

PREVENTION OF POLLUTION OF THE MEDITERRANEAN SEA
AREA BY TRANSBOUNDARY MOVEMENTS OF HAZARDOUS
WASTES AND THEIR DISPOSAL

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I.- Introduction.

There are several increasing trends in the structure and operation of world manufacturing and trade that suggest that there will be an increase in the transport, by ship, of more or less hazardous substances. Hence in the risks to which the marine environment will be exposed. This assertion, valid all over the world¹, is also applicable in the Mediterranean Sea².

At the end of the 1980's, the issue of transboundary movements of hazardous wastes had become a very tense subject internationally, as well as for the Mediterranean region in particular, due to its geographical location as a cross-roads between three continents. The developing countries, including those in the Mediterranean, were witnessing increased movement of various hazardous wastes which were causing risks to the environment and the human health of present and future generations. As environmental laws and regulations in the industrialised countries became increasingly tight and stringent and as the cost of waste disposal rose, in addition to the economic difficulties and financial constraints encountered by many developing countries, the practice of exporting hazardous wastes to the poor nations would continue and possibly increase in the near future. Developing countries would therefore remain vulnerable for some time to

¹ Problems posed by transboundary movements of hazardous wastes have even reached Antarctica, the least inhabited place in the world. See BOU, V. (1996), Waste Disposal and Waste Management in Antarctica and the Southern Ocean. In: F. Francioni and T. Scovazzi (ed.s), International Law for Antarctica, pp. 319-374.

² According to UNEP (1996), The State of the Marine and Coastal Environment in the Mediterranean Region, MAP Technical Reports Series n° 100, p. 15: in the Mediterranean Sea Area, "such trends are: the globalization/relocation of manufacturing (the competition between low labour costs, raw material delivery and low transportation and distribution costs); changes in production techniques (e.g., "just in time" delivery of raw materials and chemicals, rather than accumulation of high inventories at the production site); integration of regional markets (leading to an increased flow of goods, even if the mass is stable); value-adding at source (e.g., increased oil refining by the oil producer)".

come to potential exposure to hazardous wastes until international and regional mechanisms were set up to control and resolve the world's hazardous waste dilemma. In fact, it was soon evident that not only developing countries, but also developed countries were exposed to the risks of transboundary movements of hazardous wastes³.

It had been estimated that between 300-400 million tons of hazardous wastes were produced annually. Around 90 per cent were generated in industrialised countries. Some of them were disposed of through hazardous waste disposal technologies, including incineration and controlled disposal on land. The rest was moved through States and regions in a search for disposal sites on land or at sea, including sites in the Mediterranean region⁴

It must also be taken into account that, in 1989, when the Mediterranean countries asked for the first time for an assessment of the transfer of hazardous wastes in the Mediterranean area, International Environmental Law on this topic was at its very beginning. First of all, the only international convention of world-wide scope on this question was, and still is, the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989). But some Mediterranean countries considered that the Basel Convention, as it stood⁵, it had a number of weaknesses and was not a fully satisfactory instrument⁶. Hence, they were reluctant to ratify it⁷. Second, the Fourth ACP-EEC

³ It must be remembered that the movement of hazardous wastes, namely 41 drums containing soil polluted by the dioxins of the Seveso incident, concerned two developed countries (France and Italy). The drums, which in 1982 passed the frontier between the two States and left no traces for a certain period, were finally found in an abandoned slaughterhouse in a French village.

⁴ In this sense, see the statement of Mr. I. Dharat, Senior Programme Officer of the Mediterranean Action Plan, at the opening of the meeting. In: Doc. UNEP(OCA)/MED/WG. 64/3 (25 April 1993): Report of the First Meeting of Mediterranean Experts on the Preparation of a Protocol on the Prevention of Pollution of the Mediterranean Sea Resulting from the Transboundary Movements of Hazardous Wastes and their Disposal, pp. 1-2.

⁵ An important peak in the history of the Basel Convention were the amendments adopted in the Third Meeting of the Conference of the Parties (Geneva, 18-22 September 1995). See Decision III/1, reprinted in Doc. UNEP/CHW.3/35.

⁶ For instance, Turkey stressed out that: "The definition of hazardous wastes was not clear in the Basel Convention nor within the OECD, despite the efforts made within that organisation to define wastes clearly. A clear definition of environmentally sound recycling and reuse operation was also still needed because, as was well known, wastes might turn out to be hazardous after recycling or reuse". See Doc. UNEP(OCA)/MED/WG. 64/3, op. cit., p. 5, para. 34.

⁷ In April 1993, when the international negotiations for the adoption of a Mediterranean Hazardous Wastes Protocol began, only five Mediterranean States had ratified the Basel Convention, namely, Cyprus, Egypt, France, Monaco and Syria.

Convention (Lomé, 15 December 1989) applies to a very few Mediterranean States, so it cannot protect the whole Mediterranean Sea Area from pollution caused by transboundary movements of hazardous wastes. Third, the Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 29 January 1991), though provides for a stricter regime that the embodied in the Basel Convention, presents the disadvantage that never has entered into force and it is difficult that it will do so in the near future. Similar criticisms can be made both on the OECD decisions and recommendations and on the EEC directives adopted at that time ⁸.

Therefore, it became clear that the Mediterranean States should take the necessary national and regional measures, including the preparation of a legal Mediterranean instrument, to deal with transboundary movements of hazardous wastes in the Mediterranean Sea Area. Accordingly, this paper is devoted to the different political and legal instruments adopted on this topic by the Mediterranean countries, paying special attention to the 1996 Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal.

