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The Role of Unilateral State Action in Preventing International Environmental Injury

Richard B. Bilder

THE ROLE OF UNILATERAL STATE ACTION IN PREVENTING INTERNATIONAL ENVIRONMENTAL INJURY*

*Richard B. Bilder***

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I. INTRODUCTION

Internationalism rather than nationalism is currently the watchword in the world community's efforts to cope with the threats that modern technology has posed to the environment. Public discussion of international environmental problems has focused principally on the alleged necessity for cooperative international approaches, arrangements, and structures. The tendency has been to see solutions in terms of promulgating broad environmental treaties and creating international environmental institutions with far-reaching regulatory powers. In contrast, little attention has been paid to the role that unilateral state action—a manifestation of nationalism—theoretically ought to have or practically is likely to have in an emerging regime of international environmental regulation.[1] Indeed, the term "unilateral state action" is often used in a perjorative sense as the antithesis of a desirable and efficient approach to dealing with international environmental problems.

Any perspective that ignores the role of unilateral state action, however, is likely to prove incomplete and unrealistic. First, unilateral state action in the environmental field is already a fact of international life. Second, certain types of environmenntal problems may inherently require unilateral state action for their effective solution. Indeed, many environmental problems are

1. For further discussion of the role of unilateral state action *see* LAW, INSTITUTIONS, AND THE GLOBAL ENVIRONMENT, 99-100 (J. Hargrove ed. 1972) [hereinafter cited as GLOBAL ENVIRONMENT]; Goldie, *Development of an International Environmental Law, id.* at 104, 117-20; Bleicher, *An Overview of International Environmental Regulation,* 2 ECOLOGY L.Q. 1, 75-90 (1972); Coan, Hillis, & McCloskey, *Strategies for International Environmental Action: The Case for an Environmentally Oriented Foreign Policy,* 14 NAT. RESOURCES J. 87 (Jan. 1974); Goldman, *Pollution: International Complications,* 2 ENVIRONMENTAL AFFAIRS 1, 12-14 (1972); Gotlieb & Dalfen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law,* 67 AM. J. INT'L L. 299 (1973); Jacobson, *Bridging the Gap to International Fisheries Agreement: A Guide for Unilateral Action,* 9 SAN DIEGO L. REV. 454 (1972).

largely local, in the sense that their principal causes and immediate effects are confined largely within a single nation's territory. Transnational consequences occur principally as spillover from more significant domestic effects. A third reason for the importance of unilateral state action is suggested by the decentralized character of the existing international political system. In practice, individual sovereign states are likely to retain considerable authority to act unilaterally to prevent transnational environmental harm. The most significant problem of international environmental regulation may thus involve the allocation among states of jurisdiction to take unilateral action rather than the restriction of state prerogatives in favor of international authority.[2]

Given its importance, the concept of unilateral environmental action merits further analysis, particularly with respect to the following questions. What types of unilateral environmental action are states presently taking or likely to take, particularly in order to deal with threats of transnational environmental injury? To what extent does unilateral action raise problems under existing international law? What are the potential advantages and disadvantages of unilateral action in terms of its possible effects on transnational environmental problems, international relations and trade, and on the future development of international environmental law? Is it possible to accommodate the pressures that lead to unilateral action within a multilateral framework that can avoid or mitigate the problems of unilateral action? Finally, is it possible to make any broad judgment as to the appropriate roles of both unilateral and multilateral action in an effective scheme of international environmental regulation?

In this article, unilateral action is defined as any action which a state takes solely on its own, independent of any express cooperative arrangement with any other state or international institution. Of course, a state may, if its action is likely to have an international impact, first consult with other states or organizations, take their views into account, or attempt to accommodate their interests. But a state acting unilaterally claims and asserts the right to proceed independently with its proposed action even if other states or organizations disagree.

This definition of unilateral action has several implications. First, unilateral action, as thus broadly defined, potentially en-

2. *See* GLOBAL ENVIRONMENT, *supra* note 1, at 99.

compasses both state environmental actions which have international consequences and state environmental actions which do not have such consequences. While it is relevant to recognize that such primarily domestic actions are unilateral in the sense employed here, this article will, of course, be principally concerned with those types of unilateral action that may potentially affect the rights, claims, or interests of other states or international institutions.[3] Second, the term "unilateral action" is used here in a neutral sense. The phrase implies neither approval nor disapproval, nor any judgment as to the consistency or inconsistency of unilateral action with international law or international community interests. Third, as here used, the term excludes the technique of implementing or enforcing international agreements or arrangements through internationally agreed forms of individual action by the participating states, rather than through action directly by international or supranational agencies or institutions.

Finally, unilateral action is not synonymous with the so-called doctrine of "self-help." The phrase "self-help" seems frequently used to suggest that international law permits a state, in certain situations, to act unilaterally—that is, without the need for prior resort to international procedures of institutions—in order to prevent or redress certain violations of international law.[4] It is true

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3. A classic example of unilateral action with international consequences is President Truman's assertion of United States jurisdiction over the natural resources of subsoil and seabed of the continental shelf off the coasts of the United States. Proc. No. 2667, 3 C.F.R. 67 (1945); Exec. Order No. 9633, 3 C.F.R. 437 (1945). Widely copied by other states, this unilateral action led eventually to the incorporation of the principle that a coastal state has jurisdiction over the resources of its continental shelf in the Convention on the Continental Shelf, *open for signature* April 29, 1958, [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311. The International Court of Justice recognized the principle as a doctrine of customary international law in the North Seas Continental Shelf Cases, [1969] I.C.J. 3.

4. *See, e.g.*, W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW 20 (1966):

> While self-help is a minor part of the sanctioning process in domestic societies, it is a major instrumentality for sanctions in the international community. In fact, we call the international legal system primitive because states must rely almost completely on the principle of self-help. Not only must states perceive when their rights have been violated, but they must also confront the state which has allegedly committed the illegal act and must "force" the state to "pay damages." . . . In the international community, states must literally take the law into their own hands if they are to protect their legal rights.
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> The sanctioning process in international law, then, is almost entirely the

that, in view of the absence of effective international machinery to deal with many kinds of violations of internaional law, the international legal system does allow states to engage in a considerable range of self-enforcement actions in this sense. Self-help is also occasionally invoked by states in a more free-wheeling sense in an attempt to justify unilateral actions which may be highly questionable under international law. The propriety of such actions may be doubtful either because the facts concerning the alleged prior legal violations by another state are unclear, or because it is doubtful whether international law in any event permits unilateral action under the applicable circumstances. A state that in these circumstances claims the right to "take the law into its own hands" may in effect be asserting the existence of some overriding rights to take unilateral action without regard to generally applicable law—a claim analogous to that reflected in the doctrines of self-defense or necessity. Thus, while states may occasionally attempt to justify their unilateral actions as self-help, the phrase seems to confuse rather than clarify analysis.[5] Consequently, it will be avoided in this article.

II. Types of Unilateral State Actions: Some Distinctions

Since the widespread surge of concern with environmental problems in the late 1960s, states have engaged in an increasing number and variety of unilateral actions designed to prevent environmental harms. Most of these unilateral actions have been primarily domestic in character, designed to deal with environmental threats that arose and produced their principal effects within the acting state's own borders. Such domestic environmental programs may have a profound significance for, and indeed be indispensable to, effective overall efforts to preserve the quality of the global environment. As previously suggested, however, these primarily domestic environmental actions do not normally have consequences that directly and immediately threaten the rights, claims, or interests of other states, and that have consequently been perceived as potentially raising significant international problems.

Within the past fifteen years, there have also been a number of

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application of the principle of self-helf.

5. For a suggestion that self-help should be carefully distinguished from self-preservation *see* Goldie, *supra* note 1, at 117, 153-54n.31.

unilateral environmental actions that do raise international problems. For example, in 1967, the British Royal Air Force bombed the Liberian-flag supertanker *Torrey Canyon*, which had run aground in international waters off Cornwall, in an attempt to halt oil spills from the vessel which were threatening English and French beaches.[6] In 1970, Canada enacted its Arctic Waters Pollution Prevention Act,[7] which asserted Canada's jurisdiction to control shipping up to 100 miles off its Arctic coasts in order to prevent pollution of the Arctic environment. Iceland subsequently asserted a broad claim to a similar zone.[8] Iceland extended its fisheries jurisdiction from 12 to 50 miles off its coasts in 1972, and from 50 to 200 miles in 1975, justifying its actions largely on the alleged need for fisheries conservation.[9] Since then many other coastal states have unilaterally asserted similar claims to 200 mile fisheries zones, relying in part on the broad support for such extensive jurisdiction evidenced in negotiations at the Third United Nations Conference on the Law of the Sea.[10] In 1973, New Zealand and Australia announced a joint naval demonstration against French nuclear tests at Mururoa Atoll in the South Pacific, and

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6. *See, e.g.*, E. COWAN, OIL AND WATER: THE TORREY CANYON DISASTER (1968); C. GILL, F. BOOKER & T. SOPER, THE WRECK OF THE TORREY CANYON (1967); Brown, *The Lessons of the Torrey Canyon*, 21 CURRENT LEGAL PROB. 113 (1968); Nanda, *The "Torrey Canyon" Disaster: Some Legal Aspects*, 44 DEN. L.J. 400 (1967).

7. CAN. REV. STAT. c. 2 (1st Supp. 1970). For further discussion *see* Beesley, *Rights and Responsibilities of Arctic Coastal States: The Canadian View*, 3 J. MAR. L. & COM. 1 (1971); Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1 (1970); Gotlieb & Dalfen, *supra* note 1, at 240-47; Henkin, *Arctic Anti-Pollution: Does Canada Make—or Break—International Law?*, 65 AM. J. INT'L L. 131 (1971). *See also* Wulf, *Contiguous Zones for Pollution Control*, 3 J. MAR. L. & COM. 537 (1972).

8. Resolution of the Althing Concerning Fisheries Jurisdiction, Feb. 15, 1972, *reprinted in* 11 INT'L LEGAL MAT. 643 (1972).

9. Ministry of Fisheries of Iceland, Regulations of July 14, 1972, Concerning the Fishery Limits Off Iceland (effective Sept. 1, 1972), *reprinted in* 11 INT'L LEGAL MAT. 1112 (1972). For further discussion *see* Bilder, *The Anglo-Icelandic Fisheries Dispute*, 1973 WIS. L. REV. 37. *See also* Regulation Concerning the Fishery Limit Off Iceland, July 15, 1975, *reprinted in* 14 INT'L LEGAL MAT. 1282 (1975).

10. As of September 1978, 74 out of 131 independent coastal states claim at least a 200 mile fishing zone, and 39 of these states have declared a 200 mile economic zone. *See* OFFICE OF THE GEOGRAPHER, DEPARTMENT OF STATE, NATIONAL MARITIME CLAIMS, dated Oct. 3, 1978.

