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BASEL CONVENTION

Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal
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Item 4 (e) (iii) of the provisional agenda*

Matters related to the implementation of the Convention: international cooperation, coordination and partnerships: cooperation with the International Maritime Organization

Legal analysis of the application of the Basel Convention to hazardous and other wastes generated on board ships

Note by the Secretariat

As referred in document UNEP/CHW.11/17 on cooperation between the Basel Convention and the International Maritime Organization, the annex to the present note contains the legal analysis of the application of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal to hazardous and other wastes generated on board ships, prepared by the Secretariat. The annex to the present note has not been formally edited.

* UNEP/CHW.11/1.

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Annex

Legal analysis of the application of the Basel Convention to hazardous wastes and other wastes generated on board ships

By paragraph 5 of its decision BC-10/16, the tenth meeting of the Conference of the Parties requested the Secretariat to prepare, taking into account comments received by parties and others, a legal analysis of the application of the provisions of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal to hazardous wastes and other wastes generated on board ships for the consideration of the eighth meeting of the Open-ended Working Group. Following consideration of the legal analysis prepared by the Secretariat, the eighth meeting of the Open-ended Working Group, by its decision OEWG-8/9, requested the Secretariat, taking into account comments received and as appropriate, presenting various interpretations, to prepare a revised version of the legal analysis including a summary and conclusions that may include more than one interpretation, for consideration by the Conference of the Parties at its eleventh meeting

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Summary

The interpretation of the Convention is the prerogative of the Parties to the Convention. The underlying objective of the current legal analysis is to provide Parties with the opportunity to agree on an interpretation of relevant provisions of the Convention that will not lead to ambiguities in the application of the Basel Convention to wastes generated on board ships.

This analysis covers both wastes falling within the scope and outside the scope of the exclusion clause embedded in Article 1, paragraph 4 of the Basel Convention. This analysis also takes into account developments within the framework of IMO, in particular the adoption of the SOLAS regulation VI/5-2 on the prohibition of the blending of bulk liquid cargoes and production processes during sea voyages.

Following an overview of the application of the Basel Convention to hazardous and other wastes generated on board ships, this analysis identifies MARPOL as the international instrument governing the discharge of wastes derived from the normal operation of a ship and concludes that the wastes covered by the exclusion clause embedded in Article 1, paragraph 4 of the Basel Convention are MARPOL wastes. The analysis then focuses on the application of the Basel Convention to hazardous and other wastes generated on board ships, in particular with respect to its provisions on waste minimization, environmentally sound management (ESM) and the control of transboundary movements (TBM) of covered wastes.

The legal analysis concludes that **MARPOL wastes generated on board ships** are excluded from the scope of the Basel Convention, be it its minimization requirement, its ESM requirement or the PIC procedure, as long as those wastes are on board the ship. Once the wastes are offloaded the ship, this analysis argues that the Basel Convention ESM requirement applies to MARPOL-wastes generated on board ships that are “hazardous” or “other”. This conclusion is supported by the fact that whereas MARPOL contains provisions on environmentally sound management whilst at sea that are supportive of the objective and purpose of the Basel Convention, it does not have similar requirements for landed wastes. Hence, the Basel Convention requirements on ESM are applicable once the waste is offloaded, for instance to port reception facilities if these are intended to serve as “adequate disposal facilities”. In addition, in the event MARPOL wastes are subsequently the object of a TBM, then the Basel Convention PIC procedure applies.

With regards to the application of the Basel Convention obligations to hazardous and other wastes generated on board ships that fall outside of the exclusion clause - **non-MARPOL wastes**, this legal analysis suggests the following conclusions:

(a) The minimization requirement embodied in Article 4 paragraph 2 (a) of the Basel Convention applies to the waste generated “within it”, a terminology that appears to mean the land territory, internal waters, national airspace and territorial sea of a Party. Because a ship is not part of the “territory” of a Party, the minimization requirement would not apply to ships located outside the territory of a Party. The minimization requirement is binding upon Parties to the Convention irrespective of their status as flag State. These conclusions pertain only to the interpretation of the terminology “within it” as set out in paragraph 2 (a) of Article 4 of the Convention;

(b) With regards to the Basel Convention ESM requirement, this legal analysis concludes that it does not apply to wastes generated on board ships while the wastes are on board the ship, but suggests that the ESM requirement embodied in Article 4 paragraph 2 (c) applies to wastes offloaded the ship;

(c) With regards to the Basel Convention provisions regulating TBM, this legal analysis suggests that the PIC procedure would apply in the case of a transboundary movement of non-MARPOL wastes that are either hazardous or other wastes under the Basel Convention and that are generated on board a ship physically located in the internal waters or within the marine area (i.e. territorial sea and exclusive economic zone) of a Party. This being said, it would appear that, unless the required number of objections is made, as of 1 January 2014 both blending and production processes on board ships as provided under the SOLAS regulation VI/5.2 will be prohibited and that flag States will thereafter be responsible for ensuring that ships under their flag comply with these new requirements. The Parties to the Basel Convention may agree to consider that this new SOLAS regime is expected to prevent chemical reactions from taking place on board a ship during a sea voyage and, hence, that addressing waste issues associated with production processes is no longer relevant. However, if hazardous and other wastes generated on board ships have been offloaded a ship and are subsequently the object of a TBM as defined by the Basel Convention, the control procedure of the Basel Convention applies to such TBM.

Introduction

1. The need for legal clarity with regards to the application of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereinafter "Basel Convention") to hazardous wastes and other wastes generated on board ships was prompted by the August 2006 Probo Koala incident. This matter was especially discussed by States in the context of two international fora: the bodies of the Basel Convention and the International Maritime Organization's (hereinafter "IMO") Marine Environment Protection Committee (hereinafter "MEPC"). Issues of relevance to this matter have also been considered in the IMO Maritime Safety Committee (hereinafter "MSC").

2. Following the Probo Koala incident, Côte d'Ivoire sent a request for technical assistance to the Secretariat of the Basel Convention. The mission mandated by the Secretariat in response to this request established that "based on available information, the Probo Koala wastes exhibit the hazard characteristics of the Basel Convention".[1]The dumping in Côte d'Ivoire of wastes generated on board the Probo Koala ship was the subject of thorough consideration during the eighth meeting of the Conference of the Parties of the Basel Convention (hereinafter "COP"), in 2006. During that meeting, noting that the Probo Koala vessel had entered the port of Amsterdam during its journey, the Netherlands stressed the importance of ruling out any future ambiguity on the applicability of international instruments. The Netherlands also highlighted concern about future waste streams, which might end up in the marine environment if processing at sea became a normal practice.[2] Most Parties stressed the need to identify loopholes and grey areas in the Basel Convention and other international and national legal instruments related to waste and shipping, which might be exploited by unscrupulous business operators.

3. In light of the aforementioned incident and the issues it raised concerning the applicable legal framework, COP-8 adopted decision VIII/9 on Cooperation between the Basel Convention and the International Maritime Organization. By virtue of this decision, the Conference of the Parties requested Parties and the Secretariat of the IMO to provide information and views on:

(a) The respective competencies of the Basel Convention and the International Convention for the Prevention of Pollution from Ships (1973), as modified by the Protocol of 1978 and the Protocol of 1997 (MARPOL)[3] in respect to hazardous wastes and other wastes;

(b) Any gaps between those instruments;

(c) Any option for addressing those gaps.

Norway, Colombia and the Secretariat of the IMO provided their views as a result.[4]

4. The invitation contained in decision VIII/9 was reiterated in decision IX/12 adopted by the ninth meeting of the Conference of the Parties and again in decision VII/13 adopted by the seventh session of the Open ending Working Group (hereinafter "OEWG"), which invited the IMO to provide further comments, views or information on the elements contained in decision VIII/9. In response, the Secretariat of the IMO sent a letter dated 5 July 2010 to the Secretariat of the Basel Convention in which it explained that the requirements of MARPOL for Parties to provide adequate reception facilities for oily residues did not extend to the environmentally sound management of the landed wastes/residues. As a consequence, the Secretariat of the IMO expressed the view that advice and guidance from the Parties to the Basel Convention on the environmentally sound management of waste oil residues of ships would be a welcome development[5]. In its decision VII/13, the OEWG also requested the Secretariat to prepare a legal analysis of the application of the Basel Convention to hazardous and other wastes generated on board ships.