II.- The revision process of the Barcelona system for the protection of the Mediterranean Sea against pollution.

Since the adoption of the Mediterranean Action Plan in Barcelona, on 4 February 1975 ⁹, the coastal States of the Mediterranean Sea and the European Community, in close collaboration with the United Nations Environment Programme, have successfully co-operated on a regional basis

⁸ For all these international instruments, see SCOVAZZI, T. (1992), Hazardous Waste. In: T. Scovazzi and T. Treves (ed.s), World Treaties for the Protection of the Environment, pp. 431-435; KWIATKOWSKA, B. and SOONS, A. (ed.s) (1993), Transboundary Movements and Disposal of Hazardous Wastes in International Law; CAMPINS ERITJA, M. (1994), La gestión de los residuos peligrosos en la Comunidad Europea, Bosch Ed.; JUSTE RUIZ, J. (1995), La regulación internacional de los movimientos transfronterizos de desechos y otras materias peligrosas, Anuario Hispano-Luso-Americano de Derecho Internacional, 12, 57-98.

⁹ See, inter alia, TANGI, M. (1975), Plan d'Action pour la Méditerranée après 1973. In: La Méditerranée, Ann. études int., 6, pp. 134 et seq.; DE HOYOS, D. (1976), The United Nations Environment Program: the Mediterranean Conferences, Harvard International Law Journal, 17, pp. 639 et seq.; YERROULANOS, M. (1982), The Mediterranean Action Plan: a Success Story in International Co-operation, Coastal Management, 49, pp. 175 et seq.; RAFTOPOULOS, E. G. (1988), The Mediterranean Action Plan in a Functional Perspective: A Quest for Law and Policy, MAP Technical Report Series N° 25, UNEP, Athens, 105 pp.; UNEP (1992), The Mediterranean Action Plan. Saving our common heritage, Athens, 40 pp.; SKJÆRSETH, J. B. (1993), The "effectiveness" of the Mediterranean Action Plan, International Environmental Affairs, 1993, pp. 313 et seq.

in order to protect the marine environment of this semi-enclosed sea. As a result of this regional co-operation, the Barcelona system for the protection of the Mediterranean Sea was built, being integrated by several political and legal instruments¹⁰.

At the Eighth Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Mediterranean Sea against Pollution and Its Related Protocols, held in Antalya, Turkey, from 12 to 15 October 1993, the Contracting Parties decided to begin a revision process of the whole Barcelona system for the protection of the Mediterranean Sea in order to update these political and legal instruments and to adjust them to the new environmental trends that had appeared after the celebration of the United Nations Conference on Environment and Development (UNCED).

After convening several Meetings of Legal and Technical Experts, and during the twentieth anniversary of the adoption of the MAP, the revision process ended at the Conference of Plenipotentiaries that was held in Barcelona, from 9 to 10 June 1995, where new political and legal instruments were adopted¹¹.

¹⁰ The texts of the former Mediterranean Action Plan (hereinafter quoted as MAP), the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, the Protocol concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency, the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and the Protocol concerning Mediterranean Specially Protected Areas are published in UNEP (1992), Mediterranean Action Plan and Convention for the Protection of the Mediterranean Sea against Pollution and its related Protocols, Athens, 61 pages. Later on, a Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and Its Subsoil was adopted in Madrid, on 14 October 1994. See UNEP(OCA)/MED IG.4/4: Final Act and Protocol for the Protection of the Mediterranean Sea against Pollution Resulting From Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (Madrid, 13-14 October 1994). See, inter alia, JUSTE RUIZ, J. (1993), The Evolution of the Barcelona Convention and Its Protocols for the Protection of the Mediterranean Sea against Pollution. In: Edward L. Miles and Tullio Treves (eds.), The Law of the Sea: New Worlds, New Discoveries, pp. 208-238; LEANZA, U. (1993), Il nuovo diritto del mare e la sua applicazione nel Mediterraneo, Torino, pp. 485 et seq.; SCOVAZZI, T. (1994), The Fifth Protocol to the Barcelona Convention for the Protection of the Mediterranean, IJO Newsletter, November 1994, pp. 14 et seq.; *ibid.* (1995), Il quinto protocollo alla convenzione di Barcellona sulla protezione del Mediterraneo, Rivista giuridica dell'ambiente, 1995, pp. 365 et seq.

¹¹ See UNEP(OCA)/MED IG.6/7: Final Act of the Conference of Plenipotentiaries on the Amendments to the Convention for the Protection of the Mediterranean Sea against Pollution, to the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft and on the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, Athens, 409 pp. An integrated version of all the Mediterranean instruments can be found in UNEP (1995), Mediterranean Action Plan Phase II and Convention for the Protection of the Marine Environment and the Coastal

Although none of these political and legal instruments is exclusively devoted to the problem of pollution of the Mediterranean Sea by transboundary movements of hazardous wastes, references to this issue can be found in the three new political instruments and in the 1995 amendments to the Barcelona Convention. First of all, the Action Plan for the Protection of the Marine Environment and the Sustainable Development of the Coastal Areas of the Mediterranean (MAP Phase II) is the political document that devotes more attention to this problem. Subsection I.3.2.3 is entitled "Prevention and control of the environment resulting from transboundary movements of hazardous wastes and their disposal". It begins recognising that in the Mediterranean, a cross-roads between three continents and countries at different levels of industrial and socio-economic development, transboundary movements of hazardous wastes have become a serious potential threat especially for the developing countries of the region. It is in fact known that only a small part of the hazardous wastes produced is disposed of through hazardous wastes disposal technology. Accordingly, the objectives of this component of the new MAP Phase II are:

