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# *Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues*

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## **Abstract**

*Unilateralism is a notion devoid of legal meaning per se, but provides a prism or conceptual tool through which international activities may be apprehended and subsequently allocated their place in the international legal order. Unilateralism is nonetheless harnessed by the law and at times its applications infringe the law. Having first questioned the novelty of the unilateralism/environment debate, this article proceeds to consider two aspects of unilateral behaviour of particular interest today: the 'policy forging' facet and the 'implementation or enforcement' facet of unilateral acts. The first deals with the manner in which unilateral acts shape legal outcomes in the environmental context, whilst consideration of the second facet concentrates on how legally required outcomes are avoided, mitigated or re-interpreted by legal arguments (such as the state of necessity), which are vehicled by, or manifest themselves in the form of, unilateral acts.*

## **Introduction**

Unilateralism is a notion which has recently regained attention in diplomatic circles, before judicial and arbitral bodies and in the media. Whilst used symbolically to denounce various practices, unilateralism does not have a legal meaning per se. The notion is both broad and amorphous, allowing it to be used as a *passe-partout* to cover various types of acts, measures and actions with international consequences. Some are merely political, others have a legal content and produce legal effects. A common

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denominator to most of these actions is that they are adopted, proclaimed or exercised by a state or by several states jointly and entail consequences for other states.

In an a-centralized society composed of sovereign and equal states, unilateralism, as broadly defined, is generally perceived as being part of the ‘normality’ of international relations: it is understood as a means of exercising sovereign rights. Decisions of the International Court of Justice are littered with references to unilateral acts, be they lawful or unlawful. For example, when referring to the Truman Proclamation issued by the Government of the United States on 28 September 1945, the International Court of Justice said that ‘it has in the opinion of the Court, a special status’, and it ‘soon came to be regarded as the starting point of the positive law on the subject, and the chief doctrine it enunciated, namely that of the coastal State as having an original, natural and exclusive (in short, vested) right to the continental shelf off its shores’.<sup>1</sup> In another context however, the Court considered that ‘the Regulations concerning the Fishery Limits off Iceland (*Reglugero um fiskveiioilandhelgi Islands*) promulgated by the Government of Iceland on 14 July 1972 and constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines specified therein are not opposable to the Government of the United Kingdom’; and that ‘... in consequence, the Government of Iceland is not entitled unilaterally to exclude United Kingdom fishing vessels from areas agreed to in the Exchange of Notes of 11 March 1961 and the limits specified in the Icelandic Regulations of 14 July 1972, or unilaterally to impose restrictions on the activities of those vessels in such areas’.<sup>2</sup>

To make any sense of a concept such as unilateralism in international law and for the purposes of this article, it is important to define what kind of action or behaviour the concept encompasses. Alongside the classic ‘normative’ facet, namely the study of unilateral acts such as promises, declarations, protests or recognition as generating rights or obligations,<sup>3</sup> today’s headlines bring to the fore the ‘implementation and enforcement’ facet of unilateral acts, whereby an individual state (or group of states) claims the capacity or even the right to enforce rules, either in its own interests or in those of the international community as a whole. In this context, it is important to distinguish unilateral action taken within the framework of a given legal structure which itself authorizes<sup>4</sup> (or at least tolerates) such action, from behaviour which ignores, bends or contravenes outrightly applicable rules. In addition, one must not overlook the existence of a grey zone between these two hypotheses. Another type of

<sup>1</sup> *North Sea Continental Shelf*, Judgment, ICJ Reports (1969) 3, at 33, para. 47.

<sup>2</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, ICJ Reports (1974) 3, at 34, para. 79.

<sup>3</sup> For a recent review of such acts, see the reports of the Special Rapporteur of the International Law Commission Rodríguez-Cedeño, *First Report on Unilateral Acts of States*, UN Doc. A/CN.4/486, 5 March 1998 and *Second Report on Unilateral Acts of States*, UN Doc. A/CN.4/500, 14 April 1999. See also E. Suy, *Les actes juridiques unilatéraux en droit international public* (1962).

<sup>4</sup> See for example Article 218 of the United Nations Convention on the Law of the Sea, which enables a port state to institute proceedings against a vessel voluntarily within a port or at an off-shore terminal, in respect of any discharge in violation of international law, which occurs outside the territorial waters or exclusive economic zone of the port state. Reproduced in 21 *ILM* (1982), 1261, at 1312. For the French text see L. Boisson de Chazournes, R. Desgagné and C. Romano, *Protection internationale de l’environnement, Recueil d’instruments juridiques* (1998) 370.

unilateralism is when the author of the measure attempts to shape a given legal regime and its application in a way that is more congruent to the interests it defends. For convenience, this may be termed the 'policy-forging' facet of unilateralism. Although the normative facet of unilateral action plays an important role in the environmental area as a source of rights and obligations,<sup>5</sup> attention here will focus on the two other aspects, namely the 'policy-forging' and the 'implementation and enforcement' facets, as they appear to raise more contentious issues.

It is however interesting to note briefly some recent practice in relation to the 'normative' facet described above. A recent example of a unilateral act which may be at the source of an international obligation is Japan's 'clear commitment [made before the International Tribunal for the Law of the Sea] that the 1999 experimental fishing program will end by 31 August'.<sup>6</sup> It will be interesting to see whether any noticeable legal effects will be attached to this declaration, bearing in mind the stringent conditions necessary for a unilateral declaration to be a source of legal obligation.<sup>7</sup> The recent decision of the WTO Panel in the case concerning *United States — Sections 301–310 of the Trade Act of 1974*<sup>8</sup> contains another example of a unilateral statement which may produce legal effects. It is however to be noted that, according to the WTO panel set up in that case, the unilateral statement 'clarifies and gives an undertaking, at an international level, concerning aspects of domestic US law, in particular, the way the US has implemented its obligations under Article 23.2(a) of the DSU',<sup>9</sup> suggesting that the international legal effects attached to the unilateral statement were grounded in the domestic law of the US, therefore limiting its importance as a source of rights and obligations at the international level.

Unilateralism, as referred to in this article, is primarily related to the action of states. However, one must not forget that other actors, such as international organizations and non-governmental organizations (NGOs), engage in unilateral conduct in

<sup>5</sup> See *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports (1974) 253, at 267, para. 43. As an example, see the joint unilateral commitments made by some members of the EEC/UN countries to reduce their emissions by an amount greater than that provided for by the Additional Protocols to the Convention on Long-Range Air Pollution, see Fauteux, 'Commentary: Percentage Reductions versus Critical Loads in the International Battle against Air Pollution: A Canadian Perspective', in W. Lang, W. Neuhold and H. Zemanek (eds), *Environmental Protection and International Law* (1991) 100, at 113.

<sup>6</sup> *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Requests for Provisional Measures, Order of 27 August 1999, para. 83. Text available at <http://www.un.org/depts/los/index.htm>

<sup>7</sup> See *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Reports (1986) 554 at 573–574, paras. 39–40.

<sup>8</sup> WT/DS152/R, 22 December 1999.