New Zealand and Australian naval ships cruised near the atoll to protest the tests and the consequent possibility of radioactive fallout in New Zealand and Australian territory.[11]

In recent years, the United States has itself unilaterally undertaken a variety of environmental actions. For example, it has enacted legislation establishing the 200 mile protective fishery zone and the 200 mile pollution control zone.[12] Regulations have been promulgated barring the dumping of certain substances within United States territorial or contiguous waters;[13] providing for the establishment of design and construction standards for bulk-carrying vessels in foreign trade, including foreign-registered vessels entering United States navigable waters;[14] preventing the importation into the United States of vehicles not meeting United States-established pollution control requirements;[15] prohibiting

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11. Australia and New Zealand also pursued a multilateral approach to the problem. Proceedings were instituted against France in the International Court of Justice, asking the Court to rule that the French atmosphere nuclear tests were a violation of international law, and seeking an order barring further tests. Australia also asked the Court to indicate provisionally that France should desist from further tests pending the Court's judgment. I.C.J. Communiqué No. 73/8, May 9, 1973. New Zealand filed a similar request on May 14, 1973. I.C.J. Communiqué No. 73/10, May 14, 1973. France, however, informed the Court that in its view the Court did not have jurisdiction of the cases, and that France would not appoint an agent. I.C.J. Communiqué No. 73/11, May 17, 1973. *See also*, N.Y. Times, May 18, 1973, at 10, col. 4. On June 22, 1973, the Court indicated interim measures of protection to the effect that France should suspend her nuclear tests in the South Pacific pending the Court's final decision in the cases. N.Y. Times, June 23, 1973, at 3, col. 1; I.C.J. Communiqué Nos. 73/22, 73/23, June 22, 1973. In 1974, France announced that it would finish its Pacific above-ground nuclear tests and start underground testing. Because this ended the basis for the dispute between France, New Zealand, and Australia, the I.C.J. dismissed the cases. *See* Nuclear Test Case, [1974] I.C.J. 469, 470, 478, 530 (1974).

12. Fishery Conservation and Management Act of 1976, 16 U.S.C. §§1801-1882 (1976), *reprinted in* 15 INT'L LEGAL MAT. 634 (1976); and Federal Water Pollution Control Act, 26 U.S.C. §§ 1251-1265, 1281-1297, 1311-1328, 1341-1345, 1361-1376, amended as of Dec. 28, 1977, Cleanwater Act of 1977, Pub. L. 95-217, sections *reprinted in* 17 INT'L LEGAL MAT. 144 (1978).

13. Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1434, (1972), 33 U.S.C. §§ 1411-1421, 1441-1444 (1972).

14. Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1227 (1972), 46 U.S.C. § 391(a) (1978), *as amended by* Pub. L. 95-474, § 5, 92 Stat. 1480.

15. The National Traffic and Motor Vehicle Safety Act of 1966, 16 U.S.C. §§ 1381, 1391-1410, 1421-1426, 1431 (1966), provides for the establishment of automobile emission standards for anti-pollution purposes. The Clear Air Act of

the importation of certain endangered species of their products;[16] and prohibiting the importation of fisheries products from foreign countries whose nationals are conducting fishing operations in a manner inconsistent with international fishery conservation programs.[17] Other United States regulations restrict the import of DDT into the country and control its export as well as other environmentally harmful substances.[18] In 1972, the Department of State agreed to file Environmental Impact Statements under the National Environmental Policy Act concerning any of its activities which might have a foreign environmental impact.[19]

1977, 42 U.S.C. § 7522 (1977), provides that pollution standards are generally applicable to automobiles offered for importation into the United States.

16. Since 1930, the United States has prohibited the importation into the United States of specimens of wildlife taken, killed, possessed, or exported in violation of the laws or regulations of the foreign country of origin. Tariff Act of 1930, 19 U.S.C. § 1527 (1930).

Marine mammals have been of special concern to the United States. On December 2, 1970, the Secretary of the Interior put eight species of commercially hunted whales on the endangered species list. 35 Fed. Reg. 18, 319 (1970). This action banned the importation of whale products into the United States as of December 1971, thus removing about 20% of the world's demand for whale products. *See* COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT, ENVIRONMENTAL QUALITY—1972, at 95 (1972). Also relevant is the Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified at 16 U.S.C. §§ 1361-1362, 1371-1384, 1401-1407 (1972). *See* U.S. CODE CONG. & AD. NEWS, 92d Cong., 2d Sess. 1202-25 (1972).

On March 3, 1973, representatives of the United States and 79 other countries meeting in Washington, D.C., signed the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The Convention prohibits commercial trade with respect to some 375 species of animals that are in danger of extinction, and provides that trade in 239 other species will be conducted only under special permits from the nations involved. For background information on the Convention see 68 DEP'T STATE BULL. 608-19 (1973); for the text of the Convention, *id.* at 619-27.

17. Fishermen's Protective Act of 1967, 22 U.S.C.A. §§ 1971-1980 (1964, Supp. 1973), as amended by Pub. L. 95-541, 42 Stat. 2057 (1978).

18. All DDT for use in the United States must be registered, and its use is greatly restricted. Currently there is only one domestic producer and no importer who is registered under Section 17 of the Federal Insecticide, Fungicide, and Rodenticide Act. Phone conversation with the Environmental Protection Agency (Dec. 7, 1978). The Act permits the export of DDT, but it requires the foreign purchaser's signature and notification of the foreign government. Phone conversation with the Environmental Protection Agency, International Division (Nov. 17, 1978). *See also* INT'L ENVIRONMENT REPORTER, CURRENT REPORT 390 (Nov. 10, 1978).

19. It has been suggested that the Agency for International Development is

It may be easier to analyze the legality and consequences of such unilateral environmental actions if we attempt to classify them in certain ways and suggest certain distinctions among them. The subsequent discussion is in part organized in terms of the motive of the state taking unilateral action, and consequently it is worth indicating these distinctions in some detail.

First, the action may be primarily intended to protect the state's own territory or jurisdiction. For example, much of the environmental legislation and administrative action in the United States and most other industrial countries is designed to deal with domestic problems such as air and water pollution and solid waste disposal,[20] although they may in fact have international repercussions. The 1973 Trans-Alaska Pipeline Authorization Act, for example, appears to recognize the possibilities of such international repercussions of primarily domestic legislation in its provisions allowing "any persons or entity, public or private, including those resident in Canada . . . " to invoke the Act's liability system.[21]

Second, the action may be primarily intended to protect the territories or nationals of other states from threats of environmental injury arising principally from activities of the acting state or its national within its own territory or jurisdiction. Unilateral action by the United States to reduce the salinity level of the Colorado River prior to its reaching the Mexican border would be a possible example.[22]

Third, the action may be primarily intended to protect certain international environments, such as the oceans or outer space,

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showing an increasing awareness of environmental concerns in its policies regarding procurement of commodities such as DDT. Coan, Hillis, & McCloskey, *supra* note 1, at pt. 2, pp. 7-8. Environmental impact statements are generally required by section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1976). For the State Department's notice that it would file environmental impact statements, *see* 37 Fed. Reg. 19,167 (1972). *See also,* COUNCIL ON ENVIRONMENTAL QUALITY, 5TH ANNUAL REPORT at 599 (1974).

20. *See, e.g.,* the comprehensive discussions of federal and state legislation and administrative action in the annual reports transmitted to Congress by the Council on Environmental Quality from 1970-1976.

21. Section 204(c) of the Trans-Alaskan Pipeline Authorization Act of Nov. 16, 1973, 43 U.S.C. § 1653(c)(1) [Supp. 1980], *quoted in* Sands, *Role of Domestic Procedures in Transnational Environmental Disputes,* LEGAL ASPECTS OF TRANSNATIONAL DISPUTES 166 (OECD, 1977).

22. *Cf.* Brownell at Eaton, *The Colorado River Salinity Program with Mexico,* 69 AM. J. INT'L L. 255 (1975).

from threats of environmental injury arising principally from activities of the acting state or its nationals within its own territory or jurisdiction. Examples include legislation prohibiting the acting state's nationals or vessels from dumping radioactive or other toxic wastes into the high seas or unilateral measures designed to ensure that space activities or scientific experiments carried out by the acting state do not adversely affect either outer space[23] or the global environment as a whole.

Fourth, the action may be primarily intended to protect the acting state's own territory and nationals from threats of environmental injury arising principally from the activities of foreign states or their nationals. Examples of this type of action would include legislation seeking to prevent foreign vessels from polluting the oceans off the acting state's coasts, or legislation prohibiting or applying domestic environmental protection standards to the importation of environmentally dangerous products.

Finally, the action may be primarily intended to protect the territory of other states, international regions such as the high seas or outer space, or broader international community environmental concerns from threats of environmental injury arising principally from the activities of other states or their nationals. In this case, the state acts to protect foreign states, the international commons, or the global environment as a whole from the environmentally harmful activities of others. For example, legislation prohibiting the importation of certain endangered species or their products which are found only abroad would fit this pattern. The Canadian Arctic Waters Pollution Prevention Act was justified in part as necessary to protect the broad international community interest in preserving the Arctic ecology.

In the first three of these situations, where the risk emanates largely from within the acting state's own territory, its unilateral actions are directed principally at environment-threatening activities carried out by its own nationals within its own jurisdiction. In the fourth and fifth situations, the risk emanates principally from environment-threatening activities carried out by foreign nationals, who may be carrying out such activities either within the acting state's jurisdiction or in other countries or international regions outside of its jurisdiction. Since it is unilateral action directed at the activities of foreign nationals that tends par-

23. *See, e.g.*, Weiss, *Project Westford: Needles in Space*, Center for Environmental Studies, Princeton University, Reprint No. 25 (Dec. 1975).

ticularly to raise international problems, the remainder of this discussion will focus largely on these last two categories.

A second major classification for unilateral actions might distinguish them according to the location of their principal and immediate effect. Some measures, such as United States legislation prohibiting the importation of products failing to meet United States pollution prevention standards or United States legislation prohibiting entry into the United States waters by foreign vessels failing to meet required safety or construction standards will usually be applied only within a state's presently recognized territorial or contiguous jurisdiction. Other measures, such as the British bombing of the *Torrey Canyon* while the vessel was in international waters, have been taken in areas clearly outside of a state's recognized territorial jurisdiction.

A third way of classifying unilateral actions would be in terms of the relative duration or permanence of the action. Some actions, such as the British bombing of the *Torrey Canyon,* or the threatened action by New Zealand and Australia to thwart the French South Pacific nuclear bomb tests, are essentially temporary in nature. They are designed to deal with a unique problem and are unlikely to recur. Other actions, such as the United States Ocean Dumping Act or the Canadian Arctic Waters Pollution Prevention Act, represent a claim to impose a permanent and continuing regime of environmental protection. Of course, in some cases, a state may make a general claim to the right to impose such a continuing regime without actually implementing it.

A fourth classification would distinguish unilateral actions in terms of the nature of the environmental threat to which they are ostensibly a response. Some actions, such as the bombing of the *Torrey Canyon,* may be justified as responses to imminent, highly probable, and fairly grave environmental dangers. Other actions, such as measures to protect a particular endangered species—for example, the pig-footed banidcoot, Barnard's wombat, or Mrs. Marden's owlett—[24] may be responses to what many might regard as a less imminent, more contingent, and less serious type of environmental threat.