Region of the Mediterranean and its Protocols, Athens, 129 pp. See BOU FRANCH, V. (1995), Protected areas and species: the Mediterranean Basin. In: E. Özhan (ed.), Proceedings of the Second International Conference on the Mediterranean Coastal Environment, vol. 2, pp. 671-695; *ibid.*, (1996), Hacia la integración del medio ambiente y el desarrollo sostenible en la región mediterránea, Anuario de Derecho Internacional, 12, pp. 201-251; *ibid.*, (1996), Land-Based Pollution in the Mediterranean Sea Area. In: Özhan, E. (ed.), Proceedings of the International Workshop on Integrated Coastal Zone Management in the Mediterranean and Black Sea, pp. 53-72; BOU FRANCH, V.; BADENES CASINO, M. (1997), La protección internacional de zonas y especies en la región mediterránea, Anuario de Derecho Internacional, 13, in print; INTERNATIONAL LAW Facing Mediterranean Sustainable Development: the Revision of the Barcelona Convention and its Related Protocols, ICCOPS International Workshop 1995: Regional Seas towards Sustainable Development in the Mediterranean, Genoa, 19-22 April 1995; JUSTE RUIZ, J. (1995), El Plan de Acción para el Mediterráneo 20 años después: la revisión del Convenio de Barcelona y sus protocolos, Meridiano Ceri, 6, pp. 12-15; *ibid.*, (1995), Le Plan d'action pour la Méditerranée vingt ans apres: las revision des instruments de Barcelone, Espaces et ressources maritimes, 9, pp. 249-259; *ibid.*, (1995), The Revision of the Barcelona Convention and its Related Protocols. In: ICCOPS Meeting, Genoa 20-23 April 1995, invited paper; MARCHISIO, S. (1995), Mediterranean Sustainable Development in International Law. In: E. Özhan (ed.), Proceedings of the Second International Conference on the Mediterranean Coastal Environment, vol. 2, pp. 657-669; ROS VICENT, J. (1995), Introducció. In: Generalitat de Catalunya (ed.), Conveni di Barcelona per a la protecció de la mar Mediterrània, pp. 7-18; SCOVAZZI, T. (1995), Nuovi sviluppi nel "sistema di Barcellona" per la protezione del Mediterraneo dall'inquinamento, Rivista Giuridica dell'Ambiente, 1995, pp. 735-740; VALLEGA, A. (1995), The Mediterranean after the 1995 Convention. The historical sense of a turnaround point. In: E. Özhan (ed.), Proceedings of the Second International Conference on the Mediterranean Coastal Environment, vol. 2, pp. 719-732.

“1.- the protection of the Mediterranean environment against pollution caused by transboundary movements and the disposal of hazardous wastes;

2.- the prohibition of all exports of hazardous wastes from the OECD countries of the Mediterranean to countries which are not Member States of the European Union; and

3.- the early ratification and implementation of the draft Protocol for the Prevention of Pollution of the Mediterranean Sea resulting from the Transboundary Movements of Hazardous Wastes and their Disposal, as well as the Basel Convention”.

Concerning the last objective, it must be taken into account that, before the beginning of the revision process of the MAP, the Barcelona Convention and its related Protocols, the Contracting Parties had already held two Meetings of Legal and Technical Experts aimed at negotiating a Mediterranean Protocol on this item ¹². Afterwards, this international negotiation was frozen, in order to be able to concentrate themselves in the revision process of all the Mediterranean instruments. But once the revision process was concluded, the Contracting Parties committed themselves to conclude the negotiation of the Mediterranean hazardous wastes Protocol ¹³.

Following the same technique than Agenda MED 21, the new MAP Phase II lies down the activities to be carried out at regional and national levels in order to achieve those objectives. On the one hand, the activities proposed at a regional level are:

“1.- to develop appropriate guidelines for the evaluation of damage, as well as rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes;

2.- to develop new clean production methods for reducing and eliminating hazardous wastes; and

¹² See Doc. UNEP(OCA)/MED WG. 64/3: Report of the First Meeting of Mediterranean Experts on the Draft Hazardous Wastes Protocol (Cervia, 23-25 April 1993) and Doc. UNEP(OCA)/MED WG. 79/4: Report of the Second Meeting of Mediterranean Experts on the Draft Hazardous Wastes Protocol (Rome, 21-24 September 1994).

¹³ Paragraph 4 of the Barcelona Resolution on the Environment and Sustainable Development in the Mediterranean Basin insists on this very same idea. Pursuant to it, the Ministers in charge of the Environment in the Mediterranean countries and the member of the European Commission in charge of the Environment "entrust the Co-ordinating Unit with the task of concluding the process of preparing the Protocol on the Prevention of Pollution of the Mediterranean resulting from the Transboundary Movements of the Hazardous Wastes and their Disposal and the amendments to the Land-Based Sources Protocol, and request that the Executive Director of UNEP convene a Conference of Plenipotentiaries to adopt these Protocols by March 1996". This idea is also repeated in Section II of the new MAP Phase II, entitled "Strengthening of the legal framework".