<sup>9</sup> *Ibid.*, para. 7.125.

pursuance of environmental protection objectives, be it through normative,<sup>10</sup> or implementation and enforcement activities. International organizations can extend unilaterally the scope of their competences and take action on this basis.<sup>11</sup> Numerous boycott campaigns have been orchestrated by NGOs with the aim of promoting environmental concerns.<sup>12</sup>

In addition, the unilateral measures which will be analysed in the context of this paper should be distinguished from those which are exercised by a state or several states acting jointly pursuant to an authorization provided for by international law, be it customary or conventional. This is the case with measures such as retorsion, reprisals or sanctions, also covered under the heading of countermeasures,<sup>13</sup> which are exercised in reaction to a violation of international law attributable to a state and in conformity with legal parameters, such as proportionality and the respect of dispute settlement requirements.<sup>14</sup> For the purposes of this article, these measures are ‘de-unilateralized’ as international law authorizes or tolerates their use subject to more or less stringent conditions. This is the case, for example, with the measures exercised in application of Article 22 of the GATT/WTO Dispute Settlement Understanding (DSU).<sup>15</sup>

There is a noticeable trend in the revamping of the use of the terms ‘unilateralism’ and ‘unilateral measures’. The main reason is not so much their increased use. It has more to do with the negative connotations attached to the concept. Besides inefficiency-related arguments, unilateralism is perceived in many instances as a hegemonic weapon allowing the stronger to impose its will on the weaker.<sup>16</sup> Unilateralism raises issues of fairness and equity. Unilateralism is also quite often set against the notion of multilateralism and cooperation, the latter being perceived as a more satisfactory means of addressing international problems.

Environmental protection is one of the areas where such derogatory connotations arise. Unilateralism will be assessed in this context here, as well as in the light of the

<sup>10</sup> On resolutions of international organizations being considered as unilateral acts, see Virally, ‘Les actes unilatéraux des organisations internationales’, in M. Bedjaoui (ed.), *Droit international: Bilan et perspectives*, tome 1 (1991) 253. See the International Organization for Standardization’s (ISO) standards, exemplifying the increased use of self-regulation, be it industry or consumer based and other voluntary systems of compliance, Roth-Arriaga, ‘Private Voluntary Standard Setting, the International Organization for Standardization and International Environmental Lawmaking’, 6 *Yearbook of International Environmental Law* (1995) 107.

<sup>11</sup> See *ERTA Case*, Case 22/70 *Commission v. Council*, [1971] ECR 263.

<sup>12</sup> Recall the boycott campaign orchestrated by Greenpeace due to the decommissioning of an oil platform in the high seas in 1995. More generally on the involvement of a state’s responsibility in such matters, see Rousseau, ‘Le boycottage dans les rapports internationaux’, XXIX *RGDIP* (1958) 5, at 20.

<sup>13</sup> On the notion of countermeasures as a generic concept encompassing a wide array of measures taken in reaction to a violation of international law, see L. Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques* (1992).

<sup>14</sup> See the *Case Concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*. Decision of 9 December 1978, XVIII *RIAA*, 417.

<sup>15</sup> For the text of the DSU see 31 *ILM* (1994) 112.

<sup>16</sup> On the hegemony aspects see Huntington and Willis, ‘Is American Hegemony Working’, 78 *Foreign Affairs*, (March/April, 1999) 35, at 50.

others referred to above. It is useful at this stage also to define what one means by environment, as it too remains a multifaceted notion. The International Court of Justice has stressed that 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'.<sup>17</sup> The International Tribunal for the Law of the Sea has recently considered that 'the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment'.<sup>18</sup>

## 1 *Nihil Sub Sole Novi?*<sup>19</sup>

### A *Unilateral Measures as Usual* . . .

Unilateral measures with international consequences are not new. This is also the case in the environmental field, where such measures by no means constitute new phenomena, either from a political or a legal perspective. States have, and will continue to resort to such measures for various environment-related objectives. A point to be borne in mind is that environmental protection is seldom the only motive for such measures: political, strategic, social and especially, economic considerations may also be present.

In the early 1970s, Richard Bilder<sup>20</sup> drew attention to the large number of unilateral measures resorted to in the name of the environment. The examples he mentions are numerous and take different forms. They include, President Truman's assertion of United States (US) jurisdiction over the natural resources of the subsoil and seabed of the continental shelf off the coast of the US; the bombing in international waters of the Liberian-flag supertanker *Torrey Canyon* by the British Royal Air Force to prevent oil spills threatening English and French coasts; the adoption by Canada of its Arctic Waters Pollution Prevention Act, which asserted Canadian jurisdiction over shipping up to 100 miles off its Arctic coasts; and the adoption by the US of statutes ranging from the prohibition on the importation of fish products from foreign countries whose nationals conduct fishing operations in a manner inconsistent with international fishery conservation programmes,<sup>21</sup> to the restriction of the import of DDT and other environmentally harmful substances, as well as the control of their export.

Unilateral measures like these may pave the way towards the negotiation of

<sup>17</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996) 226, at 241-242, para. 29.

<sup>18</sup> *Southern Bluefin Tuna Cases*, *supra* note 6, para. 70.

<sup>19</sup> ('Nothing New under the Sun'), Latin translation of the Greek in *Ecclesiaste*, 1-9.

<sup>20</sup> And published with some updating in the early 1980s, Bilder, 'The Role of Unilateral State Action in Preventing International Environmental Injury', 14:51 *Vanderbilt Journal of Transnational Law* (1981) 51.

<sup>21</sup> Fishermen's Protective Act of 1967, 22 U.S.C.A. para. 1971-1980 (1964, Suppl. 1973), as amended by Pub. L. 95-541, 42 Stat. 2057 (1978).

international agreements. Such was the case with the bombing of the Torrey Canyon, which led to the conclusion in 1969 of the International Convention relating to Intervention in High Seas in Cases of Oil Pollution Casualties.<sup>22</sup> Others may lead to the emergence of customary rules, for example in the area of maritime jurisdiction. Finally, some of these unilateral measures have given rise to disputes which were settled through negotiation or by judicial mechanisms, be it before international tribunals<sup>23</sup> or before the International Court of Justice.<sup>24</sup>

If resort to unilateral measures for environmental purposes is not such a new phenomenon, it is interesting to note that neither is the debate over their effectiveness and adequacy.<sup>25</sup> The punitive connotation associated with these measures means they are still perceived negatively. This is especially true in the North/South context, where developing countries raise the issue of the unequal balance of power. More generally, the abusive use which is made of unilateral measures in the overall context of international economic relations has been and remains a very sensitive issue for developing states.<sup>26</sup> In addition, the legitimacy of the inherently individualistic nature of such measures is questioned when it comes to resolving issues of common interest.

*Nihil sub sole novi?* The answer is yes in some respects and no in others. Some of these measures were less contentious in the past than they are today. This is the case with unilateral trade measures resorted to for environmental purposes. These measures have become the centre of attention of the overall trade and environment debate. Whatever their importance in real terms, trade measures resorted to for environmental purposes have acquired a very symbolic status. In this context one may refer to Austria's adoption of legislation on 5 June 1992, requiring ecolabelling of imported tropical timber and the ensuing reaction of timber exporting countries, particularly Malaysia and other members of the Association of South East Asian Nations (ASEAN) and the latter's complaint brought before the GATT Council.<sup>27</sup> One may also recall the US embargo on Mexican tuna caught using purse-seine nets which involved a high incidental taking of dolphins and was prohibited under US legislation, and as a final example, the US embargo on shrimps caught in countries (India, Malaysia, Pakistan and Thailand) that do not mandate turtle-excluder devices on fishing vessels as provided for by US legislation, and the reactions to these embargoes both within and outside the GATT/WTO forum by the affected parties as well as by representatives of international civil society.