Fifth, unilateral actions might be distinguished in terms of their impact on the interests of other countries. Some actions

24. *See* 50 C.F.R. § 17.11 (1979). I do not mean to suggest that the international community should not be concerned over possible threats to even unfamiliar or commercially valueless species.

may have a profound impact on the interests of other nations. For example, Iceland's extensions of its fisheries' limits to 50 miles, and then to 200 miles, clearly had a serious impact on the United Kingdom,[25] which had been taking about one-fourth of its catch from the Icelandic fisheries.

Finally, unilateral actions might be classified according to their apparent consistency or inconsistency with present or emerging international law. To some extent, this classification begs an issue in question, namely, the legality of particular unilateral actions. As will be subsequently suggested, the issue of legality may, in particular instances, be determined only by a weighing and balancing of various factors, such as those just discussed. At least some broad distinctions, however, may be useful. Thus, in certain cases the type of unilateral action may, on its face, raise no or few problems under international law, since it is a type of action which a state is clearly privileged to take unilaterally under international law. For example, United States legislation restricting importation of certain endangered species, where such importation is not protected by a specific trade or other agreement, is clearly consistent with international law, which recognizes broad state prerogatives in such matters of importation. Other actions, on the other hand, might clearly violate international law. For example, suppose fumes from a Canadian smelter caused certain limited pollution damage to trees in the State of Washington (as in the famous *Trail Smelter* arbitration)[26] and that the United States then proceeded to bomb the smelter as a measure of self-help. This action would be clearly inconsistent with international law, both as a use of force in violation of article 2, paragraph 4 of the United Nations Charter and as a response wholly disproportionate to any Canadian breach of international law that might possibly be involved. In other cases, a state might not only be privileged to take a particular unilateral action, but might also have a duty under international law to so act. For example, to the extent that each state can be said to have an international duty to prevent activities within its territory from causing injury to other states or international regions, unilateral action on its part might be necessary to implement that duty.

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25. *See* Dershem and Kaisler, *Synopsis*, 14 SAN DIEGO L. REV. 729-30 (1977).

26. Trail Smelter Arbitration (United States v. Canada), 3 R. Int'l Arb. Awards 1911 (1949) (preliminary decision); 3 R. Int'l Arb. Awards 1938 (1949) (final decision).

III. The Legality of Unilateral Action by a State to Protect Itself from Environmental Injury

To what extent may a state, consistently with international law, take unilateral action to protect itself from environmental injury? The legality of such action would appear to depend upon several factors, including the locus of application of the action, current trends in international environmental law, and the perceived reasonableness of the action in terms of the nature of the environmental risks against which it is directed, its duration, and its impact on the interests of other countries.

The significance of the locus of the action derives principally from the tendency of international law—and indeed of all law—to allocate jurisdiction primarily on a territorial basis. International law generally recognizes each state's jurisdiction to prescribe and enforce rules with respect to all conduct or events occuring within defined areas considered subject to its control. International law, however, also permits states in certain circumstances to exercise jurisdiction even where the conduct or events occur outside of its territory. Typically, a state's claim to take unilateral measures of environmental protection will be based on its broad jurisdictional authority over a particular geographic area, such as its territorial waters or some contiguous zone.[27] In some cases, however, a state's claim may have a more specific character, related to its alleged special interest in the particular environment-affecting conduct or events in question, as in its regulation of ocean dumping by vessels carrying its flag. Finally, a state's claim to jurisdiction may in some cases merge these two approaches, as in the case of Canada's Arctic Waters Pollution Prevention Act, which in effect asserts jurisdiction on a broad geographic basis, but only over conduct or events having a specific potential environmental impact.

The legality of unilateral action will also be affected by the extent to which international law has already incorporated such newly emerging international environmental norms as those put forward at the 1972 Stockholm Conference on the Environment and in other recent international meetings and proclamations, such as United Nations Resolutions 2996 and 3129 and the 1975

27. For a good discussion of the Canadian experience, see Gotlieb & Dalfen, *supra* note 1.

Helsinki Accords.[28] Principle 21 of the Stockholm Declaration declares that:

> States have, in accordance with the Charter of the United Nations and the principle of international law . . . the responsibility to ensure that activites within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[29]

The principle that states have an international duty to avoid causing damage to the environment of other states or to areas beyond the limits of national jurisdiction arguably implies that a state threatened by another state's breach of this duty has the right to take reasonable action to protect itself from environmental damage. To the extent that international law presently recognizes such a principle,[30] the arguments for the legitimacy of unilateral action may be strengthened.

Finally, judgments concerning the legality of unilateral environmental action may conceivably be influenced by certain theoretical conceptions about the nature of international law. Some theories stress the primacy of state sovereignty. They see international law as restraining state sovereignty only to the extent that states have expressly or implicitly consented to such restrictions. Other theories see state powers as in effect derived from international law. Under this latter view, a state cannot unilaterally take action in the international sphere except where in-

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28. These resolutions and statements closely followed the wording of the Stockholm Declaration. *See* UNGA Resolution 2996 (Dec. 15, 1972); U.N.G.A. Resolution 3129 (Dec. 13, 1973); Charter of Economic Rights and Duties of States, adopted by the U.N. General Assembly Dec. 12, 1974; and the Final Act of the Conference on Security and Co-operation in Europe (Helsinki Accords), section 5 of which states: "[E]ach of the participating States, in accordance with the principles of international law, ought to ensure, in a spirit of co-operation, that activities carried out on its territory do not cause degradation of the ennvironment in another State or in areas lying beyond the limits of national jurisdiction."

29. The United Nations Conference on the Human Environment was held on June 5-16, 1972, Stockholm, Sweden. Representatives of 113 nations participated. Sections I-III of the Report of the Conference, U.N. Doc. A/CONF. 48/14, have been reprinted in 11 INT'L LEGAL MAT. 1416-69 (1972). The Declaration appears at 1420. For a summary of the results of the Conference, *see* COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT, ENVIRONMENTAL QUALITY—1972, at 78-80 (1972).

30. Gross, *World Law in 1972: Some Questions for the Assembly*, VISTA, 87, 90-91 (Sept./Oct. 1972).

ternational law specifically authorizes it to do so. This issue has arisen most concretely in the context of international judicial discussion of the burden of proof in customary international law. In the famous *Lotus* case,[31] for example, France complained that Turkey had acted illegally in asserting its criminal jurisdiction over a French officer on a French merchant vessel who was allegedly responsible for its collision with a Turkish vessel on the high seas off Turkey, with a consequent loss of lives. The Permanent Court of International Justice took the position that, in order for France to prevail, it was necessary that France establish the existence of customary law prohibiting Turkey from asserting its jurisdiction under these circumstances; it was not necessary for Turkey to establish that customary law authorized it to exercise jurisdiction. France was unsuccessful in meeting this burden.

More recently, this burden-of-proof question arose when Iceland sought to justify its unilateral extension of its fisheries limits to fifty miles by contending, *inter alia*, that there was no generally accepted rule of international law regarding the permissible breadth of fisheries limits, and, therefore, it was free to take unilateral action to establish such reasonable limits as were necessary to protect its own vital interests.[32] The International Court of Justice, in rejecting Iceland's 1972 claim, based its decision principally on Great Britain's long historical fishing experience in the contested region. It is relevant that, in a separate concurring opinion, five of the judges recognized that the current international law was uncertain, but took the view that Iceland nevertheless lacked the unilateral right to completely prohibit others from fishing in the zone. The five judges remarked that:

> It could therefore be concluded that there is at present a situation of uncertainty as to the existence of a customary rule prescribing a maximum limit of a state's fisheries jurisdiction. No firm rule could be deduced from State practice as being sufficiently general and uniform to be accepted as a rule of customary law fixing the maximum extent of the coastal state's jurisdiction with regard to fisheries. This does not mean that there is a complete "lacuna" in the law which would authorize any claim or make it impossible to decide concrete disputes. In the present case, for instance, we have been able to concur in a Judgment based on the concepts which we

31. Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A., No. 10.

32. GOVERNMENT OF ICELAND AND THE LAW OF THE SEA 27-28, 31-32 (1972) [hereinafter cited as ICELAND WHITE PAPER].

> fully support: the preferential rights of the coastal State and the rights of a State where a part of its population and industry have a long established economic dependence on the same fisheries resources.[33]

In 1976 Senator Edward Kennedy similarly argued that present international law does not prohibit the unilateral extension of a country's fisheries boundaries: "The extension of our fishing zone to 200 miles does not abrogate existing treaties; it does not violate international law; . . . Two previous Law of the Sea Conferences failed to agree on the permissible extent of coastal nations fishery jurisdiction. There are no international treaty provisions which circumscribe fishery limits."[34]

As these examples suggest, the burden-of-proof issue may be particularly relevant where the law is unclear, as may often be the case in the developing field of international environmental law. The more permissive view, which appears more widely supported, would in theory tend to buttress and encourage unilateral environmental action in such cases; the argument being that a state may do anything that international law does not specially forbid. It remains questionable, however, whether differences in theoretical perspectives really tend, in practice, to influence significantly either state decisions to take or not to take unilateral actions or international judgments as to the legitimacy of such actions.[35]

A. *Action Within a State's Recognized Territory, Territorial Waters, or Contiguous Zone*

In general, a state appears free to take whatever action it considers necessary or desirable within the territory recognized as

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33. Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda, on Iceland's Fishing Boundaries, [1974] I.C.J. 53.

34. Senator Kennedy in a speech before the U.S. Senate on January 28, 1976, *quoted in* LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976 at 230 (1976).

35. For a good discussion of the burden-of-proof issue in the context of the Anglo-Norwegian Fisheries Case (United Kindgom v. Norway), [1951] I.C.J. 116, see Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law,* 30 BRIT. Y.B. INT'L L. 1, 8-18 (1954). H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 365 (1958), suggests that the burden-of-proof issue is not really significant and that the determinative question is "[W]hat is the substantive rule of international law applicable to the dispute." *See also id.* at 359-67; A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 177-86 (1971).

subject to its jurisdiction[36] to protect itself against environmental injury. Thus, the broad range of domestic unilateral environmental actions would normally not raise any international legal problems. Moreover, such unilateral actions as restrictions for environmental purposes against importation of environmentally harmful products, or against entry into national waters or ports of foreign vessels failing to conform with national environmental standards, would in general appear not to violate international law. This right, however, may be subject to certain limitations. For example, applying domestic standards to such vessels might arguably be inconsistent with the doctrine of innocent passage.[37] Some precedents exist, however, including Canada's arguments concerning its Arctic Waters Pollution Prevention Act, that suggest that the doctrine of innocent passage may not apply where passage by foreign vessels threatens environmental harm,[38] and the Third United Nations Conference on the Law of the Sea (LOS III) appears to be moving in this general direction.[39] Certain types of import restrictions might violate the provisions of the General Agreement on Tariffs and Trade (GATT) or particular bilateral trade or commercial treaties.[40] Finally, certain unilateral actions might violate either customary or treaty standards protecting aliens and their property, especially where the action involved unreasonable treatment of or injury to foreign nationals

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36. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 17-23 (1965) [hereinafter cited as RESTATEMENT (SECOND)].