5. In line with decision OEWG VII/13, the Secretariat of the Basel Convention prepared an initial legal analysis, which was published on the website of the Basel Convention on 4 April 2011[6].

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1 UNEP/CHW/OEWG/6/2, annex, paragraph 3 (c). The Secretariat of the IMO on its side noted that gasoline is a MARPOL Annex I cargo while cargo of caustic soda solution would under fall under MARPOL Annex II. See the comments from the IMO as a follow up to decision OEWG VIII/9, available at: http://www.basel.int/Portals/4/Basel%20Convention/docs/legalmatters/coop-IMO/rep-imo.pdf

2 UNEP/CHW.8/16, p. 8, paragraph 38.

3 *United Nations Treaty Series*, Vol. 1340, pp. 61 et seq. and 184 et seq. MARPOL entered into force on 2 October 1983. It replaced the 1954 Convention for the Prevention of Pollution of the Sea by Oil.

4 See these views at: http://www.basel.int/Implementation/LegalMatters/Ships/tabid/2405/Default.aspx.

5 IMO, T5/1.01, p. 2.

6 UNEP/CHW.10/INF/16, annex II.

Argentina, the European Union and its member States, Guatemala, Mexico, Qatar, and Trinidad and Tobago submitted comments on this initial legal analysis.[7] The Secretariat prepared a revised legal analysis dated 7 October 2011 which was submitted to COP-10.[8] Following consideration of this matter, COP-10 adopted decision BC-10/16 on Cooperation between the Basel Convention and the International Maritime Organization that, inter alia, invited Parties and others to comment on the legal analysis submitted to the consideration of COP-10 and requested that a revised version of the legal analysis be prepared by the Secretariat, taking into account comments received by Parties and others. This revised legal analysis was to be considered during the eighth meeting of the OEWG.

6. Following COP-10, the following parties submitted comments on the legal analysis: Canada, the European Union and its member States, and Norway[9]. The Secretariat prepared the requested revised legal analysis taking account these comments as well as comments from the IMO Secretariat. Shortly before the eighth meeting of the OEWG, the Secretariat of the IMO provided additional information on developments pertaining to the prohibition of production processes and of blending on board a ship[10]. The revised legal analysis[11] was submitted to the consideration of the eighth meeting of the OEWG at what time decision OEWG-8/9 was adopted[12]. In that decision, parties and others were invited to review the analysis further and to provide comments to the Secretariat by 1 December 2012. In addition, the Secretariat was requested, taking into account comments received and as appropriate, presenting various interpretations, to prepare a revised version of the legal analysis including a summary and conclusions that may include more than one interpretation, for consideration by the Conference of the Parties at its eleventh meeting.

7. Following the eight meeting of the OEWG, comments were received from three Parties, namely Colombia, Switzerland and Zambia, and two observers, namely the United States of America and the Centre for International Environmental Law. All comments received since COP-10 are available in document UNEP/CHW.11/INF/23 and have been posted on the Convention's website[13].

8. It is worth recalling that the Secretariat, as it did during the elaboration of previous iterations of the legal analysis, consulted the Secretariat of the IMO in the preparation of the present legal analysis. The Secretariat of the IMO provided comments on the technical aspects of this analysis but noted that its comments do not extend to the possible endorsement of the conclusions contained in this document.

I. Overview of the application of the Basel Convention to hazardous and other wastes generated on board ships

9. The Basel Convention applies a life cycle approach to the management of hazardous wastes and other wastes, from their generation to their disposal. According to the definition provided for by the Convention, "wastes" are substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law (Article 2). Article 1 on the scope of the Basel Convention provides:

"1. The following wastes that are subject to transboundary movement shall be "hazardous wastes" for the purposes of this Convention:

(a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and

(b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.

2. Wastes that belong to any category contained in Annex II that are subject to transboundary movement shall be "other wastes" for the purposes of this Convention."

Annex I of the Convention is further elaborated in Annexes VIII and IX of the Convention.

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7 UNEP/CHW.10/INF/17.

8 UNEP/CHW.10/INF/16, annex I.

9 UNEP/CHW/OEWG.8/INF/19

10 UNEP/CHW/OEWG.8/INF/24

11 UNEP/CHW/OEWG.8/INF/18, annex

12 See the report of the eighth meeting of the Open ended Working Group, document UNEP/CHW/OEWG.8/16 available at: http://www.basel.int/TheConvention/OpenendedWorkingGroupOEWG/LatestMeeting/OEWG8/tabid/2786/mctl/ViewDetails/EventModID/8295/EventID/269/xmid/9029/Default.aspx

13 See: http://www.basel.int/Implementation/LegalMatters/Ships/tabid/2405/Default.aspx

10. The Convention excludes two types of wastes from its scope. Paragraphs 3 and 4 of Article 1 provide:

> "3. Wastes which, as a result of being radioactive, are subject to other international control systems, including international instruments, applying specifically to radioactive materials, are excluded from the scope of this Convention.
>
> 4. Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, are excluded from the scope of this Convention."

11. The approach taken to define the scope of the Convention is thus as follows: 1) to list wastes covered based primarily on their **nature** - not the process by which they are generated or who generates them; and 2) to exclude from the scope those wastes that may have adverse effects on human health and the environment but that are subject to **other international control systems** dealing more comprehensively with specific substances and objects, including when defined a wastes. In that sense, negotiators made use of the *lex specialis* approach by deferring to these other treaty regimes.

12. In addition, and as this analysis will show, other important elements associated with the **spatial sphere** in which such wastes are generated, managed or moved also affect the scope of application of the Basel Convention.

13. The Party or Parties concerned, in undertaking their obligations concerning wastes covered by the Convention, should be determined to achieve the objective of the Basel Convention as set in its Preamble: to protect, by strict control, human health and the environment from the adverse effects which may result from the generation and management of hazardous wastes and other wastes. The Basel Convention provides for three tracks to achieve this objective. The first track relates to the generation of hazardous and other wastes and requires that Parties reduce such generation to a minimum. The second track relates to the management of hazardous and other wastes and requires that such wastes be the subject of environmentally sound management (hereinafter "ESM"). The ESM requirement applies to the collection, transport and disposal of relevant wastes. The third track applies to transboundary movements (hereinafter "TBM") of hazardous and other wastes. It is also worth emphasizing that the ESM provisions of the Convention as well as those pertaining to the generation of wastes apply regardless as to whether a TBM occurred.

14. This analysis aims at clarifying the application of the Basel Convention to hazardous wastes and other wastes generated on board ships. Because this matter is specifically addressed in one of the Convention's provisions, namely paragraph 4 of Article 1, the analysis will start by considering the exclusion clause set out therein. In addition to clarifying the meaning and the implications of this exclusion clause, the legal analysis will look at the issue of the application of the Basel Convention to hazardous and other wastes generated on board ships that fall outside the scope of Article 1 of paragraph 4 and thus, prima facie, within the scope of the Convention. For wastes generated on board ships that are covered and those that are not covered by the exclusion clause, the analysis will aim at clarifying whether and how far the Convention's requirements of waste minimization, ESM and the control procedure for TBM apply.

II. Relationship between the Basel Convention and an international instrument governing the discharge of wastes derived from the normal operation of a ship

15. In its paragraph 4 of Article 1, the Basel Convention neither defines the terms "wastes which derive from the normal operation of a ship" nor explicitly identifies "another international instrument" that covers the discharge of such wastes. In order to clarify the scope of the application of the Basel Convention to hazardous wastes and other wastes generated on board ships, it seems necessary as a first step to identify the other "international instrument" to which this provision refers.

