unilaterally or on a regional level. These kinds of action either do not solve the problem at all, but lead to more disputes between the states concerned especially if the unilateral action involves the use of force in order to expel a ship carrying hazardous materials from the territorial waters of other states, or do solve the problem partially only between states of that region.

Such a universal solution, which had already been proposed by Lawrence Marin, is to delineate one

77 Kari Hakapaa and Erik Jaap Molenaar, 'Innocent Passage-Past and Present', 23 *Marine Policy* 131, 142 (1999).

78 Constance O'Keefe, 'Transboundary Pollution and the Strict Liability Issue: The Work of the International Law Commission on the Topic of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law', 18 *Denver Journal of International Law and Policy* 145, 208 (1990).

79 Jon M. Van Dyke, 'Balancing Navigational Freedom with Environmental and Security Concerns', 15 *Colorado Journal of International Environmental Law and Policy* 19 (2003).

universal sea lane for all ships carrying hazardous materials (not only radioactive shipments as Lawrence proposed).[80] Thus, rather than leaving such ships searching for a friendly route that would allow them to reach their final destinations, they could sail through one predetermined route passing through territorial seas of states that approved such shipments and are prepared to deal with any emergencies that might occur during the travel of these ships.

Although such a universal lane may make this transport more expensive and increase the distance, these detriments are minor when compared with the benefits of such lane. In addition to the above mentioned benefits, this universal lane has the following features:

First, this lane will avoid the territorial waters of coastal states that do not allow such shipments to pass through their territorial waters, therefore this will help in reducing the potential of any possible disputes between shipping states and coastal states.

Secondly, such a universal sea lane will try to avoid all areas of sea that are known to be of severe weather or unsafe nature, therefore reducing the risk of accidents or disasters that might occur in such areas.

Thirdly, such a universal sea lane can be monitored by states concerned with the help of non-governmental organisations, such as the Greenpeace, by establishing a global monitoring system along with the universal sea lane that can check upon the safety requirements which the shipping vessels must satisfy.

80 *See* Marin, note 11 above at 375-7.

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