37. Convention on the Territorial Sea and the Contiguous Zone, *open for signature* Apr. 29, 1958. arts. 14-17, [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

38. *See* Bilder, *supra* note 7, at 20-22. *Id.* at 21n.80 quotes Mr. Beesley, Head of the Legal Division, Department of External Affairs, as saying: "It is the Canadian position that any passage threatening the environment of a coastal state cannot be considered innocent since it represents a threat to the coastal state's security."

39. *See* Articles 17-19 of the Draft Convention on Law of the Sea (Informal Text) of the Third United Nations Conference on the Law of the Sea, Aug. 27, 1980, U.N. Doc. A/CONF. 62/WP. 10/Rev.3 [hereinafter cited as Informal Text], which defines innocent passage as a right to navigate through the territorial sea unless, among other things, there is "[a]ny act of willful and serious pollution, contrary to this Convention."

40. *See, e.g.*, General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, para. I(b), 61 Stat. A61, T.I.A.S. No. 1700, 55 U.N.T.S. 187. Article XX, para. I(b) permits states to impose regulations necessary to protect human, animal or plant life or health."

or the destruction or seizure of foreign property.

B. *Action Outside a State's Recognized Territory, Territorial Waters, or Contiguous Zone*

Unilateral action occuring beyond the limits of the acting state's territorial or contiguous jurisdiction raises more complex and difficult legal problems. A state seeking to justify extraterritorial unilateral action might argue that the action was appropriate either under traditional international law theories of jurisdiction or newly evolved international norms regarding protection against environmental harm or that it was legally justified as an exercise of the overriding right of self-defense.

Traditional international law recognizes that a state may unilaterally exercise its jurisdiction over persons, activities, or events outside its territory in certain limited circumstances. First, under the so-called "nationality principle," a state may unilaterally establish regulations controlling the extraterritorial activities of its own nationals, companies, vessels or aircraft of its registry, and certain other classes of persons or enterprises having substantial connections with the state.[41] Many states have such regulations controlling their nationals beyond territorial borders, and as concern for pollution continues, more states are passing laws providing for such jurisdiction.[42] Normally, however, a state cannot enforce such regulations against its nationals or enterprises while they are within another state's territory, though it may be able to do so with respect to vessels or aircraft of its registry on the high seas.[43] This unilateral action by a state regulating its own nationals, companies, or vessels on the high seas or in foreign waters to prevent activities which might ultimately cause the state environmental harm, conceivably including even the bombing of its own vessels on the high seas to prevent shoreline pollution, would not appear to raise substantial international legal problems. Of course, where a state sought to apply its unilateral regulations to

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41. RESTATEMENT (SECOND), *supra* note 36, at §§ 30-32.

42. *See* Hickey, Jr., *Custom and Land-Based Pollution of the High Seas*, 15 SAN DIEGO L. REV. 466, 468-71 (1978); Ruster, *Divergent Standards of National Oil Pollution Legislation*, ENVIRONMENTAL LAW 119 (J. Nowak, ed. 1976). The Informal Text of the Third United Nations Conference on the Law of the Sea also establishes flag state responsibilities over aircraft. Informal Text, *supra* note 39, at art. 222.

43. RESTATEMENT (SECOND), *supra* note 36, at § 32.

conduct by its nationals in foreign territory, there might be difficult practical problems of concurrent or overlapping jurisdiction between the state taking the action and the other country concerned, which might also wish to regulate such activities.[44] Second, under the so-called "protective principle," a state may unilaterally regulate certain extraterritorial activities of aliens in order to protect significant governmental administrative interests, such as the integrity of its currency or visa system.[45] It might be argued that this principle is capable of expansion to deal with certain kinds of environmental threats. Finally, there is some authority to the effect that a state may take unilateral action to regulate not only conduct and activities occurring within its territory, but also conduct and activities occurring outside its territory that produce a substantial effect within its territory.[46] While this theory could conceivably be invoked to support a state's jurisdiction to prescribe rules to prevent extraterritorial actions by aliens threatening environmental harm within its territory, it would not support the application of sanctions against persons or legal entities violating its extraterritorial regulations unless they were "found" within its territorial jurisdiction.

In addition to traditional international law theories, a second possible justification for extraterritorial jurisdiction is that emerging international law either already recognizes or is rapidly moving towards recognition of the appropriateness of extraterritorial exercises of both prescriptive and enforcement jurisdiction for certain environmental protection purposes. Canada invoked this argument as a legal justification for its Arctic Waters Pollution Prevention Act, although it stressed the *lex ferenda* rather than *lex lata* aspect of relevant environmental law.[47] Subsequent developments have buttressed Canada's position in this respect. For example, claims to similar extensive pollution prevention zones have since been asserted by other coastal states, both in the Ocean Dumping Convention,[48] and in the current United Nations

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44. *Id.* §§ 37, 39-40, 44.

45. *Id.* § 33.

46. *Id.* § 18. *See, e.g.,* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

47. *See* Bilder, *supra* note 7, at 13-19; Gotlieb & Dalfen, *supra* note 1, at 247.

48. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *opened for signature* Dec. 29, 1972, 11 INT'L LEGAL MAT. 1294 (1972). The Convention was approved by the 91 participating states

Law of the Sea Conference negotiations,[49] which has substantially approved Canada's actions in its draft article 234, which gives coastal states special environmental authority over ice-covered areas of ocean within 200 miles of land.[50]

A third possible argument might invoke the doctrine of self-defense as establishing an allegedly inherent or overriding right of a state to take unilateral action to protect its environment, even where the action might otherwise be contrary to law.[51] Canada rested its argument for its Arctic Waters Pollution Prevention Act principally on this ground, claiming that the Act was justified as "based on the overriding right of self-defense of coastal states to protect themselves against grave threats to their environment."[52] Similarly, Iceland based its unilateral extensions of its fisheries jurisdiction from 12 to 50 and from 50 to 200 miles on the ground that the extensions were necessary to protect its fisheries, which allegedly were imminently threatened with destruction from foreign over-fishing.[53] The United States also claimed the need for protection of United States offshore waters when it first unilaterally expanded the United States fishing zone and later pollution control zone to 200 miles.[54] On one occasion,

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at the Intergovernmental Conference on the Convention on the Dumping of Wastes at Sea, held in London in October and November 1972.

49. Informal Text, *supra* note 39, at arts. 211 and 220.

50. Informal Text, *supra* note 39, at art. 234.

51. The concept of peremptory norms of international law*(jus congens)* is reflected in the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 53, 64, U.N. Doc. A/CONF. 39/27, *reprinted in* 8 INT'L LEGAL MAT. 679, 698, 703 (1969).

52. Summary of Canadian Note of Apr. 16, 1970, *reprinted in* 9 INT'L LEGAL MAT. 607, 610 (1970). *See also* Beesley, *supra* note 7, at 8.

53. In an aide-mémoire to the United Kingdom, Iceland stated the proposed extension of its fisheries limits to 50 miles was necessary "(i)n order to strengthen the measures of protection essential to safeguard the vital interest of the Icelandic people in the seas surrounding its coasts." Iceland's Aide-Mémoire of Aug. 31, 1971, *quoted in* Bilder, *supra* note 9, at 55. For Iceland's reasons for its 1975 extension, see U.N. MONTHLY CHRONICLE 24 (Jan. 1976).

54. In the debate on the Fishery Conservation and Management Act, Congresswoman Sullivan stated: "Meanwhile, our important fishery resources are facing extinction by overfishing from foreign fishing fleets. Thus we cannot wait but must act unilaterally now." Congresswoman Sullivan, speech in the House of Representatives, Oct. 9, 1975, *quoted in* LEGISLATIVE HISTORY OF THE FCMA, *supra* note 34, at 824. In 1977, when the United States Senate considered expanding the pollution control zone, Senator Muskie declared:

The many recent incidents of tanker spills, especially the disaster caused

Maurice Strong, former Executive Director of the United Nations Environmental Program, characterized certain environmentally harmful state actions (such as using weather modification technology to "steal" another country's rainfall), as "environmental aggression." Arguably, "environmental aggression" may suggest the existence of a right of self-defense analogous to the right of self-defense against military aggression.[55]

As various commentators have pointed out,[56] the doctrine of self-defense has traditionally been limited to legitimate and proportionate responses by a state to situations of the most urgent necessity. Article 51 of the United Nations Charter expressly embodies this doctrine only in this sense of defense against armed attack. Moreover, article 51 contemplates that unilateral action in self-defense is appropriate only until the United Nations Security Council takes multilateral measures to deal with the threat. Consequently, there seems to be little support in precedent for extending the traditional doctrine of self-defense in order to justify unilateral action against solely environmental threats.

It is possible, however, to conceive of environmental situations when the rationale of the doctrine of self-defense, reflecting compulsions to act to ensure self-survival, might apply. For example, a state might arguably invoke the doctrine to justify measures to restrain another state from exploding a nuclear device potentially creating a substantial risk of exposing the acting state's population to lethal radiation or some other environmental catastrophe. The suggestions that Australia and New Zealand send warships into the area of the French South Pacific nuclear bomb tests, and Canada's and Japan's protests against the United States underground nuclear Cannikin test on the Aleutian Island of Amchitka, are examples of situations in which the states concerned believed

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by the *Argo Merchant* off the coast of New England, underscore the immediate need for improved protection from and jurisdiction over marine pollution. The absence of clear legal authority to deal with oil spills beyond the territorial seas is indefensible.

134 CONG. REC. S13542 (daily ed. Aug. 4, 1977) (remarks of Senator Muskie).

55. Mr. Strong was quoted as saying in a press conference on March 22, 1973: "I predict that in 10 or 15 years environmental aggression will be a major source of political conflict." N.Y. Times, Mar. 23, 1973, at 11, col. 1.

56. *See, e.g.*, GLOBAL ENVIRONMENT, *supra* note 1, at 99-100; Goldie, *id.* at 117. *But see* Utton, *The Arctic Waters Pollution Prevention Act, and the Right of Self-Protection*, in INTERNATIONAL ENVIRONMENTAL LAW 143-44 (L. Teclaff and A. Utton eds., 1974), for a discussion of "self-defense" and "self-protection."

that their peoples as well as their environment were imminently and seriously threatened. The British bombing of the *Torrey Canyon* similarly reflected pressures for unilateral action analogous to those recognized in the doctrine of self-defense.

But the kinds of environmental threats that typically arise rarely involve risks so grave and imminent that they jeopardize the very survival of a state or its population. Moreover, any broadening of the doctrine of self-defense to encompass threats of environmental harm could pose considerable risks for the achievement of an effective system of international environmental regulation. The doctrine could conceivably be used by states to justify whatever unilateral action they wished to take, ostensibly to achieve environmental objectives.[57] Since the doctrine leaves such decisions largely to each state's own discretion, the potential role of international law in controlling relevant state behavior in the environmental field could be severely restricted.