3.- to establish regional co-operation for the prevention and control of transboundary movements of hazardous wastes”.

On the other hand, the activities proposed at a national level are the following:

“1.- to assist the Contracting Parties to reduce to a minimum, and where possible eliminate, the generation and transboundary movement of hazardous wastes in the Mediterranean;

2.- to assist the Contracting Parties to take appropriate legal, administrative and other measures within the area of their jurisdiction in order to prohibit the export and transit of hazardous wastes to developing countries; and

3.- to develop programmes for financial and technical assistance to developing countries for the implementation of the Hazardous Wastes Protocol”.

Another political document, that is, the Priority Fields of Activities for the Environment and Development in the Mediterranean Basin (1996-2005) establishes more accurate objectives to be reached before the end of the forthcoming decade. In particular, it establishes the four following objectives:

“1.- to prepare and adopt national programmes on reduction and environmental management of hazardous wastes on the basis of methodology guidelines for rational environmental management;

2.- to prepare and adopt national programs on the environmental management of urban wastes on the basis of methodology guidelines for rational environmental management;

3.- to encourage the installation of at least one secure depot and, where necessary, a treatment plant for hazardous wastes in each Mediterranean country;

4.- to ban export by OECD member countries of toxic wastes and other residues including radioactive materials to Mediterranean countries not members of the European Union”.

But without any doubt, the most important commitment that arose from the revision process of the Barcelona system is the introduction of a new Article 11 to the amended Barcelona Convention, entitled "Pollution resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal". According to Article 11 of the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean:

“The Contracting Parties shall take all appropriate measures to prevent, abate and to the fullest possible extent eliminate pollution of the environment which can be caused by transboundary movements and disposal of hazardous wastes, and to reduce to a minimum, and if possible eliminate, such transboundary movements”.

Despite the general wording of this provision, it must be highlighted that this is the only provision mentioned until now that enjoys a mandatory character, that is, not an hortatory one. Moreover, as it has already happened with all the other sources of pollution stipulated in the Barcelona Convention, it is easy to presume that, sooner or latter, an additional Protocol will implement this provision.

III.- The Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal.

The sixth and most recent Protocol to the Barcelona Convention was adopted at Izmir, Turkey, on 1st October 1996¹⁴. Although the Izmir Conference was preceded by three Meetings of Legal and Technical Experts on the preparation of this Protocol¹⁵, finally it was not signed by some of the delegations that participated in its negotiation¹⁶. The complexity of the subject ruled by the Izmir Protocol, the lack of a common clear idea on its contents and the legal novelties introduced, explain the different views that the Mediterranean States and the European Community have on the Izmir Protocol. Actually, these different opinions have been present during all its negotiation process¹⁷ and make uncertain its future entry into force.

¹⁴ The Protocol and the Final Act of the Izmir Conference are published in Doc. UNEP(OCA)/MED IG.9/4 of 11 October 1996. On the Izmir Protocol, see CUBEL, P. (1997), *Transboundary Movements of Hazardous Wastes in International Law: The Special Case of the Mediterranean Area*, 39 pp. (in print); JUSTE RUIZ, J. (1997), *Un nuevo instrumento jurídico del sistema de Barcelona para la protección del Mar Mediterráneo: el Protocolo sobre movimientos transfronterizos de desechos peligrosos y su eliminación*, *Revista Española de Derecho Internacional*, 1997, 16 pp. (in print); SCOVAZZI, T. (1997), *The Mediterranean Hazardous Wastes Protocol*, *International Journal of Marine and Coastal Law*, 13, 8 pp. (in print).

¹⁵ See Doc. UNEP(OCA)/MED WG. 116/4: Report of the Third Meeting of Government-Designated Legal and Technical Experts on the Preparation of a Protocol on the Prevention of Pollution of the Mediterranean Sea Area by Transboundary Movements of Hazardous Wastes and Their Disposal (Izmir, Turkey, 26-28 September 1996). See also *supra*, note 12.

¹⁶ The Izmir Protocol was signed by Algeria, Egypt, Greece, Italy, Libya, Malta, Monaco, Morocco, Spain, Tunisia and Turkey. It was not signed by Bosnia and Herzegovina, Croatia, European Community, France, Israel and Slovenia.

¹⁷ In fact, these different opinions concern the same existence of the Izmir Protocol. While at the first Meeting of Experts the representative of Turkey said that her country fully

1.- The definition of transboundary movements and the geographical scope of the Izmir Protocol.

The activities covered by the Izmir Protocol are the transboundary movements of hazardous wastes and their disposal. The definition that the Izmir Protocol provides of "transboundary movements" in its Article 1 (f) repeats word by word the definition provided by Article 2.3 of the Basel Convention. Pursuant to both provisions, transboundary movement means any movement of hazardous wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement

Hence, the movements of hazardous wastes originated in one State for being disposed of in the Mediterranean high seas without entering into the marine zones of a third State are excluded from both the Izmir Protocol and the Basel Convention. However, these movements of hazardous wastes for their final disposal in the Mediterranean high seas are covered both by the Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (London, 7 November 1996)¹⁸ and by the Protocol to the Barcelona Convention for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea (Barcelona, 16 February 1976 amended in Barcelona, 10 June 1995). As far as these two international treaties contain a general waste export ban and follow a reverse list system, the possibility of carrying out this kind of movements of hazardous wastes in the Mediterranean high seas vanishes completely.