16. The United Nations Convention on the Law of the Sea (UNCLOS) provides a general legal framework to govern matters of the law of the sea, including the protection of the marine environment, and its provisions governing the protection of the marine environment from pollution from ships call for a competent international organization or general diplomatic conference to set the applicable international standards and rules. In this context, the IMO and the international instruments developed under its auspices are of direct relevance to setting such international standards and rules on the prevention of pollution from ships for the protection of the environment.

17. Among the IMO international instruments, MARPOL[14] appears to be the most relevant international instrument governing the discharge of wastes which derive from the operation of ships. MARPOL applies, in accordance with paragraph 1 of its Article 3, to ships entitled to fly the flag of a Party to MARPOL and to ships not entitled to fly the flag of a Party but which operate under the authority of a Party. Pursuant to paragraph 1 of Article 1, the Parties to MARPOL undertake to give effect to the provisions of the Convention and its annexes in order to prevent the pollution of the marine environment by the discharge of harmful substances or effluents containing such substances in contravention of the Convention.

18. MARPOL aims at preventing pollution of the marine environment by discharges into the sea of harmful substances, or effluents containing such substances from ships, whether from operational or accidental causes. MARPOL addresses pollution from ships in six annexes that foresee: oil (Annex I), noxious liquid substances (Annex II), harmful substances carried in packaged form (Annex III), sewage (Annex IV), garbage (Annex V), and air pollution (Annex VI).[15] MARPOL also contains requirements in relation to port reception facilities which must be "adequate" to meet the needs of the ships using them.[16] "Guidelines for ensuring the adequacy of port waste reception facilities" intended, inter alia, to "encourage States to develop environmentally appropriate methods of disposing of ships' wastes ashore", elaborate on the location and capacity requirements for the reception facilities.[17]

19. Hazardous wastes generated on board ships may pose severe danger to human health and the environment. In this regard, it is important to clarify the application of the Basel Convention and of MARPOL to hazardous wastes and other wastes generated on board ships. Providing clarity was certainly the intention of those who drafted and agreed to Article 1 paragraph 4 of the Basel Convention. By introducing this provision, negotiators made use of Article 30 of the Vienna Convention on the Law of Treaties (hereinafter "Vienna Convention") that foresees the application of successive treaties relating to the same subject matter and defers to the will of Parties as expressed in the treaty through the adoption of a "conflict clause". Such a clause, as embedded in Article 1 paragraph 4 of the Basel Convention, usually helps to determine the scope of apparently or possibly colliding treaties. As mentioned above, this is one of two instances in which Parties to the Basel Convention expressly defer to other more specific treaty regimes.

20. Nevertheless, conflict clauses do not always succeed in clearly distinguishing the respective scope of application of various agreements. The terms in which those treaties are couched may be ambiguous and they may not be able to cover all the possible situations that could or will arise. Therefore, it becomes necessary to apply the general rules on treaty interpretation as contained in Articles 31 and 32 of the Vienna Convention. Hence, consideration of the general rules on treaty interpretation to Article 1, paragraph 4 of the Basel Convention will help provide some legal clarity to the application of the Basel Convention or/and another legal instrument, in this case MARPOL, to hazardous and other wastes generated on board ships.

21. In order to properly interpret Article 1, paragraph 4 of the Basel Convention, it is necessary to take into consideration all of its terms. This provision states that "[w]astes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, are excluded from the scope of this Convention". The analysis of this provision will be broken into two segments. First, the meaning of "wastes which derive from the normal operations of a ship the discharge of which is covered by another international instrument" will be analysed in section III. Second, this analysis will assess in section IV how far the obligations of the Basel Convention pertaining to the minimizations of the generation of hazardous and other wastes, those pertaining to ESM and those pertaining to TBM apply to wastes generated on board ships.

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[14] *United Nations Treaty Series*, Vol. 1340, pp. 61 et seq. and 184 et seq. MARPOL entered into force on 2 October 1983. It replaced the 1954 Convention for the Prevention of Pollution of the Sea by Oil.

[15] Annex I of MARPOL entered into force on 2 October 1983, Annex II did so on 6 April 1987, Annex III on 1 July 1992, Annex IV on 27 September 2003, Annex V on 31 December 1988, and Annex VI on 19 May 2005. Whilst every State Party to MARPOL must accept Annexes I and II, consent to the rest of them is optional.

[16] See for example regulation 38 of Annex I and regulation 18 of Annex II of MARPOL.

[17] Resolution MEPC.83(44) of 13 March 2000.

III. Interpretation of "*Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument …*"

22. Articles 31 and 32 of the Vienna Convention contain the international general norms on treaty interpretation.[18] The International Court of Justice has stressed in its advisory opinion on the *Competence of the General Assembly on the Admission of a State to the United Nations* that there is no sense in interpreting a clear text.[19] The fact that the Parties to the Basel Convention have adopted several decisions seeking Parties' views on the respective scope of the Basel Convention and MARPOL as well as decisions requesting the Secretariat to elaborate a legal analysis of the application of the Basel Convention to hazardous and other wastes generated on board ships is evidence that Article 1 paragraph 4 does not appear to be "a clear text". Thus, it becomes necessary to establish more accurately the meaning of this legal provision.[20]

23. In accordance with Article 31 of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the **terms** of the treaty in their **context** and in the light of its **object and purpose**. The context for the purpose of the interpretation of a treaty shall comprise, in addition to its text, including its preamble and annexes: (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. There shall also be taken into account, together with the context: (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (*c*) any relevant rules of international law applicable in the relations between the parties. Finally, a special meaning shall be given to a term if it is established that the parties so intended. Article 32 authorizes the recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable.

24. The interpretation achieved through the application of the rules of the Vienna Convention must thus be checked against its result: if the result is manifestly absurd or unreasonable, then an alternative interpretation needs to be sought. This "reality check" allows for instance for the practical implications of an interpretation to be given proper consideration.

25. The first part of Article 1 paragraph 4 of the Basel Convention needs to be interpreted as a whole in order to fully understand its meaning. It refers to wastes which derive from the normal operations of a ship the discharge of which is covered by another international instrument.

26. An interpretation of Article 1, paragraph 4 cannot contradict the language of the treaty as a whole. The *travaux préparatoires* of Article 31 of the Vienna Convention support this interpretation. In its draft Articles on the law of treaties, the International Law Commission recalls the *dictum* of the Permanent Court of International Justice in the advisory opinion of the *Competence of the ILO to Regulate Agricultural Labour*.[21] The Court stressed that,

> "In considering the question before the Court upon the language of the Treaty, it is obvious that the **Treaty must** be **read as a whole**, and that **its meaning is not to be determined**

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[18] Cf. *Territorial Dispute* (Lybian Arab Jamahiriya v. Chad), judgment of 3 February 1994, ICJ Reports 1994, p. 6, at p. 21 para. 41; *Oil Platforms* (Islamic Republic of Iran v. United States of America), preliminary objection, judgment of 12 December 1996, ICJ Reports 1996, p. 803, at p. 812, para. 23 and *Kasikili/Sedudu Island* (Botswana v. Namibia), judgment of 13 December 1999, ICJ Reports 1999, p. 1045, at p. 1059, para. 18.

[19] The Court declared: "If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter". *Competence of the General Assembly on the Admission of a State to the United Nations,* advisory opinion of 3 March 1950, ICJ Reports 1950, p. 4, at p. 8. See also *Fisheries Jurisdiction case,* (Spain v. Canada) jurisdiction of the Court, judgment of 4 December 1998, ICJ Reports 1998, p. 432, at p. 464, para. 76.

[20] Cf. SADAT-AKHAVI, Seyed Ali, *Methods of Resolving Conflicts Between Treaties*, Leiden, Martinus Nijhoff, 2003, p. 25.