<sup>22</sup> Reproduced in 7 *ILM* (1969) 466.

<sup>23</sup> See *Pacific Fur Seal Arbitration*, *Moore's Int'l Arb. Awards* (1893) 755. This case dealt with a dispute between the US and Great Britain. In response to Great Britain's purported over-exploitation of fur seals in areas beyond its national jurisdiction, the United States asserted a right to exercise jurisdiction over the natural resources outside its territorial waters to ensure the conservation of the seals. The award rejected the US' argument; see P. Sands, *Principles of International Environmental Law I, Frameworks, Standards and Implementation* (1994), at 28-29.

<sup>24</sup> See *Fisheries Jurisdiction*, (*United Kingdom v. Iceland*), Merits, Judgment, ICJ Reports (1974) 3.

<sup>25</sup> See Bilder, *supra* note 20.

<sup>26</sup> See Boisson de Chazournes, *supra* note 13.

<sup>27</sup> See Dawkins, 'Ecolabelling: Consumer Right-to-Know or Restrictive Business Practice?' in R. Wolfrum (ed.) *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (1996) 501, at 551.

Unilateral measures are also part of the environmental debate within the European Community (EC). Their application has given rise to disputes before the European Court of Justice.<sup>28</sup> The EC is also resorting to such measures in the course of its external relations, although it is aware of the potential disputes to which this may give rise with other states. For example, it was decided in 1991 to ban imports of certain animal furs from countries that allow the use of leghold traps. However, the coming into effect of the decision was delayed and did not take place because of doubts as to its compatibility with international trade rules.<sup>29</sup>

While some states plead for a right to conduct their own environmental policy without being barred by trade-restriction considerations,<sup>30</sup> others consider such measures to be a mere alibi for protectionism and a vehicle for green imperialism.<sup>31</sup> It is interesting to note that similar measures did not raise much concern in the 1970s, essentially because they were not so numerous but also because the general awareness of trade-related effects of environmental measures were not as politicized as they are today.<sup>32</sup>

Thus while the debate appears to be almost a classical one, it is undeniable that unilateralism is today the focus of increased attention. This brings us to the reasons why unilateralism has become more visible, not to say more contentious.

## B A Changing International Scene

It has become commonplace to note the development and increased importance played by institutions, as well as principles and rules related to the protection of the environment. The number of conventions, treaty provisions and other instruments dealing with the environment has grown dramatically.<sup>33</sup> This evolution has influenced the content of international law applicable to environmental protection. It has also had a significant impact on the interpretation of international law in general. This evolution was highlighted by the WTO Appellate Body in the *United States — Import Prohibition of Certain Shrimp and Shrimp Products*<sup>34</sup> when it noted with respect to the notion of 'exhaustible natural resources' as contained in Article XX of the GATT 1994 that:

The words of Article XX (g), 'exhaustible natural resources', were actually crafted more than

<sup>28</sup> See L. Krämer, *E.C. Treaty and Environmental Law* (3<sup>rd</sup> ed., 1998), at 140–141.

<sup>29</sup> *Ibid.*, at 28–29.

<sup>30</sup> For an advocacy of such a policy, see Anderson, 'Unilateral Trade Measures and Environmental Protection Policy', 66 *Temple Law Review* (1993) 751.

<sup>31</sup> For such assertions, see Ruiz, 'Green Protectionism: The North's Latest Trade Weapon', *Third World Network Features*, 8 June 1997; Bello, 'View and Comment: The Rise of Green Unilateralism', *Business World*, 10 June 1997.

<sup>32</sup> For an appraisal of the current situation of the overall trade and environment relationship see Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement', 33 *Journal of World Trade* (1999) 87.

<sup>33</sup> In 1993, it was estimated there were about 800 such treaties and treaty provisions, see Brown-Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order', 81 *Georgetown Law Journal* (1993) 675.

<sup>34</sup> WT/DS58/AB/R, 12 October 1998, reproduced in 38 *ILM* (1999), 118.

50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment . . . From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term ‘natural resources’ in Article XX (g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’.<sup>35</sup>

The Conference on Environment and Development held in Rio de Janeiro in June 1992 gave significant momentum to the shaping and development of the international legal order. Instruments such as the Rio Declaration on Environment and Development,<sup>36</sup> the Program of Action Agenda 21<sup>37</sup> and the Conventions on Climate Change<sup>38</sup> and on Biological Diversity<sup>39</sup> have entrenched notions and principles, such as ‘sustainable development’ and the ‘precautionary principle’. The words of the WTO Appellate Body in the above-mentioned case are an illustration of these developments. It noted that the negotiators of the *WTO Agreement*

evidently believed, however, that the objective of ‘full use of the resources of the world’ set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990’s. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words: . . . while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development.<sup>40</sup>

...

We note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add color, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.<sup>41</sup>

One problem however, is the definition of these notions and principles. The meaning of sustainable development may differ from one region to another, notably between North and South. Since the 1972 United Nations Conference on the Human Environment held at Stockholm — the first truly international effort to broach environmental concerns — the degree of importance to be given to the environment has been a source of dissension between developing and developed states. The pressing need for development has been opposed to the development of an environmental

<sup>35</sup> *Ibid.*, para. 129. As to the need to take into account the development of international law in the implementation of treaties, see also the case concerning the *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* Judgment, ICJ Reports (1997) 7, at 67, para. 112.

<sup>36</sup> Reproduced in 31 *ILM* (1992) 874. For the French text see Boisson de Chazournes, Desgagné and Romano, *supra* note 4, at 41.

<sup>37</sup> UN Conference on Environment and Development: Agenda 21, UN Doc. A/CONF.15/4 (1992).

<sup>38</sup> Framework Convention on Climate Change (9 May 1992), reproduced in 31 *ILM* (1992) 849. For the French text see Boisson de Chazournes, Desgagné and Romano, *supra* note 4, at 616.

<sup>39</sup> Convention on Biological Diversity (5 June 1992), reproduced in 31 *ILM* (1992) 818. For the French text see Boisson de Chazournes, Desgagné and Romano, *ibid.*, at 230.

<sup>40</sup> *Supra* note 34, at para. 150.

<sup>41</sup> *Ibid.*, at para 153.



ethic.<sup>42</sup> Twenty years later at the United Nations Conference on Environment and Development at Rio, the same conflict resurfaced. There was little consensus on the real environmental issues, the significance of the terms, 'environment' and 'development' and indeed the nature of the 'environment-development' interaction.<sup>43</sup>

Despite these differences, a consensus developed around the concept of 'sustainable development'. Defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs,<sup>44</sup> sustainable development has acquired a rhetorical power for bridging gaps, at least at a preliminary level. Subsequent practice has shown the virtue of the concept of sustainable development for reconciling different interests and for establishing links between different areas of international regulation.<sup>45</sup>

In addition, the environmental regimes which have been created have been consolidated over time. Due to increased attention being given to the effective implementation of environmental rules, various compliance and enforcement mechanisms have been developed.<sup>46</sup> These conventional regimes have elaborated means for improving compliance, be they diplomatic, aimed at reaching a solution agreeable to all parties concerned, or by way of sanction-oriented tools in cases where a state is reluctant to comply with its commitments. In the latter case, measures are taken by virtue of the collective authorization or endorsement of the other state parties.<sup>47</sup> The call for increased scrutiny of implementation is, however, still very central: more attention should be given to the means and processes put in place in order to ensure compliance with international law. The number of actors involved in the designing and implementation of policies is increasing and there is greater interaction among states, international organizations and non-state actors. In addition, non-state actors are becoming increasingly involved both formally and

<sup>42</sup> The Report of the UN Conference on the Human Environment reads in part as follows,

Considerable emphasis was placed by speakers from developing countries upon the fact that for two-thirds of the world's population the human environment was dominated by poverty, malnutrition, illiteracy and misery . . . The priority of developing countries was development. Until the gap between the rich and the poor countries was substantially narrowed, little if any progress could be made . . . support for environmental action must not be an excuse for reducing development.