At the present time, it is difficult to say more than that the international community's judgments as to the legitimacy of unilateral national claims to exercise jurisdiction beyond national territories for environmental purposes will probably be strongly influenced by some notion of reasonableness. The international community will probably tend to acquiesce in extraterritorial unilateral actions that seem to be reasonable and proportionate responses to the threats of environmental harm involved. A claim of reasonableness will be buttressed to the extent that the state can show that its action does not depart dramatically from traditional theories of jurisdiction; is a response to a relatively imminent, probable, and serious threat of environmental injury; is temporary in nature; and has little or no adverse impact on other states' interests. On the other hand, where the unilateral action severely challenges traditional international law; is directed at relatively long-run, highly contingent, and less serious environmental risks; establishes a permanent and far-reaching regulatory regime; and has a severe impact on the interests of other states, the international community is likely to question its legitimacy more seriously. The absense of broad international condemnation of the British bombing of the *Torrey Canyon* is probably due to the fact that its action, while technically very questionable under existing

57. *See, e.g.*, GLOBAL ENVIRONMENT, *supra* note 1, at 99. In 1973, Iran declared that its navy could stop and search ships within 50 miles of its coast that were suspected of polluting.

law, was generally regarded as reasonable. As the risks of environmental harms become better defined, and as the practical impact of unilateral actions to control these environmental risks becomes clearer, international law will probably move towards a more precise articulation of standards of reasonableness in the form of explicit norms.

IV. The Legality of Unilateral Action by a State to Protect Community Environmental Concerns: The Concept of Custodial Protection

To what extent may a state, consistently with international law, take unilateral action to protect community environmental concerns? There is little in existing international law or precedent suggesting any broad recognition of a right by states to act unilaterally to protect general community interests.[58] As has been indicated, the right to take unilateral action has usually been justified on the ground that such action was to protect the acting state's own interests. Only infrequently have broader community goals been invoked, and altruistic justifications of unilateral actions in terms of protection of the international community have generally been skeptically received.

In recent years, however, the emergence of an ecological perspective has posed this community protection issue more directly. There is a growing awareness that all peoples and nations inevitably share the planet earth and that they have responsibilities to each other and to future generations for preserving its environment. In this context, the legitimacy of action by each nation to protect a common environment may be strengthened—at least in the absence of effective collective international action. Even so, there is no clear-cut distinction between state action for the protection of national environmental interests and state action for the protection of common global environmental interests. Since the conditions of the global environment affect every state in the world, a state which claims to act to protect community interests necessarily protects its own interests as well. Indeed, concern for the state's own environmental interests, as affected by the general condition of the global environment, will in most cases be the predominant motive for any unilateral action taken.

There are recent indications that a principle of custodial re-

58. *See* Global Environment, *supra* note 1, at 100.

sponsibility is attaining growing recognition, at least in the context of multilateral international action. This principle is clearly reflected, for example, in the World Heritage Trust Convention,[59] based on the concept that some areas of the world are of such unique natural, historical, or cultural value that they are part of the heritage of all mankind and should be given special recognition and protection by the nations in which they are located. The principle is also reflected in emerging doctrines considering areas of the seabed and ocean floor beyond limits of national jurisdiction as the common heritage of mankind,[60] in the Antarctic Treaty,[61] and the Outer Space Treaty.[62] The concept of trusteeship with respect to non-environmental concerns is also embodied, of course, in the trusteeship provisions of the United Nations Charter.[63] However, none of these examples of multilateral arrangements directly support the concept of unilateral action to meet alleged custodial responsibilities.

There are certain other broad international law principles which may be analogous to the alleged right of a nation to act unilaterally to protect the global environment. One possible analogy is the concept of universal jurisdiction under which every state, in order to protect general community interests, is authorized to prescribe and enforce regulations against certain acts deemed offenses against mankind.[64] This concept allows any state to take action against such international crimes, regardless of the locus of the offense, the nationality of the offender, or the place where the offender is found. The usual examples of universal jurisdiction are piracy and war crimes. Slavery, hijacking, and genocide have been given a similar status under treaty, as have "crimes against internationally protected persons."[65] A limited

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59. The Convention Concerning Protection of the World Cultural and Natural Heritage, *entered into force* Dec. 17, 1975, 27 U.S.T. 37, T.I.A.S. 8226.

60. Informal Text, *supra* note 39, at arts. 133-191.

61. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

62. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

63. U.N. CHARTER arts. 75-91.

64. RESTATEMENT (SECOND), *supra* note 30, at § 34, Reporter's Note 2.

65. U.N.G.A. Res. 32/8, Nov. 12, 1977, "Safety of International Civil Aviation," 16 INT'L LEGAL MAT. 1545; the 1970 Hague Convention, 10 INT'L LEGAL

form of jurisdiction has also been proposed in current negotiations in the Third United Nations Law of the Sea Conference under which states would have a general right to act against offshore radio transmitters and drug smugglers.[66]

Another principle analogous to unilateral action in the interests of the world's environment is the concept of international human rights. The basis for international concern with human rights frequently has been explained in terms similar to those used to explain international concern with environmental problems. Thus, it is argued that serious and persistent human rights violations in one state may have significant repercussions or spillover effects in other states. Moreover, it is argued that the general global climate of observance of human rights has an impact on the level of observance in each individual state. The doctrine of humanitarian intervention is particularly suggestive of a right of unilateral action to protect community environmental interests. In the name of humanitarian intervention, some states have claimed the right to use force to act unilaterally to protect the human rights of citizens of other countries—an act that might otherwise appear to violate existing norms regarding intervention and aggression.[67]

The present draft of the proposed LOS Convention, however, does not seem to be moving in this direction. Article 221 of the Informal Text permits states to act unilaterally to "protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably (sic) be expected to result in major harmful consequences."[68] But there is nothing in the Informal Text articles expressly recognizing a concept of custodial responsibility in this respect.

MAT. 133 (1971); and the 1971 Montreal Convention, 10 INT'L LEGAL MAT. 1151 (1971). *See also* the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, U.N.G.A. Res. 3166, 13 INT'L LEGAL MAT. 41 (1974).

66. *See* Informal Text, *supra* note 39, at arts. 108-110.

67. *See, e.g.,* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973); Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force,* 67 AM. J. INT'L L. 275 (1973); Lillich, Forcible Self-Help by States to Protect Human Rights, 53 IOWA L. REV. 325 (1967).

68. Informal Text, *supra* note 39, at art. 221.

A. *Action Within a State's Recognized Territory, Territorial Waters, or Contiguous Zone*

The legal issues concerning domestic unilateral action are similar, whether the action is designed to protect community environmental concerns or state environmental interests. As previously indicated, international law places few constraints on a state's actions within its own territory. The fact that actions were taken out of an allegedly altruistic motive to protect broader community environmental interests, rather than, or as well as, out of a motive to protect national environmental interests, would not appear to weaken a state's claim to jurisdiction in this respect. Thus it seems clear that a state could act unilaterally to regulate conduct within its territory which might threaten the preservation of its own endangered species or national parks as a world heritage. Moreover, a state could unilaterally prohibit importation of products of foreign endangered species, or control exportation of polluting devices or substances deemed likely to harm the global environment, unless such actions were inconsistent with specific international agreements.

B. *Action Outside a State's Recognized Territory, Territorial Water, or Contiguous Zone*

The legality of unilateral action beyond normal territorial jurisdiction for the purpose of protecting community environmental concerns is more questionable, absent international authorization for state action. The international community may be reluctant to recognize the right of a state to decide on its own what is in the international community's interest and how this interest can best be furthered. The arguments for the legality of such action are similar to those indicated in the discussion of extraterritorial action by a state to protect its own environmental interests. But applied in the context of community environmental concerns, the arguments for the legality of unilateral action are less persuasive.

First, it should be noted that, under the nationality principle[69] a state has jurisdiction to regulate the activities of its nationals, companies, and ships or aircraft flying its flag even outside of its territories. It may presumably exercise this jurisdiction in order to protect broader community environmental concerns as well as its own environmental concerns. Thus, the United States could

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69. *See* note 41 *supra* and accompanying text.

unilaterally establish regulations to prohibit dumping or other potentially polluting activities by United States vessels or aircraft in international or foreign waters or airspace; establish regulations to prevent United States nationals or companies exporting to foreign countries or operating on the high seas or in foreign countries from causing environmental harm abroad; take measures to ensure that United States scientists do not conduct experiments that might be harmful to the environment of the oceans, Antarctica, or outer space; or establish environmental standards covering the kinds of foreign projects its foreign assistance funds or activities or its technical assistance personnel abroad can support. On the other hand, it is questionable whether existing international law provides a jurisdictional basis for a state to claim the right to regulate the conduct and activities of aliens carried on wholly outside of its territorial jurisdiction solely to protect community environmental interests.

It might be argued, however, that international law has recently changed or is currently changing to permit certain unilateral exercises of extraterritorial jurisdiction to protect community environmental concerns. At least a few recent supporting precedents can be adduced. For example, Canada justified its Arctic Waters Pollution Prevention Act in part on the ground that it was fulfillment of its custodial responsibility to protect mankind's Arctic heritage. Prime Minister Trudeau commented that "[w]e owe it to the world to do something [about Arctic pollution]."[70] Similarly, Iceland, the United States, and other coastal states have in part justified extensions of fishing limits or establishment of extensive fisheries conservation zones on the ground that these are necessary to permit the acting countries to meet their alleged custodial responsibilities to protect man's common interest in preservation of the world's fisheries resources.[71] Again, it may be urged

70. N.Y. Times, Nov. 12, 1969, at 7, col.1. Beesley, *supra* note 7, at 6, states that the Arctic Waters Pollution Prevention Act "makes clear the Canadian Government's determination to discharge its responsibilities for the protection of the Arctic environment." The *Times* also quoted Prime Minister Trudeau as stating in the House of Commons on October 24, 1969: "We do not doubt for a moment that the rest of the world would find us at fault, and hold us liable, should we fail to ensure adequate protection of that environment from pollution or artificial deterioration." *Id.*

71. Senators Magnuson and Stevens declared that the United States expansion of its fishing control zone would protect:

both U.S. and world community interests in fishery resources found off the

that the various states party to the Antarctic Treaty, and the United States and the Soviet Union in carrying out space activities subject to the Outer Space Treaty, have assumed an essentially custodial role on behalf of all mankind with respect to the prevention of these unique environments.[72] But these precedents seem too sparse and controversial to be persuasive evidence that a broadly applicable new norm in this respect has presently evolved.

Finally, it may be urged that there exists some doctrine of community-defense, analogous to the doctrine of self-defense, under which any state has an overriding right to take unilateral action to prevent imminent, probable, and grave harm to the global environment, even if the activities threatening that harm occur outside the limits of its traditional jurisdiction. The states in the examples discussed above justified their actions in part on the ground that only such immediate and far-reaching unilateral measures could protect the common interest in saving the resources involved from the threat of imminent destruction.[73] Once again, however, these unilateral actions have proved controversial, and there appear to be few if any other supporting precedents. Whatever may be the reach of the doctrine of self-defense as applied to unilateral action by a state to protect itself from environmental harm, there is little to suggest that the international community is as yet prepared to accept the use of this concept to

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coast of the United States. Over-fishing of these resources, particularly by foreign fleets, has resulted in severe depletion of many economically important fish species—this is fact. It has been estimated that U.S. coastal waters contain upward of 20% of the world's living resources and positive U.S. action to protect and conserve these resources, as exemplified by S. 961, pending international settlement on the question of coastal state control over fishery resources, not only protects the resources for the United States but for the world community at large.