[21] *Yearbook of the International Law Commission*, Vol. II, 1966, p. 121.

merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense".[22]

27. The treaty as a whole comprises both its preamble and annexes. In the case of the Basel Convention, which has no separate provision outlining specifically its objective, the preamble provides evidence of the object and purpose in the light of which Article 1, paragraph 4 should be understood. The Parties to the Convention are "determined to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes". In addition, they are "convinced also that the transboundary movement of hazardous wastes and other wastes should be permitted only when the transport and ultimate disposal of such wastes is environmentally sound". Their goal is to reduce the generation and transboundary movements of hazardous wastes to a minimum and to ensure that hazardous wastes are treated and disposed of as close as possible to their source of generation.[23]

28. In defining the wastes covered by the Convention it is important to recall that it is primarily the **nature** of the wastes involved - not the process by which they are generated or who generates them - that is the basis for defining the scope of the Basel Convention. Taking into consideration the process by which wastes are generated would seem to be at odds with the approach of the Basel Convention which has a primary objective to prevent the negative impact or "adverse effects" of such wastes on human health and the environment. Hence, there is apparently no justification under the Basel legal regime to treat differently the wastes stemming from "normal" or "abnormal" operations, whether on board or off board ships. In light of the object and purpose of the Basel Convention, the origin of the waste in question would not be relevant as long as its discharge is covered by MARPOL. Such an understanding is also supported by the fact that MARPOL appears to follow the same approach as that of the Basel Convention: it is primarily the listing in the Annexes that determines whether a specific substance is covered by MARPOL, not the process through which such substances are generated, unless, obviously that process is prohibited.

29. In as much as the use of the terms "normal operations" cannot be interpreted in isolation of the rest of the first part of the Article, of the context of the Convention and without taking into account its object and purpose, it would appear that a helpful approach to the use of the word "normal operations" in Article 1 paragraph 4 could be that this word was intended to serve as a marker to identify, without specifically mentioning it, MARPOL, as opposed to the LC/LP.[24] In light of all the above, and by virtue of the application of Article 31 of the Vienna Convention, the first part of Article 1 paragraph 4 of the Basel Convention should be taken to mean "MARPOL wastes".

30. Whilst the only "authentic" interpretation of a treaty is said to be that provided by the Parties to the agreement in question,[25] resort to subsequent agreements and subsequent practices in interpreting a treaty is based on the understanding that a treaty is by nature evolving and that current Parties should have a say in what it means to them. The International Court of Justice has so confirmed in its judgment on the *Costa Rica v. Nicaragua* case.[26] For this reason, in accordance with Article 31, there shall also be taken into account any subsequent agreement and subsequent practice in the application of the Basel Convention that establishes the agreement of parties regarding its interpretation.[27] Subsequent agreements between Parties (whether the Protocol on Liability and Compensation or COP decisions) do not shed light of Parties' understanding of Article 1 paragraph 4. Moreover, based on the

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22 *Competence of the ILO to Regulate Agricultural Labour*, advisory opinion of 12 August 1922, PCIJ, Series B, Nos. 2 and 3, p. 23.

23 Cf. RUMMEL-BULSKA, Iwona, "The Basel Convention and the UN Convention on the Law of the Sea", in: RINGBOM, Henrik, Competing Norms in the Law of Marine Environmental Protection, London, Kluwer Law International, 1997, p. 84.

24 Article III of the LC/LP specifies that "dumping" does not include "the disposal at sea of wastes or other matter incidental to, or derived from the normal operations of vessels …".

25 Applying the Latin adagio *eius est interpretari cuius est condere*, the Permanent Court of International Justice declared in its advisory opinion on the *Jaworzina case:* "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it". *Question of Jaworzina (Polish-Czechoslovak Frontier)*, advisory opinion of 6 December 1923, PCIJ, Series B, No. 8, p. 6, at p. 37.

26 *Dispute over Navigational and Related Rights (Costa Rica v. Nicaragua)*, judgment of 13 July 2009, p. 1, at p.29, para. 63-64.

27 Caflisch defines practice as "*le comportement des acteurs de la scène internationale* sur les plans interne (législation, actes administratifs) ou externe (pratique diplomatique), de même que la *jurisprudence nationale et internationale*". CAFLISCH, Lucius, "La pratique dans le raisonnement du juge international", Société fran aise pour le droit international, *La pratique et le droit international*, Colloque de Genève, Paris, Pedone, 2004, p. 126.

information held by the Secretariat, few, if any, conclusions can be drawn from Parties' subsequent practice as to the meaning of Article 1, paragraph 4.

31. Article 32 of the Vienna Convention authorizes the recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31. The text of Article 1, paragraph 4 was drafted by a representative of the IMO Secretariat and submitted at a late stage of the negotiations of the Basel Convention.[28] It follows the same approach as paragraph 3 of the same article that excludes radioactive waste from the scope of the Basel Convention. There is no indication in the available travaux préparatoires as to the rationale for the choice - at the time - of the terminology "normal operations". One can actually question whether, at the time, industrial processes did take place on board ships and resulted in the generation of wastes. One can also question why it was proposed that such wastes should be treated differently under the Basel Convention, depending on whether they were generated as a result of "normal" of "abnormal" operations. As a consequence, the use of the terminology "normal operations" was perhaps at the time left very wide on purpose as it is too difficult to map all kind of operations that may exist – at present or in the future – on board ships. Most probably the terminology used was thus with reference to Article III.1b of the LC/LP, which contains a similar exclusion provision. Whereas a specific reference to MARPOL was not included in Article 1, paragraph 4 of the Basel Convention, resorting to the term "normal" was a way to clarify that it is the wastes falling within the scope of MARPOL that were targeted by the exclusion provision.[29]

32. Hence, by virtue of the application of Articles 31 and 32 of the Vienna Convention, this legal analysis suggests that "Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument …" means wastes falling within the scope of MARPOL. This conclusion, however, may not be seen as offering all the legal clarity that may be needed by the Parties to the Basel Convention to implement this treaty and it can be argued that the boundaries between the "normal operation of ships" and the other activities or operations of ships may require further clarification. In this regard, it may be worth recalling work undertaken in the framework of the IMO that is of relevance to the issue under consideration.

33. During the 56th session of the MEPC, in July 2007, the Netherlands expressed concern about the lack of information and regulation on industrial production processes on board ships whilst at sea.[30] This country expressed uncertainty with regard to the practice of making alterations to oil cargo through "industrial processing" or on-board chemical processes. The issue was again discussed at the 59th session of the MEPC, held on 13-17 July 2009. The MEPC recalled the Netherlands' request for information to submit details of any relevant industrial production processes on board ships. It acknowledged that no feedback had been given to that date.[31] However MEPC 59 and the Maritime Safety Committee (MSC) 86 agreed that blending on board during a sea voyage should be prohibited. MEPC 59 and MSC 86 thus instructed the Bulk Liquids and Gases (BLG) Sub-Committee to develop mandatory regulation, and, as an interim measure, issued MSC-MEPC.2/Circ.8 – Prohibition of blending MARPOL cargoes on board during the sea voyage. Subsequently, MSC 89 approved in May 2011 draft amendments to International Convention for the Safety of Life at Sea (SOLAS),[32] adding a new regulation VI/5.2 on the "Prohibition of the blending of bulk liquids cargoes during the sea voyage".[33] BLG had considered that physical blending on board during the sea voyage had primarily

28 UNEP/IG.80/4, p. 10, paragraph 15.

29 This Article states: "For the purposes of this Convention, b. "Dumping" does not include: (i) the disposal at sea of wastes or other matter incidental to, or derived from the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment, other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platforms or structures" (emphasis added). This convention entered into force on 30 August 1975. *United Nations Treaty Series*, Vol. 1046, p. 140.

30 IMO, MEPC 56/22/2, of 13 April 2007.

31 IMO, MEPC 59/24, p. 110, paragraph 23.4.

32 *United Nations Treaty Series*, Vol. 1184, p. 277 *et seq*. SOLAS Convention entered into force on 25 May 1980.

33 This new regulation states that: "The physical blending of bulk liquid cargoes during a sea voyage is prohibited. Physical blending refers to the process whereby the ship's cargo pumps and pipelines are used to internally circulate two or more different cargoes with the intent to achieve a cargo with a new product designation. This prohibition does not preclude the master from undertaking cargo transfers for the safety of the ship or protection of the marine environment." Also, "the prohibition does not apply to the blending of products for use in the search and exploitation of sea-bed mineral resources on board ships used to facilitate such operations.", IMO, MSC 89/25/Add.1, Annex 22.

safety-related issues, and thus SOLAS was regarded as the appropriate convention for the proposed new regulation.[34] The approved amendments were circulated to Contracted Governments in accordance with the amendments' procedure of SOLAS, with a view to adoption at the 90th session of the Maritime Safety Committee, which was held from 16th to 25th May 2012.