UN Doc. A/CONF.48/14 and Corr. 1 (1972), reproduced in 11 *ILM* (1972), 1416.

<sup>43</sup> Adil, 'The South in International Environmental Negotiations', 31(4) *International Studies* (1994) 427, at 441. While the industrialized countries sought progress on climate change, biodiversity, forest loss and fishery issues, developing states placed more emphasis on market access, trade, technology transfer, development assistance and capacity building.

<sup>44</sup> See Principles 3 and 4 of the Rio Declaration on Environment and Development.

<sup>45</sup> Sands, 'International Courts and the Application of the Concept of "Sustainable Development"', 3 *Max Planck Yearbook of United Nations Law* (1999), 363.

<sup>46</sup> Boisson de Chazournes, 'La mise en œuvre du droit international dans le domaine de la protection de l'environnement : Enjeux et défis', 99 *Revue générale de droit international public* (1995) 35. For an assessment of the CITES regime and an account of state practice, see Sands, 'Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment', 8 *EJIL* (1997) 29.

<sup>47</sup> A question may arise as to the legality of measures taken by one member state without prior authorization of the competent body of a convention, such as, for example, the US measures taken against Singapore within the context of the CITES regime. See Sands, *ibid.*

informally in the decision-making processes.<sup>48</sup> All these elements should be taken into account when assessing unilateralism used for environmental purposes, as unilateralism has become an attractive tool for many of these actors.

Lastly, with the emergence of the precautionary principle, ‘doubt’ as a matter of law, now needs to be taken into consideration when conducting international relations. This should be borne in mind when assessing the changes taking place on the international scene. Principle 15 of the Rio Declaration on Environment and Development provides that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>49</sup>

The precautionary principle has received wide support, being included in almost every recent treaty and policy document related to the protection of the environment. Although its content is the subject of debate, it can already be seen from national and international practice that the precautionary principle influences, and will continue to influence, the decision-making process in the trade, economic, health, and other areas. It is also referred to in reassessing certain past practices.

Concerns related to the precautionary principle may be invoked in an attempt to justify unilateral measures. The WTO Appellate Body’s decision in the *EC Measures concerning Meat and Meat Products (Hormones)*<sup>50</sup> case provides a vivid example of the consequences that such action may entail. The European Community has invoked the precautionary principle as justifying its import restrictions. Its application was challenged by the United States before the dispute settlement bodies of the GATT/WTO and led to the exercise of WTO-authorized countermeasures under Article 22 of the GATT/WTO DSU. Another example was the debate in the biosafety field and the conflicts between the European Community and the US and other agriculture exporting countries over the issue of whether the precautionary principle should be included in the proposed Biosafety Protocol to the Convention on Biological Diversity as an operational principle for dealing with trade in living modified organisms (LMOs). This debate highlights the stakes associated with the precautionary principle and

<sup>48</sup> An issue is whether environmental protection is benefiting from new developments in international law with respect to criminalization and individual responsibility for environmental crimes. On this issue see Boyle, ‘Remedying Harm to International Common Spaces and Resources: Compensation and Other Approaches’, in P. Wetterstein, *Harm to the Environment* (1997) 83.

<sup>49</sup> *Supra* note 44.

<sup>50</sup> Report of the Appellate Body, 16 January 1998, *supra*.

raises, among other things, the possibility of resorting to unilateral measures allegedly to protect essential interests.<sup>51</sup>

In order to assess the legality of the resort to unilateral measures, one should also refer to fundamental principles of international law such as sovereign equality and non-intervention.<sup>52</sup> In this context, the principles of jurisdiction are key parameters, as for example in the fisheries area. The trade and environment debate has been considered through the prism of 'extra-territorial jurisdiction'. This is not the place to go into details.<sup>53</sup> Suffice it to say that there too, there may be an issue of perception. What for some may merely be an issue of domestic application of legislation, for others may be an issue of 'universal application' of a domestic statute,<sup>54</sup> that is to say the unilateral imposition of domestic standards on other entities.

## 2 Shades of Unilateralism

Environmental protection is a breeding ground for unilateral measures. They appear in their different shades, patent and obscure, from legal to political.

### *A Unilateralism as a Policy-forging Instrument: The Case of the Global Environment*

This form of unilateralism relates to the dealings that often go on 'behind-the-scenes', such as the pressure exerted during the course of negotiations in order to ensure a 'satisfactory' result. This pre-negotiation type of unilateralism may not be visible in media or public opinion terms. After adoption of a conventional instrument, i.e. in a post-conclusion stage, unilateral measures may also be taken to 'rectify' a system whose content was already 'weakened' or 'diluted' to achieve sufficient consensus. This type of unilateralism can take various forms, such as the promotion of 'amendment-related techniques' or similar techniques for adjusting the content of an

<sup>51</sup> See for example the report written by the French professors Kourilsky and Viney, which states with respect to the emergence of the concept of the precautionary principle, that 'Son émergence traduit un changement, sans doute considérablement accéléré par les affaires du sang contaminé et de la vache folle, dans la perception sociale des risques [...] Bien que les revendications qui se réclament de la précaution ne soit pas toujours exemptes d'incohérences, il s'agit d'un phénomène social majeur qui met en cause de nombreux aspects du fonctionnement des démocraties', in Nau, 'Le respect croissant du principe de précaution en matière de santé', *Le Monde*, 10 December 1999, 3.

<sup>52</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports (1986) 14, at 106, para. 202.

<sup>53</sup> For discussion on the Helms-Burton Act, see Stern, 'Can the United States Set Rules for the World? A French View', 31 *Journal of World Trade* (1997) 5; Mani, 'Unilateral Imposition of Sanctions through Extra-Territorial Application of Domestic Laws: A Tale of Two US Statutes', 38 *Indian Journal of International Law* (1998) 1.

<sup>54</sup> See the Conclusions of Alain Pellet in *Sanctions unilatérales, mondialisation du commerce et ordre juridique international* (1998) 321. As an example see the US statute: *Sea Turtles Conservation: International Agreements (Fish and Fishing, Maritime affairs, 16 USC 1537 note)*.

instrument in the period between its formal adoption and its entry into force,<sup>55</sup> or it may even take the shape of a refusal to become a party to the instrument, despite having gone through stringent negotiations. Although eminently political, this form of unilateralism has a significant impact on legal outcomes.