W. Magnuson and T. Stevens, Memorandum to the Senate Foreign Relations Committee concerning S. 961: The Magnuson Marine Fisheries Conservation and Management Act (Nov. 21, 1974), *quoted in* LEGISLATIVE HISTORY OF THE FCMA, *supra* note 34, at 625.

72. *See, e.g.*, Bilder, *The Present Legal and Political Situation in Antarctica*, in THE NEW NATIONALISM AND THE USE OF COMMON SPACES: ISSUES IN MARINE POLLUTION AND THE EXPLOITATION OF ANTARCTICA (J. Charney ed.) (to be published in 1981).

73. This notion seems implicit in the Canadian statements quoted *supra* note 70. *See also* Bilder, *supra* note 7, at 11 n. 45. For Iceland's position, see ICELAND WHITE PAPER, *supra* note 32.

legitimate unilateral state action to prevent community environmental harm.

Whether international law will eventually move toward recognition of the doctrine that a state can unilaterally assume in the community's interest a custodial role over an adjacent environment not normally subject to this jurisdiction remains to be seen. Certainly, the international community may be expected to be skeptical of the alleged altruistic motives of states making such claims. This is not to imply that the concept of custodial protection should be discarded, indeed, it opens important and interesting possibilities for new international arrangements in the environmental field. It is probable, however, that this concept will prove most readily acceptable only when it is subject to the safeguards of multilateral rather than unilateral state action. This concern that any action by states to protect the international environment be subject to broader international standards is illustrated, for example, in the current LOS III negotiations; current proposals would permit states to regulate vessel pollution in their Exclusive Economic Zones, but such rules should be "conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference."[74]

V. The Effects of Unilateral State Action

Unilateral state action to prevent international environmental harm may have various consequences. In certain respects, it may help achieve the general international objective of preventing environmental injury. In other respects it may hinder attainment of this or other desirable objectives. Unilateral action may also have broader political and economic implications and effects that should be taken into account in assessing its overall desirability.

A. *Possible Advantages of Unilateral Action*

A principal advantage of unilateral state environmental action is the promptness with which state power and sanctions can be effectively brought to bear against conduct or activities threatening environmental injury. Thus, the incentives to catch endangered species will be immediately reduced when a significant importer unilaterally imposes state restrictions against importing

74. Informal Text, *supra* note 39, at art. 211(5).

these species or their products. In some cases, the alternatives to unilateral action may be no regulation at all, less effective regulation, or long delays until regulation is implemented. There may be various political, economic, military, or technical reasons why multilateral agreement is likely to prove impossible or extremely difficult to achieve. And even if mutual agreement on a regulatory regime is reached, it may only be at the level of the lowest common denominator, with the state most resistant to effective regulation in effect setting maximum standards for all participants. In practice, unilateral action is frequently justified on the ground that the urgency and gravity of the threat to which it is a response simply does not permit the delays and uncertainties involved in attempts to secure multilateral action. Canada used this argument to justify its Arctic Waters Pollution Prevention Act; Iceland used it to justify the extension of its fisheries limits; and the United States invoked this argument in its unilateral adoption of interim steps to protect its fisheries resources until such time as an acceptable LOS treaty would be adopted.[75]

A second advantage of unilateral action is that action by one state may furnish precedents and experience upon which other states can usefully draw. The action taken by one state may call attention to similar threats to other countries, demonstrate that particular types of regulatory measures are practical, and, by example, establish political or moral pressures for other states to take action to deal with their own environmental problems.

Third, unilateral action may in certain circumstances have a wide ranging and even global beneficial environmental impact, far exceeding any immediate effect within the acting state's territory or on its nationals. This may especially be true if the acting state occupies a position of particular leverage because of its size, wealth, or economic or geographical position. One type of environmental leverage may derive from a state's special international trade position. For example, any measures to reduce environmental risks taken by a state that is an exporter of potentially polluting products or technology help to protect not only the acting

75. In the United States House of Representatives, it was argued that: "Legislation is necessary now to save our fishing industry and our resources, and it is also required to provide the impetus without which there is serious doubt that the efforts to obtain an international Law of the Sea Agreement through the auspices of the United Nations will ever reach fruition." Congresswoman Sullivan, *supra* note 54, at 824.

state, but also all countries which import its products and technology. An illustration might be United States regulation designed to ensure the incorporation of adequate pollution-prevention design features on United States manufactured oil drilling equipment, a considerable quantity of which is exported. Conversely, a state that is a leading importer of certain products or technology may, through establishing environmental standards applicable to such imports, influence foreign manufacturers and exporters to take environmentally desirable measures that will produce benefits wherever such products or technology are used. Thus, United States pollution standards covering aircraft or automobiles will, because of the importance of the United States as both an exporter and importer of these products, have a major impact on their use and design in other countries.[76] Another type of environmental leverage can derive from the fact that a state's nationals or companies control enterprises in other countries. Thus, a state that is the base for multinational corporations, or one having important direct investments abroad, is at least in theory in a position to bring considerable influence to bear to ensure that its national companies comply with desirable environmental policies in their foreign operations. Finally, a state may be in a position to exercise widespread influence over environmental standards by virtue of its geographic position or control over vital air or sea routes. Indonesia's and Malaysia's plans to impose certain traffic regulations on vessels passing through the Straits of Malacca have caused international concern since ships of many nationalities must regularly use this passage.[77]

A fourth advantage of unilateral action is that it may help to promote the development of relevant international environmen-

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76. The United States is now taking steps to force foreign automobile manufacturers to meet American exhaust standards. Although such standards may not be formally adopted in countries like Japan or Germany, the foreign automobile manufacturers must master such standards if their cars are to be sold in American markets. Once this technology has been mastered, it usually happens that domestic pressure builds up for installation of similar equipment on the cars sold in Japan and Germany.

77. Malaysia and Indonesia had been considering controls on navigation through the Straits of Malacca for several years. In February, 1977, they agreed on a traffic separation and control system. FAR EASTERN ECONOMIC REVIEW 82-83 (March 18, 1977). This system has now been approved by the IMCO, and though not yet in effect, should be going into operation soon. Phone conversation with the information officer, the Embassy of Malaysia (Oct. 17, 1978).

tal agreements. The example set by unilateral action, the moral and political pressure it creates, and conceivably the threat and costs of continued unilateral approaches, may lead other states concerned to cooperate in developing multilateral solutions they might not otherwise be inclined to seek. Thus, the United States appears to have become more actively interested in a proposed international agreement to protect the Arctic environment following Canada's enactment of the Arctic Waters Pollution Prevention Act. Similarly, fisheries conservation arrangements have in some cases been negotiated only following coastal state threats to impose fisheries conservation regimes unilaterally. And unilateral United States legislation to protect endangered species probably helped to stimulate subsequent international acceptance of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora. The Ports and Waterways Safety Act of 1972 is especially interesting in this respect. Section 201(7) of the Act[78] provides that unilateral regulations regarding the design, construction, and operation of bulk carriers in United States waters would be applied to foreign vessels by 1976 unless relevant standards were adopted sooner by international agreement. The legislative history of the Act makes it clear that one of it purposes was to encourage the adoption of effective international regulations at the 1973 Conference on Marine Environmental Safety, held by the Intergovernmental Maritime Consultative Organization (IMCO). That conference resulted in a Convention for the Prevention of Pollution from Ships.[79]

Finally, unilateral state action may have a desirable impact on the evolution of progressive customary international norms con-

78. 46 U.S.C. § 391(a)(7) (1976).

79. S. REP. No. 92-724, 92d Cong., 2d Sess. 28 (1972). *See also* H.R. REP. No. 92-1178, 92d Cong., 2d Sess. 12 (1972). For two other statutory provisions calling for the encouragement of relevant international agreements, *see* Marine Mammal Protection Act of 1972, § 108, Pub. L. 92-522, 92d Cong., 2d Sess. 1 U.S. CODE CONG. & AD. NEWS, 92d Cong., 2d Sess. 1216 (1972). The United States has held off ratifying the Convention for the Prevention of Pollution from Ships. In 1978, however, IMCO adopted a Protocol strengthening the Convention in response to United States pressure. On October 17, 1978, President Carter signed the United States Port and Tanker Safety Act amending the 1972 Ports and Waterways Safety Act, bringing United States legislation substantially in line with the new Protocol. *See* INT'L ENVIRONMENT REPORTER, CURRENT REPORTS 57-58 (Mar. 10, 1978); 171 (June 10, 1978); 371 (Nov. 10, 1978); and the CONG. RECORD S16762-63 (daily ed., Sept. 30, 1978).

cerning environmental protection. Unilateral actions manifest changing state attitudes towards the relevant rules of international behavior and may, if generally followed or acquiesced in by most other states, ultimately result in the development of new customary law. Canada justified its enactment of its Arctic Waters Pollution Prevention Act in part by the argument that its unilateral action would help spur the progressive development of new law to provide protection against such environmental threats.[80] Iceland made similar arguments to justify unilateral extension of its fisheries limits.[81] The flurry of states expanding their coastal jurisdiction in 1976 clearly indicated that the customary law of ocean boundaries had changed, even in the absence of a final LOS treaty.

B. *Possible Disadvantages of Unilateral Action*

A principal disadvantage of unilateral action is that it tends to discourage the growth of international order based upon mutual accommodation, cooperation, and international law. Unilateral action by one state may encourage similar unilateral action by others, which may be subject to domestic pressures to protect

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80. Prime Minister Trudeau stated, "[W]e have acted as we have because of necessity, but also because of our awareness of the impetus given to the development of international law by individual state practice." Prime Minister's Press Speech. Mitchell Sharp, the Minister for External Affairs, commented that, "The bill we have introduced should be regarded as a stepping stone toward an elaboration of an international legal order which will protect and preserve this planet. . . . " 114 H.C. DEB. 5949 (April 16, 1970). *See also* Summary of Canadian Note of April 16, *in* 9 INT'L LEGAL MAT. 607 (1970); Bilder, *supra* note 7, at 12.

For discussion of some of the issues raised by this argument, *see* Bilder, *supra* note 7, at 25-27.

81. *See* ICELAND WHITE PAPER, *supra* note 32, at 12-14, 36, 40-42. *Id.* at 12 suggests:

> Unilateralism and multilateralism have supplemented each other in developing the international law of the sea. As a rule only after an embryo of customary international law has been created through the unilateral action of several states, and by gradual accceptance of their principles, are those principles embodied into bilateral and multilateral treaties.