34. In addition to the issue of blending, the MSC also considered a submission by the Netherlands contained in document MSC 89/11/1, proposing that an additional regulation be added to specifically prohibit any production processes on board ships. Production processes refer to "any deliberate chemical process whereby a chemical reaction between the ship's cargoes, or cargo and any other substance, results in a cargo with a new product designation." The MSC noted the general support for the proposal by the Netherlands, and decided to refer the above document to the sixteenth session of the Sub-Committee on Bulk Liquids & Gases (BLG 16) for further consideration, and to advise the 90th session of the Maritime Safety Committee in May 2012 accordingly.

35. BLG 16, which was held from 30th January to 3rd February 2012, concurred with the view that an additional regulation should be introduced to address production processes on board ships, in relation to the amendments approved for SOLAS chapter VI regarding the prohibition of the blending of bulk liquids cargoes during the sea voyage. The Sub-Committee endorsed proposed draft text for consideration by MSC 90 (noting a need for additional information to be supplied to MSC 90 regarding the activity of ships engaged in oil-related activities with respect to any possible exemptions). It is worth noting that during BLG 16 the merits of including a reference to the generation of any waste products during such processes were also debated, but it was concluded that this was not necessary since an appropriate regulation should prevent chemical reactions from taking place and hence the concept of addressing waste issues was not relevant[35].

36. BLG 16 invited MSC 90 to consider the proposed draft amendment for SOLAS regulation VI/5.3, which prohibits production processes on board a ship during the sea voyage, together with the above-mentioned draft SOLAS regulation VI/5.2 approved at MSC 89 for adoption at MSC 90, possibly with a view to adoption of both draft regulations as a single package.

37. According to the 1 August 2012 submission by the Secretariat of the IMO to the eighth meeting of the OEWG[36], MSC 90 took note that no comments had been made on the draft amendments to regulation VI/5.2 on the prohibition of blending. MSC 90 also considered the outcome of BLG 16 on the proposed new SOLAS regulation VI/5-3 for the prohibition of production processes during the sea voyage as well as a submission discussing offshore service activities that could be inadvertently affected by the proposed prohibition of production processes. A final text prohibiting both blending and industrial processes under a single SOLAS regulation VI/5-2 was considered and the amendments were adopted unanimously by resolution MSC.325(90). These amendments, set out in the annex to document UNEP/CHW.11/INF/23 for ease of reference, will be deemed to have been accepted on 1 July 2013 (unless, prior to that date, objections are communicated to the Secretary General of the IMO[37]) and should enter into force on 1 January 2014.

38. As at 28 January 2013, no objection to the amendments had been communicated to the Secretary-General of the IMO. In the event the amendment adopted by MSC 90 enters into force, as of 1 January 2014 both blending and industrial processes on board ships as provided under the regulation VI/5.2 will be prohibited. Flag States will thereafter be responsible for ensuring that ships flying their flag comply with these new requirements.

IV. The application of the Basel Convention to hazardous and other wastes generated on board ships

39. The present legal analysis is expected to bring legal clarity on the application of the Basel Convention to hazardous and other wastes generated on board ships. Clarification of which wastes "derive from the normal operations of a ship, the discharge of which is covered by another international instrument" is one important element of the analysis, and it must be associated with an

[34] IMO, BLG 14/WP.3, p. 11, paragraph 7.2.

[35] IMO, BLG 16/WP.3, p. 5, paragraph 6.3.

[36] Document UNEP/CHW/OEWG.8/INF/24

[37] SOLAS Article VIII (vi) (2) provides: "However, if within the specified period either more than one-third of Contracting Governments, or Contracting Governments the combined merchant fleets of which constitute not less than fifty per cent of the gross tonnage of the world's merchant fleet, notify the Secretary-General of the Organization that they object to the amendment, it shall be deemed not to have been accepted."

analysis of the extent to which the Basel Convention might apply to wastes that fall outside the scope of the exclusion clause but are still associated with a ship. The implications of the SOLAS regulation VI/5.2 may also be taken into consideration by Parties when considering this matter.

40. The generation of wastes on board ships is, by its very nature, an ongoing activity: it takes place in areas within and outside the national jurisdiction of states. The generation of such wastes can also be, by its very nature, a transboundary process. Moreover, once generated, the wastes on board ships move across borders and within and outside areas under national jurisdiction. For this reason, MARPOL does not make a distinction as to where, geographically and legally, the waste is generated. Equally logical is the lack of regulation within MARPOL of the movements of such wastes generated on board ships. MARPOL's basic principle is that materials (including wastes) that cannot be discharged into the sea in accordance with relevant requirements must be delivered to port reception facilities, and port states must provide adequate port reception facilities to receive MARPOL wastes. The Basel Convention, on the other hand, through its provisions on the control of TBM of hazardous and other wastes, approaches such wastes as cargo: the Convention regulates the purposely move - or transport - of waste from one place to another These are important differences between the two treaties.

41. The following paragraphs discuss the application of the Basel Convention obligations pertaining to the generation, the ESM and the control of TBM of hazardous and other wastes generated on board ships.

A. The obligation to minimize the generation of hazardous wastes and other wastes

42. Paragraph 2 of Article 4 of the Basel Convention prescribes that "[e]ach Party shall take the appropriate measures to: (a) [e]nsure that the generation of hazardous wastes and other wastes **within it** is reduced to a minimum, taking into account social, technological and economic aspects". Are wastes generated on board ships covered by this obligation? One part of the answer lies in the above interpretation of "wastes generated on board ships that derive from the normal operation of a ship the discharge of which is covered by another international instrument are excluded from the scope of this Convention". If the wastes generated on board the ships fall within the scope of the Article 1 paragraph 4 exclusion clause, it appears that the Basel Convention minimization requirement would not apply to them.

43. What about wastes generated on board ships that do not fall within the scope of the Article 1 paragraph 4 exclusion clause, are such wastes generated "within a Party" and thus subject to the minimization requirement? The terminology "within it" combines a spatial element – "within" – and an entity - "it", meaning a Party. Taken in isolation, the ordinary meaning of "within a Party" could arguably be a reference to the areas falling under the national jurisdiction of a Party, to the territory of a Party, or to something else for instance a narrow meaning of territory restricted to a Party's land territory and internal waters. Comments received since COP-10 reflect different understandings of the terminology "within it"[38]. Both Canada and Norway interpret "within it" as "within the Party's territory". The term "territory", which is evolving by nature, encompasses defined geographical areas subject to the exclusive jurisdiction of the State: land territory, internal waters, national airspace and territorial sea (through an assimilation of the territorial sea to land territory, with the important caveat of the right of innocent passage). With the European Union and its member States, Canada and Norway question that a ship may be covered by the terminology "within it". Switzerland and Colombia seek a clarification of the obligations of flag States with respect to wastes generated on board ships flying their flag, while the Center For International Environmental Law suggests an interpretation of "within it" that extends to ships flying the Party's flag.

44. In line with Article 31 of the Vienna Convention, the terms "within it" should be interpreted by taking into account their context as well as the object and purpose of the Convention. The context of the terms "within it" includes primarily the text of Paragraph 2 (a) of Article 4. Paragraph 2 (a) of Article 4 provides that: "[e]ach Party shall take the appropriate measures to: [e]nsure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects." *Prima facie*, the inclusion of the terms "within it" appears to qualify, based on spatial considerations, the scope of application of the obligation to minimize the generation of wastes.