However, the transboundary movements of hazardous wastes covered by the Basel Convention and by the Izmir Protocol are not exactly the same and the main difference between them arise from their different geographical scope of application. The Basel Convention applies to all kinds of transboundary movements of hazardous wastes, provided that the requirements of the definition of transboundary movements are complied

supported the Contracting Parties' decision to develop an additional Protocol to the Barcelona Convention that would establish a regional mechanism to prevent the transboundary movements of hazardous wastes in the Mediterranean Sea (see Doc. UNEP(OCA)/MED WG.64/3, op. cit., p. 5, para. 33), during the second Meeting of Experts the representative of France repeated the strong reservation which had already been expressed at the Eighth Ordinary Meeting of the Contracting Parties to the Barcelona Convention regarding the appropriateness of elaborating a special Protocol on the transboundary movements of hazardous wastes and their disposal (see Doc. UNEP(OCA)/MED WG.79/4, op. cit., p. 4, para. 20).

¹⁸ This 1996 Protocol will supersede, after its entry into force, the 1972 London Dumping Convention. The text of the 1996 Protocol is published in Doc. LC/SM 1/DC.4.

with. This idea means that the Basel Convention applies both to land and marine transboundary movements of hazardous wastes.

The same solution is not followed by the Izmir Protocol. Pursuant to its Article 2, the Izmir Protocol is applicable only to the Mediterranean Sea Area as defined in Article 1 of the Barcelona Convention, i.e. an area of "maritime waters". The Izmir Protocol should thus apply to movements of hazardous wastes which, besides enjoying a transboundary character, take place through the Mediterranean waters or overfly them. Therefore, the Izmir Protocol is not applicable to two different kinds of transboundary movements of hazardous wastes. First, it is not applicable to transboundary movements that occur only in land, through the territories of its Contracting Parties¹⁹. Second, it does not apply to transboundary movement through the sea that involve at least one Mediterranean coastal State, but without taking place in Mediterranean waters²⁰.

Moreover, in the wording of the Izmir Protocol, the present legal status of the Mediterranean waters were taken into account. It is well known that the Mediterranean coastal States have not already established exclusive economic zones in this semi-enclosed sea, though nothing prevent them to do so in the future. Accordingly, in the Final Act of the Izmir Conference a paragraph was included, saying that: "The Conference noted that the Protocol had been drafted in the light of the present legal situation in the Mediterranean Sea. In the event of developments affecting this situation, the Protocol might have to be revised"²¹.

The problems posed by hypothetical exclusive economic zones in the Mediterranean Sea was a consequence of the fact that the Izmir Protocol clarifies the regime of international navigation through territorial seas of ships carrying hazardous wastes. On the one hand, while the Basel Convention, in general, provides that transboundary movements of hazardous wastes only take place with the prior written notification by the State of export to both the State of import and of transit and their prior written consent (Article 5.3), the specific provision concerning

¹⁹ For instance, a land movement from Milan (Italy) to Paris (France) passing through the Alps. The only legal exception to this assertion is represented by Article 1.2. of the Barcelona Convention. This provision allows that the Mediterranean Sea Area may be extended to coastal areas as defined by each Contracting Party within its own territory.

²⁰ For instance, a transboundary movement initiated in La Coruña, an Atlantic Spanish port, towards a South American country. This hypothesis is valid only for the following Mediterranean States: France, Spain, Morocco, Egypt and Turkey.

²¹ A stronger attitude was adopted by the European Community and by France. In the Declarations attached to the Final Act of the Izmir Conference, the European Community declared that it was its understanding that nothing in the Izmir Protocol requires notice to or consent of any State for the passage of a vessel under the flag of a Party exercising freedom of navigation in an exclusive economic zone in accordance with international law. France entered a reservation in the same line of thinking.

transboundary movements through the seas has a vague wording and, therefore, its Article 4.12 has been interpreted in opposite ways by different States²², including some Mediterranean States such as Egypt²³ or Italy²⁴. On the other hand, and despite the different opinions expressed during its negotiations²⁵, the Izmir Protocol follows a compromised approach. The obligation of both prior written notification to, and prior written consent of the State of transit, provided for in its Article 6.3, does not apply to conditions of passage through the territorial sea. This case is covered by Article 6.4, and pursuant to it: "the transboundary movement of hazardous wastes through the territorial sea of a State of transit only takes place with the prior notification by the State of export to the State of transit". No prior consent by the State of transit is required.

2.- The definition of hazardous wastes.

The definition of what constitutes wastes for the purposes of the Izmir Protocol is once again the same as for the Basel Convention. Pursuant to

²² See PINESCHI, L. (1991), The transit of ships carrying hazardous wastes through foreign coastal zones. In: F. Francioni and T. Scovazzi (ed.s), International Responsibility for Environmental Harm, pp. 299 et seq.; BOU FRANCH, V. (1994), La navegación por el mar territorial. incluidos los estrechos internacionales y las aguas archipelágicas en tiempos de paz, pp. 191 et seq.; VAN DYKE, J. (1996), Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials, Ocean Development and International Law, 27, pp. 379 et seq.

²³ On 31 January 1995, Egypt declared that: "In accordance with the provisions of the Convention and the rules of international law regarding the sovereign right of the State over its territorial sea and its obligation to protect and preserve the marine environment, since the passage of foreign ships carrying hazardous or other wastes entails many risks which constitute a fundamental threat to human health and the environment; and in conformity with Egypt's position on the passage of ships carrying inherently dangerous or noxious substances through its territorial sea (United Nations Convention on the Law of the Sea, 1982), the Government of the Arab Republic of Egypt declares that foreign ships carrying hazardous or other wastes will be required to obtain prior permission from the Egyptian authorities for passage through its territorial sea. Prior notification must be given of the movement of any hazardous wastes through areas under its national jurisdiction, in accordance with Article 2.9 of the Convention".