### *1 Kyoto Protocol to the United Nations Framework Convention on Climate Change*

The Kyoto Protocol to the United Nations Framework Convention on Climate Change (hereinafter the Kyoto Protocol), adopted in December 1997,<sup>56</sup> provides an illustration of a post-negotiation ‘policy-forging’ type of unilateralism. Although a crucial instrument for combating the greenhouse effect, the Kyoto Protocol remains for the time being work in progress. Many of its implementation provisions need to be refined for it to be fully effective,<sup>57</sup> and this is meant to be done through collective decisions adopted by the Conference of the Parties to the Climate Change Convention and the forthcoming Conference of the Parties to the Kyoto Protocol. In fact, this situation has been no more than an excuse for certain countries to reopen the negotiation process unilaterally. The Kyoto Protocol has already been signed by a large number of states,<sup>58</sup> but its entry into force may nonetheless be hindered, if not totally prevented, as the main emitters of greenhouse gases (i.e. the US, the EC and other OECD countries) are each raising preconditions to their ratification.

The position of the US administration in relation to the ratification of the Kyoto Protocol has been greatly influenced by the position taken by the US Senate.<sup>59</sup> Even before the conclusion of the Kyoto Protocol, US Senators adopted a resolution which clearly states that they will not approve an international agreement unless certain ‘meaningful’ developing countries (such as China, India or Brazil) undertake commitments to reduce their emission of greenhouse gases.<sup>60</sup> Such a condition is not found in the Kyoto Protocol itself, since it only imposes reduction commitments on OECD countries. The subsequent Buenos Aires Plan of Action adopted at the fourth Conference of the Parties in November 1998<sup>61</sup> appears to fall short of the

<sup>55</sup> See Resolution of the UN General Assembly GA Res. 48/263, 28 July 1994 which constitutes a quasi-amendment to the UN Convention on the Law of the Sea, see Treves, ‘L’entrée en vigueur de la Convention des Nations Unies sur le droit de la mer et les conditions de son universalisme’, XXXIX *Annuaire français de droit international* (1993) 850.

<sup>56</sup> FCCC/CP/1997/L.7/Add.1 (10 December 1997). Text reprinted in XXXVII *ILM* (1998) 32.

<sup>57</sup> The Kyoto Protocol appears more like a ‘second framework convention’ (the first one being the 1992 Framework Convention on Climate Change), rather than a standard protocol to a convention, see Boisson de Chazournes, ‘La gestion de l’intérêt commun à l’épreuve des enjeux économiques – Le Protocole de Kyoto sur les changements climatiques’, XLIII *Annuaire français de droit international* (1997) 703.

<sup>58</sup> As of December 1999, 84 countries had signed and 19 countries ratified the Kyoto Protocol.

<sup>59</sup> Under the US Constitution, ratification of an international treaty requires the executive to receive the ‘advice and consent’ of the Senate, a procedure that requires the approval by a two-third majority of the Senators.

<sup>60</sup> S.RES.98 adopted on 25 July 1997; see Breidenich, *et al.*, ‘The Kyoto Protocol to the United Nations Framework Convention on Climate Change’, 92 *AJIL* (1998) 315, at 330.

<sup>61</sup> Reproduced in 29 *Environmental Policy and Law* (1999) 55.

requirements laid down by the US Senate, putting into doubt the possible ratification by the US of the Protocol.

Another example of such policy-type unilateralism is related to the interpretation to be given to the measures to be taken for reducing emissions. The EC has been slightly more supportive of the Kyoto Protocol than the US. This may be due to the fact that under Article 4 of the Protocol, the European Community has reallocated its emissions reduction obligations between its member countries. However, one fundamental issue that has divided the EC and the US in the post-Kyoto Protocol negotiations is the extent to which one Party can meet its obligations through the 'Kyoto mechanisms', also known as 'market-based instruments'. The Protocol provides that these market-based activities, such as joint implementation or emission trading, shall be 'supplemental' to domestic actions. The US, which sees in Russia and other economies in transition an opportunity for low-cost reductions, has argued that any limit on the use of the joint implementation mechanism should be 'qualitative'. The European Community, on the other hand, has favoured the adoption of a 'quantitative criteria' and numbers such as 51 per cent of emission reductions to be achieved through domestic measures have been informally advanced.

There are a large number of signatories to the Kyoto Protocol, including the EC and the US.<sup>62</sup> For the Protocol to enter into force, 55 parties, which accounts for at least 55 per cent of the total carbon dioxide emissions for 1990, need to ratify the instrument. In practice, it seems that due to deadlocks in post-adoption negotiations, the Kyoto Protocol may never enter into force. The EC has made it clear that it will not ratify the Protocol if the US does not do so — and the US does not seem to be willing to water down its conditions for ratification.

## 2 *The Protocol on Biosafety*

Unilateral policy-forging measures help promote individualistic objectives, a pattern common to all negotiations. In certain situations, however, their proponents may demonstrate resilience up until the end of the negotiation process and refuse to join a middle ground acceptable to all other negotiators. This was the case with the Convention on Biological Diversity, adopted at Rio in 1992, which to date the US has not signed.<sup>63</sup> Noteworthy, however, is that since the entry into force of that Convention, the US has been an active player in the negotiations of its First Additional Protocol, i.e. the Protocol on Biosafety.<sup>64</sup> The US, together with five other agriculture-exporting countries (Argentina, Australia, Canada, Chile and Uruguay), have insisted on limiting the scope of the Protocol to LMOs destined for deliberate release into the

<sup>62</sup> The US signed the Protocol on 12 November 1998, the European Community on 29 April 1998, see <http://www.unfccc.de/resource/kpstats.pdf>

<sup>63</sup> The United States is one of the very few countries which is not yet a party to the Convention on Biological Diversity.

<sup>64</sup> A provision of the Convention on Biological Diversity provides that the Parties to the Convention should consider the development of a protocol 'in the field of safe transfer, use and handling of living modified organisms (LMOs) that may have an adverse effect on biodiversity'. Article 19(3) of the Convention on Biological Diversity, *supra* note 39. For the text of the Protocol see <http://www.biodiv.org/biosafe/Biosafe-Prot.html>

environment and on excluding products of LMOs and LMO-based agricultural commodities, such as those intended for food, feed and processing, while other states have opposed this solution. They also strongly supported the inclusion of a provision in the Protocol referring to the priority to be given to other international agreements, notably the WTO agreements. Again, most of the other countries opposed this provision. They believed that this provision could handicap governments seeking to protect their consumers from questionable LMOs. These differences meant that negotiations could not be concluded in February 1999 as previously envisaged, prompting criticism from many countries and environmental organizations.<sup>65</sup> The negotiations were finally concluded in January 2000, without however, resolving all the difficulties.<sup>66</sup>

From a legal point of view, these unilateral measures resorted to for policy-forging motives relate to the content of the principle of good faith in treaty-making. In such circumstances, there is an issue of loyalty which has certain legal parameters. In another context, in the *North Sea Continental Shelf cases*, the International Court of Justice stated that parties:

are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.<sup>67</sup>

Account should also be taken of Article 18 (a) of the 1969 Vienna Convention on the Law of Treaties which provides that:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.<sup>68</sup>

The end-result of such patterns of behaviour is that the content of the principles and rules applicable to the protection of the environment is in many respects weak and unsatisfactory. This raises an important question relating to negotiations in the environmental field, an area where there are many calls for more stringent principles and rules: What should be a 'satisfactory' outcome of a negotiation process? Should it be the conclusion of a legal instrument that will provide for international standards which are forward-looking and are acceptable, if not to all countries, at least to a majority of them? Or, should it be the conclusion of an instrument whose content has been diluted to a great extent, so as to please all parties, and most importantly the

<sup>65</sup> Rajamani, 'Biosafety — or Biotrade?', 7 (21) *Down to Earth* (31 March 1999) 42.