45. Beyond the text of paragraph 2 (a) of Article 4, it should be noted that other provisions of the Convention specify the scope of application of the Convention: the terminology used in those other provisions are part of the context and may shed light on the meaning of "within it". For instance,

[38] See comments compiled in document UNEP/CHW.11/INF/23.

paragraphs 3 and 9 of Article 2, that define "transboundary movement" use the terminology "area under national jurisdiction" and clarify that this terminology means "any land, marine area or airspace area within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment", namely land territory, internal waters, national airspace, territorial sea and exclusive economic zone.

46. This context provides some possible lessons for the interpretation of "within it". The first lesson, as evidenced by the ordinary meaning of terms such as "area" and "within" a Party, is that the scope of various provisions of the Convention appears to be based primarily on geographical or spatial elements. The second lesson stems from the fact that paragraph 2 (a) of Article 4 does not use the Basel Convention terminology "within an area under the national jurisdiction of the Party". The use of the terminology "within an area under the national jurisdiction of the Party" rather than "within it" in paragraph 2 (a) of Article 4 would have meant that the Basel Convention obligations pertaining to the minimization of the generation of wastes would have applied to the land territory, internal waters, national airspace, territorial sea and exclusive economic zone of a Party. The use of "within it" rather than "within an area under national jurisdiction" suggests that a different meaning of those terms, a priori grounded on the geography or spatial sphere of the Party rather than on the extent of its jurisdiction, may need to be found.

47. Because UNCLOS was already adopted at the time of the negotiations of the Basel Convention, references in the Basel Convention to notions embodied in UNCLOS, or lack of references thereto, should also be taken into account as part of the context within which to interpret "within it". In this regard, the Basel Convention does refer in paragraph 12 of Article 4 to several notions of UNCLOS. This provisions reads as follows:

> "12. Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments."

48. This provision does not refer to the notion of the flag State or to duties of flag States with respect to ships flying their flag, as embodied in UNCLOS. No other provision of the Basel Convention incorporates the notion of "flag State" or specifies obligations Basel Convention Parties may have in their capacity as flag States. The lack of reference in the Basel Convention to the notion of the flag State thus seems to indicate that this notion does not affect the scope of application of the Convention: under the Basel Convention, no specific rights or obligations are assigned to Parties in their capacity as "flag States" and, with the exception of paragraph 4 of Article 1, no special regime applies to "ships".

49. The rules of the Vienna Convention on treaty interpretation also allow for "any relevant rules of international law applicable in the relations between the parties" to be taken into account together with the context. In this regard, Colombia, Switzerland and CIEL put particular emphasis on the notion of flag State under UNCLOS. It is suggested, for instance, that the ship flying the flag of a State is "within" that State.

50. It is worth recalling that status of ships flying the flag of a State. The fiction of ships as part of the territory of the flag State has been advanced in the 1927 Lotus case that was settled by the Permanent Court of International Justice[39], but this approach has since been extensively rejected[40]. In particular, the relevant provisions of UNCLOS do not support the view that a ship flying the flag of a State is part of the territory of that State. Rather, the approach taken by UNCLOS is that the ship takes on the "nationality" of the flag State and imposes a number of duties on that State.

51. Another relevant rule of international law applicable in the relations between the Parties is the customary international rule according to which the territoriality principle is the basic principle of international jurisdictional order, meaning that a government's power to exercise authority on persons and entities rests primarily over its territory. Although other approaches have been developed, particularly in the field of international criminal law and economic law where a State's jurisdiction has been asserted over persons/nationals, property or activities which have no territorial nexus with that

[39] Lotus Case, France/Turkey, 1927, PCIJ, Ser. A, No 10

[40] See for instance COLOMBOS C. John, *The International Law of the Sea*, Longmans, United Kingdom, 6th edition, 1967, p.286-288.

State[41], the traditional framework of territoriality applies unless provided otherwise. The UNCLOS provisions pertaining to the flag States are one specific illustration of an instance in which the jurisdiction of a State was extended to a moveable property of a State on the basis of the "nationality" of that property.

52. Taken altogether, these elements seem to support an interpretation of "within a Party" that is based on spatial or geographical considerations: "within a Party" does not appear to encompass areas beyond the territory of a Party, such as the exclusive economic zone, or ships located outside the territory of a Party.

53. The following conclusions may be drawn. The waste minimization requirement embedded in paragraph 2 of Article 4 of the Basel Convention does not apply to wastes generated on board ships which fall within the scope of the Article 1 paragraph 4 exclusion clause. For wastes generated on board ships that do not fall within the scope of the Article 1 paragraph 4 exclusion clause, the waste minimization requirement embedded in paragraph 2 of Article 4 of the Basel Convention applies to wastes generated "within it", a terminology that appears to mean the land territory, internal waters, national airspace and territorial sea of a Party. Because a ship is not part of the "territory" of a Party, the minimization requirement would not apply to ships located outside the territory of a Party. The minimization requirement is binding upon Parties to the Convention irrespective of their status as flag State.

54. It must be emphasized that these conclusions pertain only to the interpretation of "within it" as set out in paragraph 2 (a) of Article 4 of the Convention.

B. The obligation to manage wastes in an environmentally sound manner

55. Under the Basel Convention, Parties have the duty to take all appropriate measures to ensure the environmentally sound management of hazardous wastes.[42] The notion of "environmentally sound management" is defined in paragraph 8, Article 2 of the Convention. ESM entails:

> "taking all practicable steps to ensure that hazardous waste 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".

56. The Basel Convention thus defines the notion of environmentally sound management in rather general terms,[43] which call for further clarification when applied in practice. Since the Convention does not prescribe a specific standard, each Party must rely on its own understanding of what is environmentally sound[44]. However, tools for achieving environmentally sound management have been further developed by Parties through Technical Guidelines adopted by the Conference of the Parties. These guidelines assist Parties in the implementation of the Convention providing them with guidance with regard to operations involving the management of diverse types of hazardous waste.

57. The Guidance Document on the Preparation of Technical Guidelines for the Environmentally Sound Management of Wastes Subject to the Basel Convention presents some principles that merit consideration in assisting State Parties in developing their waste and hazardous waste strategies. They are: the source reduction principle, the integrated life-cycle principle, the precautionary principle, the integrated pollution control principle, the standardization principle, the self-sufficiency principle, the proximity principle, the least transboundary movement principle, the polluter pays principle, the principle of sovereignty and the principle of public participation.[45]

58. MARPOL defines the term "discharge" of harmful substances or effluents containing such substances in its Article 2, paragraph 3, a) and b) as "any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying".[46] MARPOL does not

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41 RYNGAERT Cedric, *Jurisdiction in International Law*, Oxford University Press, Untied Kingdom, 2008, p. 4-8, in particular footnote 22 that includes a review of the views of the doctrine

42 Article 4.2, b), c), e), f), g) and h) of the Basel Convention.

43 ABRAMS, David, "Regulating the International Hazardous Waste Trade: A Proposed Global Solution", in: *Columbia Journal of Transnational Law*, Vol. 28, 1990, p. 828.

44 GROSZ, Mirina & PORTAS, Pierre, "Environmentally Sound Management: Towards a Coherent Framework Bridging the Basel, the Rotterdam and the Stockholm Conventions", in: *EcoLomic Policy and Law, Journal of Trade and Environment Studies*, Vol. 5/6, Special Edition 2008-2010, p. 48.

45 See paragraph 10 of the Guidance Document, available at: http://www.basel.int/Portals/4/Basel%20Convention/docs/meetings/sbc/workdoc/framewk.doc.

46 It does not include: (i) dumping within the meaning of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, done at London on 13 November 1972; or (ii) release of harmful substances directly arising from the exploration, exploitation and associated off-shore

contain a mandatory requirement to discharge ship-generated wastes or residues. In addition, while all of MARPOL annexes contain provisions for the environmentally sound management of wastes generated on board ships only whilst at sea, MARPOL does not require the environmentally sound management of waste that is offloaded. Neither do its specific obligations concerning reception facilities, as contained in regulation 38 of Annex I foresee the environmentally sound management requirement of such wastes. The "Guidelines for ensuring the adequacy of port waste reception facilities" to which regulation 38 makes reference state that "the facilities provided by the port must allow for the ultimate disposal of ships' wastes to take place in an environmentally appropriate way" (paragraph 3.3.2). However, these guidelines do not contain specific provisions on the environmentally sound management of such wastes ashore.[47]

59. The application of the Basel Convention ESM requirement to wastes generated on board ships needs to be assessed in two respects: the existence of an ESM requirement on board the ship, and the existence of an ESM requirement once the waste is unloaded from the ship. In both instances, the exclusion clause of Article 1 paragraph 4 of the Basel Convention needs to be born in mind.