²⁴ On 30 March 1990, Italy declared that: "The Government of Italy (...) considers that no provision of this Convention should be interpreted as restricting navigational rights recognised by international law. Consequently, a State party is not obliged to notify any other State or obtain authorisation from it for simple passage through the territorial sea or the exercise of freedom of navigation in an exclusive economic zone under international law".

²⁵ On the one hand, the representatives of Greece, Croatia, Libya, Morocco and Turkey expressed their preference for the proposal that required the prior consent of the State of transit. On the other hand, the representatives of the European Community, France and Italy said it should be explicitly stated that the prior consent of the State of transit was not required for innocent passage in the territorial sea. See Doc. UNEP(OCA)/MED WG 116/4, op. cit., p. 5, para. 21.

Article 1 (c) of the Izmir Protocol, wastes means 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. However, the definition of what constitutes hazardous wastes differs from the Basel Convention and follows the more radical Bamako approach. On the one hand, Article 1 of the Basel Convention establishes that hazardous wastes are wastes that belong to any category contained in its Annex I, entitled "Categories of wastes to be controlled", unless they do not possess any of the characteristics contained in its Annex III, entitled "List of hazardous characteristics". This is a system of double list that requires that the waste in question be present in both lists. On the other hand, Article 3 of the Izmir Protocol considers that hazardous wastes are either wastes or categories of substances listed in its Annex I, entitled "Categories of wastes subject to this Protocol", or wastes or categories of substances that possess any of the characteristics contained in its Annex II, entitled "List of hazardous characteristics"²⁶. This is a broader approach as it follows a system of two alternative lists, in which for being considered hazardous wastes it is necessary to be included only in one of them.

The Izmir Protocol also includes two additional kinds of hazardous wastes. First, as the Basel Convention, the Izmir Protocol shall apply to those wastes not covered by the Protocol lists but still defined or considered to be hazardous wastes by the domestic legislation of the State of export, import or transit. Second, although not included in the Basel Convention, the Izmir Protocol, following the Bamako Convention, shall also apply to hazardous substances that have been banned or are expired, or whose registration has been cancelled or refused through government regulatory action in the country of manufacture or export for human health or environmental reasons, or have been voluntarily withdrawn or omitted from the government registration required for use in the country of manufacture or export. The inclusion of this last kind of hazardous substances in the scope of the Protocol gave rise to the opposition of the European Community and of France. In the Declarations made by different delegations at the end of the Izmir Conference, the representative of the European Community stated that the Izmir Protocol should not cover banned hazardous substances. He therefore entered a reservation regarding the inclusion of these substances in the Izmir Protocol. In a similar way, the French delegation considered that the scope of the Izmir Protocol should correspond to hazardous wastes as referred to in the Barcelona Convention

²⁶ The Lists of hazardous characteristics of the Basel and Bamako Conventions and of the Izmir Protocol follow the hazardous classification system included in the United Nations Recommendations on the Transport of Dangerous Goods. See United Nations Doc. ST/SG/AC.10/1/Rev.5, 1988.

and in accordance with the widely accepted definition in the Basel Convention²⁷.

Moreover, if we compare Annex I of the Basel Convention, entitled "Categories of wastes to be controlled", with the hazardous wastes listed in Annex I of the Izmir Protocol, entitled "Categories of wastes subject to this Protocol", it is easy to discover that the latter contains a longer list of hazardous wastes. During the negotiation of the Izmir Protocol, specially during the third Meeting of Experts, there were lengthy discussions about the convenience of including in the "List concerning the categories of wastes which are hazardous wastes" the following two kinds of wastes. The first one were household wastes²⁸. Several representatives considered that household wastes, which were not necessarily hazardous, should be listed separately. An informal open-ended working group, chaired by the Spanish Vice-Chairperson, was set up in order to consider this point²⁹. The agreement reached consisted in keeping only one list of wastes under the new title of "Categories of wastes subject to this Protocol", with two sections. Section A lists the hazardous wastes and Section B lists the household wastes. Hence, household wastes, whether hazardous or not, are treated exactly in the same way as other hazardous wastes.

The second one were all wastes containing or contaminated by radionuclides, the radionuclide concentration or properties of which result from human activity. During the third Meeting of Experts, two representatives stated that radioactive wastes should be excluded from the scope of the Protocol, while others strongly advocated their inclusion as an extremely hazardous form of waste. The observer for the International Atomic Energy Agency (IAEA) emphasised that radioactive substances were excluded from the scope of the Basel Convention, under the terms of Article 1.3 thereof. In this context, it should be noted that a number of related instruments and procedures had been developed under the auspices of IAEA, including an IAEA Code of Practice on Transboundary Movements of Radioactive Wastes and IAEA Regulations for the Safe Transport of Radioactive Waste. The observer for the IAEA insisted on that the development of a convention on the safety of radioactive waste management was at an advanced stage and the text was expected to be ready for signature in 1997. Its Article 24, on transboundary movements, covered virtually all material included in the Code of Practice. For those reasons, it was IAEA's position that radioactive substances should be

²⁷ These Declarations are attached to the Final Act of the Izmir Conference.