Id. at 42 states: "But what is Iceland aiming at on the international level? This can simply be answered by saying: *Development of progressive international law of the sea.*"

For discussion of some of the issues raised by this argument, see Bilder, *supra* note 9, at 119-21.

their national interests. Moreover, where unilateral action is perceived by other states as harmful to their interests, and particularly where it is contrary to existing international norms, the other states may in response take retaliatory actions. As a consequence, nations may turn to highly competitive rather than collaborative foreign policies, and patterns of international cooperation may degenerate. In short, apart from any possible limitations of unilateral state action with respect to the specific objectives of environmental control, it may, by its inherently individualistic character, exact broader social costs in terms of the international political and legal process.

A second disadvantage of unilateral environmental action is that it may create international tensions and conflict. Even if unilateral action does not significantly affect important interests of other states, and even if it is generally consistent with international law, other states may still resent the fact that action was taken with apparent indifference to possible cooperative approaches. For example, unilateral environmental restrictions on imports or exports of products or technology, unilateral regulation for pollution control purposes of foreign vessels or aircraft entering territorial waters, or unilateral restraints on foreign assistance to encourage foreign attention to environmental objectives may constitute irritants or be regarded as improper by other countries even where the state's power to act is unchallenged.[82] Tensions may be inevitable if other states decide that the unilateral action significantly harms their interests, and particularly where they perceive it as impinging on their rights. This would likely be true where a state unilaterally attempts to assert jurisdiction for alleged environmental purposes on the high seas adversely to other countries' interests, as, for example, Iceland's extensions of its fisheries jurisdiction, which resulted in the repeated cod wars and heightened tensions within NATO.[83] If the states affected should respond by taking retaliatory measures, political and other tensions would surely escalate.

Third, unilateral action may be inherently limited in its efficiency and effectiveness. A state can unilaterally regulate only those aspects of environmental problems that are within the

82. *See, e.g.*, Coan, Hillis, & McCloskey, *supra* note 1, at 89.

83. For brief descriptions of the events after Iceland's declarations of expanded fishing zones, see LEGISLATIVE HISTORY OF THE FCMA, *supra* note 34, at 497-98; and Dershem & Kaisler, *supra* note 25, at 729-30.

reach of its effective power. But many environmental problems have a broader scope and thus require concerted action for their effective solution. For example, a lower riparial on an international river cannot hope to ensure that its portion of the river is not polluted without securing the cooperation of its upstream neighbors. Unilateral action to prevent coastline pollution of the oceans will be only partially effective if other states are prepared to permit substantial quantities of oil or other polluting substances to be released by their vessels beyond any unilaterally established pollution control zone. One state's prohibition of the exporting of DDT or similar polluting substances will have little global effect if other states increase their exports by a corresponding amount. The establishment of a protective fishing zone which attempts to preserve a declining species of fish is ineffective if that species migrates into the waiting nets of fishermen outside of national jurisdiction. Banning supersonic transports in one state will not protect the global atmosphere if other states permit SST's to operate. Prohibiting importation of endangered species or their products in one nation will not protect such species if other states increase their imports of such products by an equivalent amount.

A fourth disadvantage of unilateral environmental action may be disproportionate interference with international trade and other transnational activities in terms of the practical needs and goals of environmental control.[84] Thus, different states acting independently may impose differing or even inconsistent requirements on the importation of the same products, or on foreign vessels or aircraft entering their territories in order to meet similar environmental objectives. While the manufacturers of the products or the owners of the vessels or aircraft may be prepared to comply with one reasonable set of environmental regulations, it may be extremely difficult, if not impossible, for them to meet all of the varying national requirements.[85] Efficient international trade clearly requires some degree of uniformity in the relevant

84. d'Arge & Kneese, *Environmental Quality and International Trade*, 26 INT'L ORG. 419 (1972); Comment, *International Trade Implications of Pollution Control*, 58 CORNELL L. REV. 368 (1973).

85. This was argued when the United States proposed pollution liability requirements differing from the IMCO Convention provisions. *See* Wood, *An Integrated International and Domestic Approach to Civil Liability for Vessel-Source Oil Pollution*, 7 J. MAR. L. AND COM. 1, 12 (1975).

environmental regulations of various states. This is a goal which unilateral action, by definition, has difficulty in meeting.

Finally, unilateral action may involve substantial competitive risks for the acting states.[86] These risks may lead them to enact less stringent regulatory measures than might be reasonable if the problem were dealt with on a multilateral basis. Thus, a state requiring its automobile manufacturers to include costly pollution control devices in automobiles they export may find that its auto exports decline as foreign buyers choose cheaper cars exported by other states not requiring antipollution devices. Similarly, a state adopting stringent and costly pollution standards for domestic industries may incur economic loss as industry moves from or is not attracted to its territory, preferring to locate in other states with less stringent and hence less costly standards. Indeed, some states may find it profitable to become pollution havens, attracting polluting activities by promising that environmental regulations will not be imported. The concern of one state that it potentially may be placed in a competitively disadvantageous position if it adopts higher standards for preventing environmental harm, the phenomenon of the exporting of pollution from states with higher standards to those with lower standards, and the consequent dislocation in patterns of international trade, can be avoided only if all interested states move collectively to adopt reasonable and effective environmental standards.

VI. Accommodating Individual State Action Within a Multilateral Framework

It was suggested at the beginning of this discussion that the

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86. *E.g.*, Wall St. J., Nov. 29, 1971, at 1, col. 6, *quoted in* Bleicher, *supra* note 1, at 83 n. 345:

> Businessmen fear that a lack of coordination among national [environmental] regulations could lead to a sort of "flags of convenience" situation in which certain countries would offer lax pollution controls as a lure to industry, much as maritime companies are now given tax advantages in flags-of-convenience nations like Liberia and Panama.
>
> The result could be a severe competitive disadvantage for those companies that operated in the stricter nations. . . .

For further discussion *see* Council on Environmental Quality, Third Annual Report, Environmental Quality—1972, at 76-82; Coan, Hillis, & McCloskey, *supra* note 1, at 91; Kirgis, *Effective Pollution Control in Industrialized Countries; International Economic Disincentives, Policy Responses, and the GATT*, 70 Mich. L. Rev. 859 (1972).

bulk of both rulemaking and enforcement powers to prevent international environmental injury will probably remain in the hands of individual states. But this does not mean that state actions need necessarily be taken on a unilateral rather than a multilateral basis. An important task for international law and environmental diplomacy must be the devising of international arrangements to define, coordinate, harness, and, where necessary, constrain state discretion in order to obtain the maximum environmental benefits from individual state action while avoiding its principal disadvantages. There are several techniques that might be utilized.

First, the international community could attempt, through broad and comprehensive international agreements, expressly to substitute overall multilateral solutions for unilateral ones. These agreements could delineate the parties' specific duties for the avoidance of transnational environmental harm and might also clarify the rights and remedies of states threatened by environmental injury. The Nuclear Test Ban Treaty[87] and the Ocean Dumping Convention[88] are examples of such multilateral agreements. Agreements that successfully reduce international environmental threats may obviate the need for unilateral action in those cases and may ease the pressures on states to respond unilaterally to any remaining threats. Moreover, any remedies created by international agreement may prove to be attractive alternatives to unilateral action. It is unlikely, however, at least in the near future, that international environmental agreements will create a multilateral authority with the power of enforcement. In most cases, matters of implementation and enforcement will probably be delegated to the parties, often with a considerable range of discretion. Thus, the role of state action, while somewhat limited, will still be significant. The Ocean Dumping Convention, for example, requires the parties to regulate dumping, but leaves matters of implementation and enforcement largely in the hands of the participating states. The Convention entirely prohibits the dumping of certain very harmful substances, but certain other

87. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *done* Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

88. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *opened for signature* Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165.

substances may be dumped pursuant to special or general permits granted by each state itself. The provisions restricting oil pollution in the conventions and agreements administered by the Intergovernmental Maritime Consultative Organization (IMCO) have generally left the licensing and basic supervision of ships to the flag state, leading to charges that flag of convenience shipping is the largest and worst pollution offender.[89] Indeed, where a multilateral agreement delgates very broad discretion to the participating states, it may be doubtful whether the problems of unilateral action are actually avoided. Clearly, any discretionary agreement is subject to abuse by the member states. Thus, it may ultimately prove useful to distinguish between multilateral agreements that are serious attempts to find cooperative solutions to international environmental problems, and those which primarily serve to cloak unilateral discretion under the guise of multilateral cooperation.

A second way of dealing with the problem of state discretion would be the clarification of the geographical zones subject to unilateral action by each state to prevent international environmental harm. The most significant aspect of this problem concerns the limits of state jurisdication to control pollution in the oceans. Thus, it is likely that the Third United Nations Law of the Sea Conference will finally agree on a principle of coastal state jurisdiction for pollution prevention purposes over an extensive off-shore zone. LOS action will provide multilateral legitimization of individual state action to prevent pollution. The present LOS informal text permits the coastal state to control its territorial zone and also to set standards consistent with international laws in the Exclusive Economic Zone.[90] The coastal state is also allowed to take emergency measures beyond the territorial zone to prevent pollution damage.[91] The coastal state is prohib-

89. Studds, OIL AND WATER, TRIAL 28 (March 1977). For examples of IMCO flag state provisions, see Convention for the Prevention of Pollution of the Sea by Oil, *done* May 12, 1954, 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3; Prevention of Pollution of the Sea by Oil: Amendments to the Convention of 1954, *adopted* October 21, 1969, 28 U.S.T. 1205, T.I.A.S. No. 8505, arts. 2 and 6; 1972 Convention of the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *supra* note 88, at art. 7; and the discussion in United States Congress Office of Technology Assessment, Oil Transportation by Tankers: An Analysis of Marine Pollution and Safety Measures 72-75 (July 1975).

90. Informal Text, *supra* note 39, at art. 211(4) and (5).

91. Informal Text, *supra* note 39, at art. 221.

ited, however, from applying more than monetary punishment for pollution caused outside of the territorial zone.[92] Similarly, the Conference has, as indicated, accepted broad coastal state jurisdiction for fisheries conservation purposes. Whether the international community can effectively control such jurisdiction to assure that international interests are not abused remains to be seen.

A third technique for the control of state discretion would be the clarification, preferably through international agreement, of the circumstances under which a state may legitimately act to protect itself against specific threats of environmental injury which arise beyond any recognized limits of national jurisdiction. The 1969 International Convention Relating to Intervention on the High Seas of Oil Pollution Casualties,[93] designed to deal with the *Torrey Canyon* type of situation, is an example of this technique. Under article 1, paragraph 1, of the Convention:

> [The] Parties . . . may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

The Convention stipulates the conditions that allow protective measures to be taken and the procedures to be followed. It also imposes upon a state that exceeds what is reasonably necessary to achieve the ends stated in the Convention the obligation to pay compensation for any resulting damage. Provision is made for the settlement of disputes arising out of any measure purported to be taken under the Convention. In effect, the Convention legitimates individual state action to deal with such specific environmental threats, but does so within a multilateral framework which provides certain safeguards and mechanisms for dispute settlement. A 1973 Protocol to this 1969 Convention extended the same procedures to cover Cases of Marine Pollution by Substances Other Than Oil,[94] and the latest LOS III draft articles include a similar

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92. Informal Text, *supra* note 39, at art. 230.