(i) The application of the ESM requirement on board ships

60. Are wastes generated on board ships that are still on the ship excluded from the overall ESM requirements of the Basel Convention? For wastes falling within the scope of the Article 1 paragraph 4 exclusion clause, the Basel Convention ESM requirement would not apply. As far as hazardous and other wastes not covered by the exclusion clause are concerned, Article 4, paragraph 2 (c) of the Basel Convention prescribes that each Party shall take the appropriate measures to "ensure that persons involved in the management of hazardous wastes or other wastes within it take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment" (emphasis added).

61. In order to determine the scope of application of this provision, in particular whether and how far it applies to wastes generated on board ships falling outside the Article 1 paragraph 4 exclusion clause, the term "management" will be analyzed. In line with paragraph 2 of Article 2, "management" means the collection, transport and disposal of hazardous wastes or other wastes, including after-care of disposal sites. Both the European Union and its member States as well as Norway question an interpretation suggesting that officers and crew on a ship are involved in the "management" of wastes as defined under the Basel Convention and it would seem indeed difficult to reasonably argue that wastes generated on board a ship are "collected, transported and disposed of" on the ship itself. As a consequence, the Basel Convention ESM requirement does not appear to apply on board ships.

(ii) The application of the ESM requirement to ships' waste once offloaded

62. Does the ESM requirement apply to ships-generated wastes once offloaded from a ship? It must be noted that the requirement for Parties to undertake ESM of hazardous and other wastes exists independently of any TBM taking place. If a TBM does take place, the ESM requirement presumably applies as soon as the wastes are "within it" , meaning within the Party to the Basel Convention. Given the context of the Basel Convention as well as its object and purpose, it is also safe to conclude that in the case of MARPOL wastes, "excluded from the scope of this Convention" cannot be interpreted as meaning that the Basel Convention ESM requirement does not apply to such MARPOL unloaded wastes.

63. Taking into account the Convention's definition of "management" and the possible interpretations of "within it" as discussed in section A, once ships'-generated wastes are unloaded from a ship, and provided they are "hazardous" or "other" wastes, the requirement that they be managed in an environmentally sound manner in accordance with the provisions of the Basel Convention is fully applicable. As a consequence, in the event a State is Party to both MARPOL and the Basel Convention and the wastes are hazardous wastes or other wastes, one may argue that the port reception facility should comply with the ESM requirement associated with being an "adequate disposal facility" under Article 4 paragraph 2 (b) if that facility disposes of the wastes. In the event the port reception facility is not a disposal facility in the sense of the Basel Convention, Parties should ensure that wastes received by the port facility are then transported to an "adequate disposal facility" as defined by the Basel Convention.

64. In this respect, it would be helpful to assess the type of information notified under MARPOL through the advance waste notification (IMO MEPC.1/Circ.644) of the nature of the wastes a ship

processing of sea-bed mineral resources; or (iii) release of harmful substances for purposes of legitimate scientific research into pollution abatement or control.

[47] See IMO, resolution MEPC.83(44) of 13 March 2000.

intends to deliver to port reception facilities in order to have a better idea of the nature of the MARPOL wastes offloaded from a ship[48]. In addition, in order to properly articulate the application of both Conventions, the Conference of the Parties could assess how far the current technical guidelines on environmentally sound management cover MARPOL wastes.

C. The control of transboundary movements of hazardous wastes and other wastes generated on board ships

65. As noted in the introduction of this work, the control of the transboundary movement of hazardous wastes and other wastes is the third track by which the Parties to the Basel Convention achieve its objective of protecting human health and the environment from the adverse effects which may result from the generation and management of hazardous wastes.[49]

66. For the purposes of the Convention, "[t]ransboundary movement" means "any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement".[50] The Basel Convention applies to those cases where the following three conditions are fulfilled:

(a) The movement is **from** an area under the national jurisdiction of a State, and

(b) The movement is **to** or **through** an area under the national jurisdiction of another State or **to** or **through** an area not under the national jurisdiction of another State, and

(c) At least **two States** are involved in the movement.

67. Under paragraph 9 of that Article, "[a]rea under the national jurisdiction of a State" means any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment. Consequently, the norms of the Basel Convention are applicable to any movement of hazardous wastes and other wastes generated on the land territory, internal waters, national airspace, territorial sea, and exclusive economic zone of one State. For these norms to be applicable, this movement must also take place to or through these same areas of another State or to or through the high seas, the international seabed or the outer space, as long as a minimum of two States are involved in such activity. A movement of hazardous wastes from the high seas or other areas outside the national jurisdiction of a State does not fall within the scope of the notion of transboundary movement of hazardous waste as defined by the Basel Convention.

68. Transboundary movements of hazardous wastes that fall within the scope of the Basel Convention must take place in accordance with the general requirements of the Convention contained in its Article 4 and also in line with the Convention's provisions on the control procedure of TBM. Article 6 is the main provision of the Basel Convention governing this procedure – also known as the Prior Informed Consent (PIC) procedure. In a nutshell, the following actions apply. Each Party appoints a competent authority responsible for administering this procedure at a national level. The State of export must notify in writing the States concerned about its intention to move hazardous wastes across their boundaries. This notification shall include detailed information on the nature and risks of the waste involved, the site of generation, the process by which it was generated, the method of disposal and the parties involved in the transboundary movement.[51] The written consent of the State of import and/or transit as well as a contract between the exporter and the disposer specifying ESM of the wastes in question are required prior to any movement of hazardous waste. If only one of the States concerned consider the waste to be moved as hazardous waste according to its national legislation, the duty to notify is still applicable.[52]

69. MARPOL does not provide for a PIC procedure in instances where there is a transboundary movement of wastes generated on board ships. Such a requirement is not in line with the object and purpose of MARPOL and the way this treaty addresses issues of marine pollution.

(i) Wastes falling under Article 1 paragraph 4 of the Basel Convention

48 This suggestion, made by the EU, is supported by Zambia that stresses the concrete difficulties faced by Parties to identify the nature of the wastes offloaded a ship.

49 See also Article 4, paragraph 2, (d).

50 Article 2, paragraph 3 of the Basel Convention.

51 Article 6 and Annex V A of the Convention. Article 7 prescribes that the obligation to notify foreseen in Article 6.1 is also applicable to the transboundary movement of hazardous waste involving one or more States of transit which are not Parties to the Basel Convention.

52 Article 6, paragraph 5 of the Convention.

70. Does the Basel Convention PIC procedure apply to wastes generated on board ships? As far as wastes falling under the Article 1 paragraph 4 are concerned, the exclusion clause embedded in this provision means that the PIC procedure would not apply.

(ii) Wastes not falling under Article 1 paragraph 4 of the Basel Convention

71. For wastes not falling within the scope of the exclusion clause, several elements may be considered: first, whether a ship can be defined as "an area under national jurisdiction", more specifically the "marine area" of a State; second, whether waste generated on board a ship that is physically located within "an area under national jurisdiction" may be considered as falling within the definition of a movement from an area under the national jurisdiction of a State; and third, what are the implication of the notion of "flag State" on the application of the Basel Convention PIC procedure.

72. When interpreting paragraphs 3 and 9 of Article 2, one must keep in mind that there is no sense in interpreting a clear text. If the text is unclear, one must look at the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose: the treaty must be read as a whole, and that meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.