<sup>66</sup> Kempf, 'Un traité sur les OGM est adopté à Montréal', *Le Monde* 30-31 janvier 2000, 2.

<sup>67</sup> Judgment, ICJ Reports (1969) 3 at 47, para. 85. See also *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, ICJ Reports (1974) 3; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports (1980) 73.

<sup>68</sup> On the obligation not to frustrate the object and purpose of a treaty, see Cahier, 'L'obligation de ne pas priver un traité de son objet et de son but avant son entrée en vigueur', *Mélanges Fernand Dehousse*, tome 1 (1979) 31.

perceived key players, in order to meet the standard mantra 'consensus was reached'? This second option carries the risk of an increased number of unilateral measures, as states may consider in the longer term that the internationally agreed standards are too weak to address their concerns effectively.

### ***B Unilateralism as an Implementation or Enforcement Measure: The Case of Fisheries***

The high seas fishery regime has been at the source of many tensions, its alleged weaknesses having led countries to resort to unilateral action. The interface between environmental and economic interests has always been an issue in this context. As early as the 1950s, and again in the 1970s, Iceland unilaterally extended its 'fishing zone', purportedly for conservation purposes.<sup>69</sup> In 1972 it extended its fisheries jurisdiction from 12 to 50 miles, and in 1975 from 50 to 200 miles. The United Kingdom fought these unilateral actions before the International Court of Justice and these became famous as the 'Cod Wars'. The Cod Wars highlighted the need for a change in international law and the concept of Exclusive Economic Zone (EEZ) was subsequently codified by the 1982 Convention on the Law of the Sea.

The *Fisheries Jurisdiction Case* (1998)<sup>70</sup> brought by Spain against Canada has again focused attention on unilateral measures. Canada had amended its *Coastal Fisheries Protection Act* in order to prohibit notably Spanish and Portuguese fishing vessels from fishing for certain straddling stocks in the North Atlantic beyond Canada's EEZ.<sup>71</sup> In March 1995, on the basis of this legislation and its implementing regulations, Canadian fisheries protection officers boarded and arrested on the high seas a Spanish registered fishing vessel, the *Estai* and arrested members of the crew. Canada alleged that the vessel was fishing in breach of the Northwest Atlantic Fisheries Organization (NAFO) conservation and management measures. Spain claimed, *inter alia*, that the Act was an attempt to impose on all persons on board foreign ships a prohibition on fishing in the NAFO's Regulatory Area, that is, in the high seas beyond Canada's EEZ. The dispute was formally settled on 20 April 1995 in an exchange of notes between Canada and the EC, which is responsible for the regulation of fishing activities of its Member States. The parties agreed to improve the Fishery Control and Enforcement in the NAFO Regulatory Area, to settle voluntary quotas for 1995 for the straddling fish stocks at issue and to submit joint proposals to NAFO for management arrangements for those stocks for 1995 and thereafter.<sup>72</sup> Spain nonetheless brought a claim before the International Court following the arrest of the Spanish vessel by Canadian

<sup>69</sup> Resolution of the Althing Concerning Fisheries Jurisdiction, 15 February 1972, reprinted in 11 *ILM* (1972) 643.

<sup>70</sup> *Fisheries Jurisdiction Case (Spain v. Canada)*, *Jurisdiction of the Court*, 4 December 1998, available on the International Court's website at <http://www.icj-cij.org/>

<sup>71</sup> See Fauteux, 'L'initiative juridique canadienne sur la pêche en haute mer', 31 *Canadian Yearbook of International Law* (1993) 33.

<sup>72</sup> The Agreed Minute of this agreement is reprinted in Freestone, 'The Estai Affair', 10 *International Journal of Marine and Coastal Law* (1995) 397.

officials. The International Court rejected the claim on jurisdictional grounds, without having occasion to consider the legality of Canada's unilateral measures.<sup>73</sup>

Another example is Norway's adoption of legislation prohibiting the issuing of fishing licences in Norwegian waters. Traditionally, relations between Iceland and Norway have been good with respect to fisheries, as in other areas. They have annually reached agreements allowing vessels from each other's countries to fish for certain amounts of fish in each other's EEZs. For the last five to six years, however, there has been tension between these two countries regarding fisheries on the high seas, i.e. fisheries in the 'Loophole' in the Barent Sea. This 'Loophole' is an area of the Barent Sea that does not fall under the EEZ of any country and is more or less unregulated with regard to fishing. States from around the world have therefore been able to fish in the Loophole free from any regulatory restraint. Many countries, among them Iceland and Russia, have exploited this gap in the regulatory framework. This has caused serious concerns both in Norway and in Iceland, partly because some of the fish stocks in this area are straddling stocks, and are thus found both in the high seas and the EEZ. Norway protested to the Government of Iceland about the fishing in the Loophole but when that proved insufficient initiated stronger measures. In March 1998 an Annex to 'Regulations relating to the regulation of fisheries in waters outside the fisheries jurisdiction of Norway' took effect in Norway. Through this Annex,<sup>74</sup> Norway introduced a regulation stating that an application for a fishing licence in their EEZ may be denied if the vessel or the vessel's owner has taken part in unregulated fishery in international waters of fish stocks subject to regulations in Norwegian waters (i.e. fish forming part of a stock that straddles the high seas and the Norwegian EEZ), even if the vessel is operated by persons other than those who actually participated in the unregulated fishing.<sup>75</sup> On the basis of this regulation, Norway has denied a number of Icelandic vessels licences to fish in Norwegian waters.

This increased the tension between Norway and Iceland and no doubt prompted them to solve their dispute. Quite recently, both countries, with Russia, reached an agreement in which they determined their respective allowable catches in the Loophole. A point of interest is that the unilateral measure taken by Norway was in

<sup>73</sup> When amending its Coastal Fisheries Protection Act, Canada also amended its declaration of acceptance of the International Court's jurisdiction so as specifically to exclude the Court's jurisdiction on the matter. The Court accepted this 'quasi-automatic' reservation and declared itself without jurisdiction to judge the merits of the dispute brought before it by Spain.

<sup>74</sup> Article 6 (Conditions for refusing or withdrawing fishing licences) of the Annex reads as follows:  
Even if other requirements are satisfied, the license may be refused, if in areas under Norwegian fishery jurisdiction, the vessel's owner, master or crew have contravened the provisions relating to fishing and hunting operations or the conditions prescribed in a license granted, or if the vessel has been used in connection with such contravention. The same applies if the vessel or the owner of the vessel has taken part in fishing outside quota arrangements in international waters for a stock which is subject to regulation in waters under Norwegian fisheries jurisdiction.