93. *Done* Nov. 29, 1969, in INT'L LEGAL MAT. 25 (1970); in force for the United States, May 6, 1975, 26 U.S.T. 765; T.I.A.S. 8068.

94. 1973 Protocol to the 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other Than Oil, *re-*

provision.[95]

Finally, the international community could reach a minimum consensus, through international agreement or otherwise, that any unilateral environmental action taken must conform to or not exceed certain standards.[96] Internationally formulated environmental standards of this character, which the proposed LOS Convention seems likely to require, might help to remove some significant disadvantages of unilateral action by encouraging a measure of uniformity among the regulations established by various states. The LOS draft articles on marine pollution also provide that when there are exceptional circumstances and a coastal state feels more stringent safeguards for a specific area are needed, that state should consult with the appropriate international agency and present the scientific evidence and proposed regulations to support its request.[97] Such uniformity would in turn provide some measure of predictability and a basis for natural decision-making to those potentially affected.

VII. A TENTATIVE ASSESSMENT

The final question is whether it is possible to make any broad judgment on the appropriate role of unilateral action in preventing international environmental injury. The advantages of multilateral rather than unilateral approaches to international environmental problems are, of course, numerous and obvious. Cooperative action is in theory, and often in practice, more efficient and effective than unilateral action. Indeed, some environmental problems may be incapable of solution if each nation acts alone. Moreover, multilateral approaches can avoid or reduce many of the potential political and economic costs of unilateral action. Finally, multilateral approaches are intrinsically more desirable than unilateral approaches because of their broad tendency to reinforce collaborative rather than competitive patterns of international behavior. Consequently, where effective multilateral approaches to prevent international environmental injury are feasible, a presumption in favor of multilateral action and against unilateral action seems justified.

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printed in 21 INT'L ENVIRONMENT REPORTER 1321 (no date).

95. Informal Text, *supra* note 39, at art. 221.

96. *See, e.g.*, COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT, ENVIRONMENTAL QUALITY—1972, at 88-91 (1972).

97. Informal Text, *supra* note 39, at art. 211(6).

In practice, however, the issue of unilateral action is seldom cast in terms of such clear alternatives. States acting unilaterally to prevent environmental injury rarely oppose multilateral action in principle. More typically, they will recognize the desirability of multilateral approaches, but will argue that multilateral approaches, as a practical matter, are likely to prove impossible to achieve or ineffective to deal with the grave and urgent environmental threats involved. In this context, the alternative to unilateral action is not multilateral action, but inaction. While there are situations where this type of argument seems unsupported by the facts, in some cases it may have a solid basis. It is true that the international community has in general been slow to act to meet environmental challenges, and that the multilateral measures adopted are not as effective as they might be. Consequently the skepticism and impatience expressed by some states is understandable. When the alternative to unilateral action is doing nothing, the case for unilateral action to deal with environmental problems seems clearly strengthened.

It should be recognized, however, that this justification of unilateral action implies that, when the environmental problem is one to which multilateral approaches are in principle applicable, unilateral action is appropriate only as an interim measure.[98] That is, unilateral measures would, under this theory, be consistent with community goals and interests only to the extent that they are imposed solely pending the possible evolution of effective multilateral approaches; consequently they would be preempted by multilateral measures when such measures are achieved. That a particular unilateral measure is intended to serve only this in-

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98. One commentator suggested:

> In view of the apparent trend toward overexploitation of certain stocks of the world's commercial fishes, and in light of the proven incapacity of the international community to come to effective agreement on any important topic in anything like a timely fashion, coastal nations ought to be allowed—even, perhaps, encouraged in some instances—to take emergency resource-protective action in the high seas within the following guidelines: (1) the protective action must be a response to a demonstrable conservation crisis, (2) the protective action must be concerned solely with protection of the endangered resource, (3) the protective action must not unreasonably discriminate on the high seas against nationals of other nations, (4) the protective action must carry an automatic termination time, (5) the protective action must be accompanied by a clear call for international agreement.

Jacobson, *supra* note 1, at 457.

terim purpose might be shown by the inclusion of features tending to encourage rather than discourage the development of multilateral arrangements to deal with the environmental problem concerned and by its capacity to be incorporated by or absorbed into any multilateral arrangements ultimately attained. The most telling test in these cases will be in the actual development of a multilateral agreement capable of dealing effectively and on a collaborative basis with the environmental threats at issue. If a state refuses to join in such a multilateral arrangement, and instead continues to act unilaterally, the credibility of its case for unilateral action will erode.

In practice, the international community will probably judge the propriety of a given unilateral action only after taking account of all relevant considerations. In a few cases, the judgement will be clear. But more often than not there will be reasonable arguments both for and against the propriety of a particular unilateral action. Whether the international community will, in these cases, actually apply a presumption against unilateral action remains to be seen.

Certain other aspects of the problem of unilateral action warrant at least brief comment. First, states may in some cases claim environmental justifications for unilateral actions that are intended primarily to achieve other, more questionable objectives. For example, measures restricting imports ostensibly for environmental reasons may actually be imposed to protect domestic industries against foreign competition. Coastal state claims to far-reaching fisheries jurisdiction for conservation purposes may be intended principally to secure exclusive access to the catch for the coastal state's fishermen. Any assessment of the reasonableness of such unilateral claims must, of course, look to their real rather than their purported purposes.

Second, any analysis of unilateral environmental action should take account of the fact that states vary greatly in size, influence, and relative power and that similar actions by different countries might consequently have very different effects. The problem is that it is not clear in which ways the inequalities cut. One might expect the larger and more powerful states to be the leading proponents of unilateral environmental action since these states would seem best able to enforce their actions and thus impose their views on other states. Conversely, one might expect the smaller and weaker states to favor multilateral environmental arrangements because these might best permit them to cumulate

their power and thus gain recognition for their interests. But it has frequently been the less powerful states, such as Canada, Iceland, and some developing nations that have in practice been the strongest proponents of unilateral action. More powerful nations like the United States and England have frequently argued for multilateral solutions to environmental problems. Indeed, experience suggests that in the current political context in which the more powerful states are often limited in the coextensive uses of their power, weaker states may sometimes find that they can pursue their national interests more effectively through unilateral rather than multilateral actions.

It might be argued that smaller less powerful states should be allowed more freedom to take unilateral action than larger and more powerful states since any possible adverse consequences from smaller states' action will presumably be limited. But it could also be argued that the larger states should be allowed to have more freedom to act because far-reaching unilateral action can be expected to have significant beneficial impact in preventing environmental injury. In practice, however, there may be little direct correlation between a state's size and power and the impact of its unilateral action. For example, Iceland is one of the world's smallest states with a population of only about 200,000, but the unilateral extensions of its fisheries limits had important consequences for the British and West German economies and for the management of the important Icelandic fisheries.[99]

Third, in making any judgments concerning the desirability of multilateral and unilateral attacks on international environmental problems, consideration should be given to the possible relation of developments in the environmental field to the course of development of international law more generally. Thus, the issue of unilateral claims by coastal states to jurisdiction over extensive pollution control or conservation zones in the oceans cannot be divorced from related issues of coastal state jurisdiction over fisheries and mineral resources and of the law of the sea more generally. All of these issues are currently being considered, though they may not necessarily be settled, at the Third United Nations Law of the Sea Conference. Similarly, the claim that states may justify wide-ranging unilateral actions to prevent environmental harm on the grounds of self-defense constitutes an ex-

99. *See Fisheries Jurisdiction, (Fed. Republic of Germany v. Iceland),* [1974] I.C.J. 175; *(U.K. v. Iceland),* [1974] I.C.J. 3.

tremely broad expansion of the doctrine with implications and precedential effects that could reach far beyond the special case of environmental protection. For example, if a state can legally justify its departure from accepted international norms on the ground of self-defense against the threat of environmental harm, perhaps it may similarly justify such departures on the ground of self-defense against the threat of economic harm, cultural harm, or ideological pollution.

Finally, any analysis of the appropriate role of unilateral state action in preventing environmental injury—indeed of the probable development of international pollution efforts more generally—must consider the different ways states perceive environmental problems. This is perhaps best illustrated by the continuing controversy over environmental questions between the industrialized and the developing countries.[100] The issues include the significance and nature of existing international environmental problems, the question of who is responsible for them, the trade-offs involved in efforts to prevent environmental harms, and the allocation of the burdens and costs of dealing with the problems. Obviously, both individual states and groups of states will tend to view the propriety of various unilateral and multilateral actions in light of what they regard as their national interests. Thus, each state may be expected to support a legal regime maximizing effective unilateral and multilateral controls and sanctions directed at avoiding those types of environmental harms which it sees as adversely affecting its interests and which it has had no part in producing. Each state may be expected to support a legal regime minimizing effective unilateral and multilateral controls and sanctions directed at avoiding those types of environmental harms which it sees as unavoidable by-products of activities related to its economic well-being, or for which it shares responsibility. The shape of the international environmental regime that ultimately emerges will probably be determined largely by a political process of accommodation and compromise among these frequently conflicting interests rather than by considerations of legal logic or precedent.

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100. For further discussion see Council on Environmental Quality: Third Annual Report, Environmental Quality—1972, at 93-94 (1972); SIXTH ANNUAL REPORT, 1975 at 608-14 (1975); ENVIRONMENT AND DEVELOPMENT (Int'l Conciliation Paper No. 586) (1972); Castro, *Environment and Development: The Case of the Developing Countries*, 26 INT'L ORG. 401 (1972); Goldman, *supra* note 1, at 8-9.

VIII. Conclusion

This discussion suggests that unilateral state action to prevent international environmental injury is likely to play an important and continuing role in efforts to deal with international environmental problems. It also suggests the futility of attempting to characterize unilateral action as inherently either desirable or undesirable. While multilateral actions seem generally preferable to unilateral action, effective multilateral arrangement in many cases may not be practically attainable. Unilateral action may be the only feasible alternative to inaction. Under these circumstances, a respectable agrument can be made for the propriety of unilateral action on at least an interim basis pending achievement of effective multilateral arrangements. The desirability and effectiveness of unilateral action as a device for dealing with international environmental problems will typically depend on a number of factors, including the nature of the problem in question, the type of measures taken, the way they are applied, the benefits and costs to both the action state and the international community, and the alteratives available.

This analysis also suggests that there are many possible ways of dealing with international environmental problems, each of which may be appropriate in particular circumstances. These possible approaches cover a wide spectrum. At one extreme is recognition of broad state discretion. At the other is the provision of a strong exclusive international regulatory authority. In between lies a wide range of possible arrangements providing a more limited state responsibility and authority subject to various types of international oversight, standards, and procedures. Each of these approaches has its own advantages, risks, and costs. A comprehensive and effective system of international environmental control will require an imaginative and realistic mix of elements of all of them.[101]

101. Gotlieb & Dalfen, *supra* note 1, at 245, 256.