²⁸ Household wastes include two different kinds of wastes: Y46 Wastes collected from households, including sewage and sewage sluges; and Y47 Residues arising from the incineration of household wastes.

²⁹ See Doc. UNEP(OCA)/MED WG.116/4, op. cit., p. 4, para. 19.

excluded from the Izmir Protocol. Some representatives pointed out that two regional agreements (Lomé IV and the Bamako Convention) did cover radioactive wastes. The representative of France expressed a reservation to the effect that radioactive wastes should be excluded from the scope of the Protocol, pointing out that questions relating to the maritime transport of such wastes were already dealt with by such organisations as the International Maritime Organisation (IMO) and IAEA³⁰. Neither the informal open-ended working group nor the Izmir Conference could reach an unanimous agreement on this point and the final inclusion of radioactive wastes in the Izmir Protocol provoked that the European Community, France and Israel entered a reservation regarding this point.

3.- General obligations.

The Preamble of the Izmir Protocol states the main reason for the adoption of this Protocol. This reason consists in the fact that the Contracting Parties of this Protocol declare themselves "conscious of the danger threatening the environment of the Mediterranean Sea caused by the transboundary movements and disposal of hazardous wastes" (paragraph 2). In order to prevent pollution of the Mediterranean Sea caused by transboundary movements of hazardous wastes and their disposal, the Preamble introduces the two main tools and objectives of the Izmir Protocol. These are the following:

“The Contracting Parties to the present Protocol,

Convinced that the most effective way of protecting human health and the marine environment from the dangers posed by hazardous wastes is the reduction and elimination of their generation, for example through substitution and other clean production methods;

Recognising the increased will for the prohibition of transboundary movements of hazardous wastes and their disposal in other States, especially in developing countries”.

This reasoning is further developed in Article 5 of the Izmir Protocol, entitled "general obligations". Its first paragraph states that the Parties to the Izmir Protocol shall take all appropriate measures to prevent, abate and eliminate pollution of the Protocol area which can be caused by transboundary movements and disposal of hazardous wastes. On the one hand, in order to reach this aim, according to Article 5.2, the Parties shall take all appropriate measures to reduce to a minimum, and where possible eliminate, the generation of hazardous wastes. This wording seems to contain a stronger commitment than the one provided for by Article 4.2(a)

³⁰ Ibid., para. 18.

of the Basel Convention ³¹. However, the obligation to reduce to a minimum, and where possible eliminate, the generation of hazardous wastes is not implemented in the Izmir Protocol. The only provision dealing with this topic is its Article 8, entitled "Regional co-operation". According to it:

“1.- (...) the Parties shall co-operate as far as possible in scientific and technological fields related to pollution from hazardous wastes, particularly in the implementation and development of new methods for reducing and eliminating hazardous wastes generated through clean production methods (...);

3.- The Parties shall co-operate in taking appropriate measures to implement the precautionary approach based on prevention of pollution problems arising from hazardous wastes and their transboundary movement and disposal. To this end, the Parties shall ensure that clean production methods are applied to production processes”.

Concerning these provisions, three considerations must be taken into account. First, most of the hazardous wastes are originated in land, not in the seas. Pursuant to Article 5.4 of the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (Athens, 17 May 1980, amended in Syracuse, on 7 March 1996) the Contracting Parties shall take into account, either individually or jointly, the best available techniques and the best environmental practices including, where appropriate, clean production technologies, taking into account the criteria set forth in its Annex IV entitled "Criteria for the Definition of Best Available Techniques and Best Environmental Practices". Second, in the 1995 Barcelona Resolution on the Environment and Sustainable Development in the Mediterranean Basin, the Ministers in charge of the Environment in the Mediterranean States and the member of the European Commission in charge of the Environment committed themselves to promote actively the transfer of clean technologies, in particular to developing countries, to encourage the establishment of clean production centres where required, and to research, promote, collect and disseminate information on clean production processes. Implementing this political understanding, at the IXth Ordinary Meeting of the Contracting Parties to the Barcelona Convention the Government of Spain offered, and it was unanimously accepted, that the Barcelona Centre for cleaner

³¹ Pursuant to Article 4.2(a) of the Basel Convention: "Each Party shall take all appropriate measures to ensure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects".

production initiatives became a new Regional Activity Centre of the MAP for cleaner production initiatives in the Mediterranean. Third, the Izmir Conference requested the first Meeting of the Parties to this Protocol to consider the establishment of an ad hoc regional centre for training and technical assistance in the field of hazardous wastes³². Therefore, the Mediterranean coastal States and the European Community have already established, or are now creating, the legal and political machinery towards this aim.

On the other hand, Article 5.3 of the Izmir Protocol states that the Parties shall also take all appropriate measures to reduce to a minimum the transboundary movements of hazardous wastes, and if possible, to eliminate such movements in the Mediterranean. To achieve this goal, Parties have the right individually³³ or collectively³⁴ to ban the import of hazardous wastes. But, without any doubt, the two most important general obligations are provided for in Article 5.4 of the Izmir Protocol. First, all Parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the export and transit of hazardous wastes to developing countries³⁵. This provision means that the export and transit of hazardous wastes, either for their final elimination or for their recycling, to developing countries is not allowed. Second, Parties which are not Member States of the European Community shall prohibit all imports and transit of hazardous wastes. The combination of these two general obligations produces the effect of classifying the transboundary movements of hazardous wastes into two categories: prohibited movements of hazardous wastes (from developed countries to developing countries, that is, North-South movements and from developing countries to other developing countries, that is, South-South movements); and allowed movements of hazardous wastes (from developing countries to developed countries, that is, South-North movements and from developed countries to other developed countries, that is, North-North movements). As far as the Izmir Protocol does not distinguish between transboundary movements of

³² Final Act, para. 18.