73. Paragraph 3 of Article 2 combines a geographical approach (area means land area, marine area and airspace) with a jurisdictional one (jurisdiction means that the State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health and the environment). The definition of transboundary movement in particular confirms that the "area" referred to in paragraph 3 of Article 2 is based on a defined physical, spatial approach. Based on international law, the areas covered by this terminology are land territory, internal waters, national airspace, territorial sea and exclusive economic zone. Accordingly, a ship would not, in itself, be considered as "an area" under national jurisdiction, as defined in Article 2 paragraphs 3 and 9 of the Basel Convention.

74. The second element proposed for discussion relates to wastes generated on board a ship that is physically located within "an area under national jurisdiction". Would the PIC procedure apply in the case of a transboundary movement of non-Marpol wastes that are either hazardous or other wastes under the Basel Convention and that are generated on board a ship physically located in the internal waters or within the marine area (i.e. territorial sea and exclusive economic zone) of a Party? It has been argued that the application of the PIC procedure to such cases is particularly relevant in instances where industrial processes, such as those undertaken on the Probo Koala, take place. It is also legitimate to advance that Article 2 paragraphs 3 and 9 of the Basel Convention appear to require that the PIC procedure apply to such cases.

75. As mentioned above, SOLAS regulation VI/5-2 was adopted specifically – but not only - to address the matter of concern resulting from the Probo Koala incident by prohibiting industrial processes on board ships. It would thus seem that, once the amendments enter into force, the processes would be prohibited under the SOLAS regime. As noted during BLG 16, Parties to the Basel Convention may similarly conclude that the new SOLAS regime is expected to prevent chemical reactions from taking place on board a ship during a sea voyage and, hence, that addressing waste issues associated with production processes is no longer relevant.

76. In the event the amendments did not enter into force in January 2014, Parties to the Basel Convention may consider revisiting this matter and clarifying to what extent the PIC procedure applies to wastes generated on board a ship that is physically located within "an area under national jurisdiction".

77. The third element relates to the implications, if any, of the notion of "flag state". Under Article 94 of part VII of UNCLOS governing the duties of the flag States, every State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag (paragraph 1), and assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship (paragraph 2 (b)). In Article 217, the UNCLOS requires States to ensure compliance by vessels flying their flags or of their registration with applicable international, rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with the UNCLOS for the prevention, reduction and control of pollution of the marine environment from vessels and must accordingly adopt laws and regulations to take other measures necessary for their implementation. Flag States must provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs (paragraph 1).

78. It has been argued that the TBM-associated obligations of a State of export could be transferred to a flag State. As previously highlighted in section A, it is worth emphasizing that UNCLOS was negotiated prior to the adoption of the Basel Convention and that this treaty does not refer to the notion of "flag state". A straightforward conclusion is that this notion is irrelevant under the Basel Convention regime: the provisions of the Basel Convention apply, or do not apply, to a given movement, regardless of the status of a Party or of a State as a flag State. This conclusion seems to be corroborated by the Convention's *travaux préparatoires*: during its third and fourth sessions, the ad hoc working group considered two proposals which would have extended the obligations of a Party to ships flying its flag and prohibited the export of wastes from a Party on ships registered in a non-Party. Agreement could not be reached on these proposals and they were deleted on the grounds that a better way to address the issue of flags of convenience was through the prohibition of transboundary movements between a Party and a non-Party[53]. As a consequence, when it comes to States, the relevant actors under the Basel Convention are the State of export, the State of transit, and the State of import, regardless of whether or not these States are flag States.

79. If hazardous and other wastes generated on board ships have been offloaded from a ship and are subsequently the object of a TBM as defined by the Basel Convention, the control procedure of the Basel Convention applies to such TBM.

Conclusions

80. The interpretation of the Convention, for instance with respect to the application of the Basel Convention to hazardous wastes and other wastes generated on board ships, is the prerogative of the Parties to the Convention. The underlying objective of this analysis is to provide Parties with the opportunity to agree on an interpretation of relevant provisions of the Convention that will not lead to ambiguities in the application of the Basel Convention to wastes generated on board ships.

81. This analysis covers both wastes falling within the scope and outside the scope of the exclusion clause embedded in Article 1, paragraph 4 of the Basel Convention. This analysis also takes into account developments within the framework of IMO, in particular the adoption of the SOLAS regulation VI/5-2 on the prohibition of the blending of bulk liquid cargoes and production processes during sea voyages.

82. In order to solve the issues under analysis, it seems necessary to agree on the meaning and scope of Article 1, paragraph 4 of the Basel Convention. In accordance with Articles 31 and 32 of the Vienna Convention, this norm requires that the segment "wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument" be interpreted as a whole. Taking into account the terms of the treaty in their context and in the light of its object and purpose, this analysis concludes that "wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument" refers to those wastes whose discharge is covered by MARPOL.

83. As a consequence, **MARPOL wastes generated on board ships** are excluded from the scope of the Basel Convention, be it its minimization requirement, its ESM requirement or the PIC procedure, as long as those wastes are on board the ship. Once the wastes are offloaded the ship, this analysis argues that the Basel Convention ESM requirement applies to MARPOL-wastes generated on board ships that are "hazardous" or "other". This conclusion is supported by the fact that whereas MARPOL contains provisions on environmentally sound management whilst at sea that are supportive of the objective and purpose of the Basel Convention, it does not have similar requirements for landed wastes. Hence, the Basel Convention requirements on ESM are applicable once the waste is offloaded, for instance to port reception facilities if these are intended to serve as "adequate disposal facilities". In addition, in the event MARPOL wastes are subsequently the object of a TBM, then the Basel Convention PIC procedure applies.

84. With regards to the application of the Basel Convention obligations to hazardous and other wastes generated on board ships that fall outside of the exclusion clause - **non-MARPOL wastes**, this legal analysis suggests the following conclusions:

(a) The minimization requirement embodied in Article 4 paragraph 2 (a) of the Basel Convention applies to the waste generated "within it", a terminology that appears to mean the land territory, internal waters, national airspace and territorial sea of a Party. Because a ship is not part of the "territory" of a Party, the minimization requirement would not apply to ships located outside the

[53] KUMMER Katharina, *International Management of Hazardous Wastes – The Basel Convention and Related Legal Rules*, Oxford, 1995, p. 54

territory of a Party. The minimization requirement is binding upon Parties to the Convention irrespective of their status as flag State. These conclusions pertain only to the interpretation of the terminology "within it" as set out in paragraph 2 (a) of Article 4 of the Convention.

(b) With regards to the Basel Convention ESM requirement, this legal analysis concludes that it does not apply to wastes generated on board ships while the wastes are on board the ship, but suggests that the ESM requirement embodied in Article 4 paragraph 2 (c) applies to wastes offloaded the ship.

(c) With regards to the Basel Convention provisions regulating TBM, this legal analysis suggests that the PIC procedure would apply in the case of a transboundary movement of non-MARPOL wastes that are either hazardous or other wastes under the Basel Convention and that are generated on board a ship physically located in the internal waters or within the marine area (i.e. territorial sea and exclusive economic zone) of a Party. This being said, it would appear that, unless the required number of objections is made, as of 1 January 2014 both blending and production processes on board ships as provided under the SOLAS regulation VI/5.2 will be prohibited and that flag States will thereafter be responsible for ensuring that ships under their flag comply with these new requirements. The Parties to the Basel Convention may agree to consider that this new SOLAS regime is expected to prevent chemical reactions from taking place on board a ship during a sea voyage and, hence, that addressing waste issues associated with production processes is no longer relevant. However, if hazardous and other wastes generated on board ships have been offloaded a ship and are subsequently the object of a TBM as defined by the Basel Convention, the control procedure of the Basel Convention applies to such TBM.

85. Because this matter pertains to the relationship between various treaties, it is important that adequate and continuous arrangements for cooperation between the Basel Convention and the secretariat of the IMO be ensured. It is also recommended that Parties to the Convention that are Parties to the relevant IMO Conventions strengthen their cooperation at the national level in order to promote the achievement of the Basel Convention objectives and to ensure consistency between the normative developments within the Basel Convention and the relevant IMO conventions. It is further recommended that the Secretariats of the Basel Convention and of the IMO continue to exchange information and monitor developments within their respective fora.