<sup>75</sup> Interestingly, Article 6 is directly linked to the vessel as such, so the vessel may be denied a fishing licence in Norwegian waters even if it is operated by persons other than those who participated in such unregulated fishing. Therefore, owners or operators of vessels cannot avoid this regulation by changing the ownership, operators, or the flag of the vessel.



fact a mere application of its jurisdictional rights under Article 56 of the UN Law of the Sea Convention: within its EEZ, the coastal state has the exclusive right to use the natural resources and to protect them.<sup>76</sup>

The Chilean concept of a *Mar Presencial*<sup>77</sup> may also be examined in the context of unilateralism. The concept is essentially a claim for control by coastal states of the fisheries beyond their EEZ. Questions have been raised as to its compatibility with international law since the UN Law of the Sea Convention declares coastal states to have jurisdiction only over fish stocks within their EEZ. However, supporters of the concept say that the notion does not involve a jurisdictional claim over the high seas and is fully consistent with present international law.

The weaknesses of the fishery regime of the high seas were at the core of all these cases, although the forthcoming entry into force of the UN Straddling Fish Stocks Agreement<sup>78</sup> will significantly strengthen the international fishery regime. It will build a regulatory framework which confers responsibility for the regulation of the fisheries on regional fisheries organizations.<sup>79</sup> International cooperation was favoured as the path to be followed. The Convention provides various incentives towards this aim. As an example, the failure of a state to become a member of, or a participant in, international fisheries organizations or arrangements will bar it from access to fishery resources. In addition, states with 'real interests' in the straddling stock fisheries are entitled to become members of the relevant organizations and arrangements. The Agreement also promotes international cooperation in enforcement by making sub-regional and regional fisheries management organizations a vehicle for implementing inspection schemes. Unilateral action of the kind resorted to by Canada in the context of the *Fisheries Jurisdiction Case* (1998) would be unlawful under such an Agreement.

The UN Straddling Fish Stocks Agreement may prove to be a means of preventing unilateral state action, although it may not entirely preclude differences of interpretation arising between state parties. The interface between environmental concerns and the economic interests of the fishing industry may continue to give rise to tensions and disputes. The resort to unilateral measures has not vanished entirely. In such cases, however, dispute-settlement mechanisms, such as those provided for in the UN Straddling Fish Stocks Agreement will thus be an effective means of resolving disputes, while at the same time, the legality of the allegedly damaging unilateral

<sup>76</sup> Had there been an issue of restriction of exportation or sale for export of fish stocks, there may have been an issue of compatibility with WTO prescriptions. See *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, Report of the Panel (1988) (L/6268), GATT, 35<sup>th</sup> Supp. BISD 98 (1989).

<sup>77</sup> Orrego Vicuna, 'Toward an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea', 24 *Ocean Development and International Law* (1993) 81.

<sup>78</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, UN Doc. A/CONF.164/37 of 8 September 1995. Reproduced in 35 *ILM* (1995) 1542. For the French text see Boisson de Chazournes, Desgagné and Romano, *supra* note 4, at 379.

<sup>79</sup> Freestone and Makuch, 'The New International Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement', 7 *Yearbook of International Environmental Law* (1996) 1.

measures will be assessed. The strengthening of dispute-settlement mechanisms is a sign of maturity of the legal order as it provides for objective assessment of the legality of the resort to unilateral action. Although not formally related to the UN Straddling Fish Stocks Agreement, the request brought by Australia and New Zealand before the International Tribunal for the Law of the Sea for provisional measures in the *Southern Bluefin Tuna cases* is but one example in that direction. In that case, Australia and New Zealand claimed that Japan, contrary to its obligations under the Law of the Sea Convention, failed to cooperate in the conservation of Southern Bluefin Tuna, by unilaterally conducting an ‘experimental’ fishing programme.

### 3 Unilateralism and Environmental Necessity: Old Wine in New Bottles or New Wine in Old Bottles?

The invocation of the protection of essential interests and the ‘urgent need to safeguard essential interests’ is often used as a reason for justifying the resort to unilateral measures. This is especially the case today, a time of increased awareness of the scarcity of natural resources as well as a perceived increase in vulnerability due to developments in science and technology. This raises the question of the legality of measures taken for such reasons. ‘State of necessity’ as envisaged by the International Law Commission (ILC) in its Draft Articles on State Responsibility for wrongful acts has been referred to in this context. International practice in this area is long-standing and the International Court of Justice has pronounced on the matter. However, one may question the potential of this legal concept to meet new environmental challenges adequately. If there is, as the arbitral tribunal stated in the *Lake Lanoux Case*, no rule of general international law ‘that forbids one state, acting to safeguard its legitimate interests, to put itself in a situation which would in fact permit it, in violation of international pledges, seriously to injure a neighbouring state’,<sup>80</sup> it remains to be seen whether a state can be excused for actually going beyond the threshold of legality in unilaterally safeguarding environmental interests.

As to state practice, one can start by considering the *Fur Seals Case*, which dates from last century. In 1893, Russia issued a decree prohibiting the fishing of fur seals just outside its territorial waters (at the time, the high seas), in reaction to British and North American fishing of fur seals in that area. Russia invoked the ‘absolute necessity of immediate provisional measures’<sup>81</sup> to prevent the extinction of the seals. In its commentary to the Draft Articles on State Responsibility later provisionally adopted on first reading, the ILC refers to this incident as an example of state practice favouring inclusion of draft Article 33 on the ‘state of necessity’ as a circumstance

<sup>80</sup> *Lake Lanoux Arbitration (France v. Spain)*, Arbitral Tribunal, 16 November 1957, 24 *ILR* (1957) 101 at 126 (emphasis added).

<sup>81</sup> See *ILC Yearbook* (1980), vol. II, Part 2 at 39, para. 14. Note the slightly different translation found in the ILC Secretariat Study, which reproduces this quote as: ‘... the absolute necessity of immediate precautionary measures’ (emphasis added); “Force majeure” and “Fortuitous Event” as Circumstances Precluding Wrongfulness: Survey of State Practice, International Judicial Decisions and Doctrine’, *ILC Yearbook*, (1978) vol. II, Part I, at 105, para. 155.

precluding wrongfulness.<sup>82</sup> As pointed out by James Crawford, the current Special Rapporteur on State Responsibility,<sup>83</sup> in the recent *Fisheries Jurisdiction Case (Spain v. Canada)*, the International Court of Justice dealt with a scenario almost identical to that in the *Fur Seals Case*, albeit one hundred years later. Canada based the amendments to its legislation on the fact that it had to safeguard essential interests in the fishery conservation area. However, as noted above, the International Court did not have occasion to pronounce on the merits in that case.

On the other hand, quite recently, the International Court of Justice pronounced itself in favour of a state of necessity as a principle of international law.<sup>84</sup> In the *Case Concerning the Gabčíkovo-Nagymaros Project*, the International Court of Justice declared that the state of necessity as embodied in draft Article 33 of the ILC Draft Articles on State Responsibility was a norm of customary international law.<sup>85</sup> In approving verbatim the ILC's formulation of the state of necessity,<sup>86</sup> and in considering the conditions attaching to the draft Article, the Court commented that the safeguard of the environment was indeed an 'essential interest' for the purposes of that provision, even if on the facts of the case, Hungary could not avail itself of the defence.

If 'state of necessity' was to be available to safeguard environmental interests,<sup>87</sup> the ILC had in its commentary in 1980 nonetheless stressed the need to distance the possibility of the plea being raised in circumstances which could be associated with historical notions of necessity which did not form a part of positive international law;

<sup>82</sup> *Ibid.*

<sup>83</sup> *Second Report on State Responsibility, Addendum*. UN Doc. A/CN.4/498/Add.2 of 30 April 1999, at 29–30, para. 285.