³³ "The representative of the Libyan Arab Jamahiriya (...) informed the Meeting that his country (...) had banned all kinds of imported waste shipments. The Libyan Technical Centre for Environment Protection had taken several measures to ensure the full control and registration of all chemical compounds imported into the country". See Doc. UNEP(OCA)/MED WG.64/3, op. cit., p. 4, para. 24.

³⁴ For instance, through the Bamako Convention.

³⁵ During the second Meeting of Experts, the Italian Ministry of Foreign Affairs stressed out that "Italy had prohibited the export of toxic wastes to non-OECD countries and it considered that only total prohibition of international traffic in wastes to non-OECD countries would ensure the promotion of self-sufficiency and reduction of waste production". See Doc. UNEP(OCA)/MED WG.79/4, op. cit., p. 2, para. 8.

hazardous wastes either for final elimination or for recycling, the classification of transboundary movements made by the Izmir Protocol implies an economic discrimination for those Mediterranean States considered as developing countries by the Izmir Protocol but that are able or at least do not want to renounce to the possibility of recycling hazardous wastes and to the economic incomes resulting from these activities.

Hence, during the negotiations for the adoption of the Izmir Protocol there were intensive discussions on the definitions of both developed and developing countries. The first draft Protocol insisted on defining developed countries as the Mediterranean coastal States that are Member States of the Organisation for Economic Co-operation (OECD). During the second Meeting of Experts on the one hand the representative of Turkey made a reservation on this point, because Turkey was an OECD country but was also a developing country. On the other hand, the representative of Israel also expressed opposition to the proposed definitions because several countries which were not members of the OECD were developed countries³⁶. The solution finally reached consisted in replacing the words “developing countries” contained in the second general obligation of Article 5.4, by the words “Parties which are not Member States of the European Community”. This solution was considered satisfactorily by Turkey, but not by Israel and by Slovenia who, accordingly, made a reservation on this point³⁷. Furthermore, the third Meeting of Experts decided to add a footnote relating to the specific case of Monaco. Monaco is not a Member State of either the OECD or the European Community, but is already included in the European Economic Area. Hence, the Meeting accepted that, for the purposes of the Izmir Protocol, Monaco shall have the same rights and obligations as the Member States of the OECD or the

³⁶ According to the definition in draft Article 1 (t), Israel would be considered a developing country and therefore prevented from importing waste for treatment, which would be prejudicial to its growing recycling industry. See Doc. UNEP(OCA)/MED WG.79/4, *op. cit.*, p. 4, para.s 22 and 23. The same attitude was adopted by Slovenia during the third Meeting of Experts. In this Meeting, the representative of Slovenia reserved his country’s right to import hazardous wastes not intended for final disposal but to cover its own need for secondary raw materials, in accordance with the provisions of the Basel Convention. See Doc. UNEP(OCA)/MED WG. 116/4, *op. cit.*, p. 5, para. 20.

³⁷ In the Declarations attached to the Final Act of the Izmir Conference, Israel made a reservation on Article 1 (u) and (v) and Article 5.4, and stated that, for the purposes of the Izmir Protocol, Israel is a developed country and shall have the same rights and obligations as Member States of the OECD and the EU. With regard to Article 5.4, Slovenia also reserved its right to import hazardous wastes not intended for final disposal but to cover its own needs for secondary raw materials, in accordance with the provisions of the Basel Convention.

European Community. This means that Monaco is considered in practice as having the same status as France, Greece, Italy and Spain ³⁸.

IV.- Final considerations.

Despite the different opinions expressed during the negotiation of the Izmir Protocol, this Protocol was finally adopted on the 1st October 1996 and eleven Mediterranean States signed it immediately. The other Mediterranean States and the European Community can sign the Izmir Protocol until the 1st October 1997 or accede to it after this date (Article 17.3 and 5). Nevertheless, the future of the Izmir Protocol remains uncertain. It is true that for its entry into force only six instruments of ratification, acceptance, approval of or accession to it are needed (Article 17.6). It is also true that some northern Mediterranean States (i.e. Greece, Italy and Spain) and nearly all the southern Mediterranean States unconditionally backed the Izmir Protocol. But, on the one hand, Croatia, Israel and Slovenia strongly opposed to the provisions concerning transboundary movements of hazardous wastes for recycling in their territories. On the other hand, the European Community, France and Israel rejected, among other provisions, the inclusion of radioactive wastes in the Izmir Protocol. Moreover, some non Mediterranean States that are Member States of the European Community, such as the United Kingdom and Denmark, have already expressed their opposition to the ratification of the Izmir Protocol either by the European Community or by its Mediterranean Member States, as they consider that the Izmir Protocol is not compatible with the requirements of European Community Law. Only time will show whether these objections to the Izmir Protocol progressively disappear or not.

³⁸ See Doc. UNEP(OCA)/MED WG.116/4, op. cit., pp. 3-4, para. 17. The representative of Israel claimed unsuccessfully for the same solution for his country. See *ibid.*, p. 5, para. 20.