<sup>84</sup> There appears to be a general resurgence in popularity of the plea of necessity. It has for instance been raised by Belgium in the *Legality of the Use of Force Case (Federal Republic of Yugoslavia v. Belgium)*. See oral pleadings of Belgium of Monday 10 May 1999 at 3 p.m., document CR 99/15 on the International Court's website: <http://www.icj-cij.org/>

<sup>85</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* Judgment, *supra* note 35, at 39, para. 50.

<sup>86</sup> Draft Article 33 as adopted on first reading reads:

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
  - (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
  - (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.
2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
  - (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of international law; or
  - (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
  - (c) if the State in question has contributed to the occurrence of the state of necessity.

<sup>87</sup> *ILC Yearbook* vol. II, Part 2 (1980), at 39, para. 14.

such as the natural law inspired ‘doctrine of fundamental rights’,<sup>88</sup> from which stemmed a purported inherent right of self-preservation.<sup>89</sup> In the past, it had been claimed that self-preservation was a right before which all other rights had to yield in the event of conflict. In the nineteenth century in particular, this doctrine had provided one allegedly theoretical underpinning for action taken ostensibly under the cover of necessity, but in reality in contravention of international law. To emphasize that the necessity referred to in draft Article 33 is not a right, fundamental or otherwise, on the basis of which a state may make a claim on others, draft Article 33 is entitled ‘state of necessity’.<sup>90</sup> Thus, necessity is merely a situation which may temporarily exempt a state from complying with an otherwise binding obligation.

To avoid the possibility of abuse, draft Article 33 was cast in particularly strict terms. In the *Gabcikovo-Nagymaros Case*, the International Court was also particularly strict in that it applied the notion of state of necessity in a rather literal manner. The International Court appeared to say that for the purposes of draft Article 33, the uncertainties surrounding the peril in that case, meant that the risk was insufficiently imminent to satisfy the requirements of the draft Article:<sup>91</sup>

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a ‘peril’ in the sense of a component element of a state of necessity. The word ‘peril’ certainly evokes the idea of ‘risk’; that is precisely what distinguishes ‘peril’ from material damage. But a state of necessity could not exist without a ‘peril’ duly established as the relevant point in time; the mere apprehension of a possible ‘peril’ could not suffice in that respect. It could moreover hardly be otherwise, when the ‘peril’ constituting the state of necessity has at the same time to be ‘grave’ and ‘imminent’. ‘Imminence’ is synonymous with ‘immediacy’ or ‘proximity’ and goes far beyond the concept of ‘possibility’. As the International Law Commission emphasized in its commentary, the ‘extremely grave and imminent’ peril must ‘have been a threat to the interest at the actual time’ (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

Thus, the peril according to the Court, needs to be ‘duly established at the relevant point in time’. It seems that the Court in fact came close to saying that for a peril to be ‘imminent’ it has to be ‘certain’. According to the current Special Rapporteur on state responsibility, the Court in the *Gabcikovo-Nagymaros Case* considered that ‘the existence of scientific uncertainty was not enough, of itself, to establish the existence of an imminent peril’.<sup>92</sup> Yet in the environmental field, risks may not be certain and

<sup>88</sup> For brief descriptions of the doctrine of fundamental rights, see Verdross, ‘Règles générales du droit international de la paix’, 30 *RCADI* (1929-V), 273 at 412 *et seq.*, Scelle, *Précis de droit des gens. Principes et systématique* (1932), at 34–35.

<sup>89</sup> *ILC Yearbook* vol. II, Part 2 (1980), at 17–18, paras 7–8 and *ILC Yearbook* vol. II, Part 2 (1980), at 35, para. 4. See also to the same effect in Ago’s report, *ILC Yearbook* vol. I (1980), at 154, paras 41–45.

<sup>90</sup> Emphasis added.

<sup>91</sup> *Gabcikovo-Nagymaros Project*, *supra* note 35, at 42, para. 54.

<sup>92</sup> *Second Report on State Responsibility*, *supra* note 83, at 32, para. 289.

states may, in order to act in conformity with the precautionary principle, need to take action before the risk is as 'imminent' as the International Court would seem to require. In his report to the Commission in 1999, the Special Rapporteur considered the possibility that the current provision in Article 33, be relaxed to accommodate the precautionary principle. He stated: 'in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be substantial areas of scientific uncertainty, and different views may be taken by different experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances'.<sup>93</sup> Were the precautionary principle accommodated within Article 33, there would be greater scope for unilateral action to safeguard the environment.<sup>94</sup> However, the Special Rapporteur decided against such an amendment, on the basis of the possibility of abuse of the Article.<sup>95</sup>

As in the recent *Fisheries Jurisdiction Case* (1998) opposing Spain and Canada, this situation may lead states, when they are undertaking urgent unilateral measures to safeguard the environment, not to invoke necessity as a circumstance precluding wrongfulness at all. As a strategy this would seem logical given that the conditions attaching to necessity as provided for in draft Article 33 are so strict and it will no doubt be applied strictly by a judicial body so as not to give the impression that the notion is susceptible of abuse. Furthermore, as a mere circumstance precluding wrongfulness, a true situation of necessity requires an admission that conduct was *a priori* wrongful. It may also entail the payment of compensation for the harm caused by the action taken in necessity. Instead of asserting necessity as a 'shield', states might simply assert necessity as a 'sword'. Thus in the recent *Fisheries Jurisdiction Case* (1998), Canada merely asserted that urgent unilateral action was necessary to safeguard the environment. In so doing, it came very close to asserting a right before which others must cede. This is precisely what Special Rapporteur Roberto Ago had wanted to avoid in, for example, distancing the doctrine of fundamental rights from the concept contained in draft Article 33 of the ILC Draft Articles on State Responsibility.

In addition, and this is perhaps a new element to what so far can be considered as a fairly traditional problem, the urgent need for unilateral action is not merely being asserted as necessary to safeguard a particular state's essential interests, but rather those of the international community as a whole. This of course gives the claim a greater appearance of legitimacy. Thus, the Canadian Minister of Fisheries and Oceans stated before the House of Commons that Canada was undertaking a

<sup>93</sup> *Ibid.*, at 32, para. 289.

<sup>94</sup> Contrast the way in which the precautionary principle has been invoked in the *Southern Bluefin Tuna cases* currently before the Law of the Sea Tribunal. In those cases, Australia and New Zealand are claiming that Japan's unilateral decision to implement an 'experimental fishing programme' is unlawful in part because it does not take into account the precautionary principle. So far, however, there is no pretence by Japan that they are acting urgently, namely in necessity to catch southern bluefin tuna in order to conduct their scientific programme. Therefore in this case the precautionary principle has been used to challenge unilateral action, rather than to justify it.

<sup>95</sup> *Second Report on State Responsibility*, *supra* note 83, at 32, para. 289.

temporary assertion of an ‘ability to enforce the conservation of measures necessary to protect endangered species, not only just for ourselves, but for the world’.<sup>96</sup> It is to be noted that in pleading for legitimacy, this approach may also tend to camouflage unlawfulness.

Interestingly enough, a proposal floated in the ILC in July 1999 and, indeed, which has been included in the revised draft Article 33(1) as it currently stands<sup>97</sup> is that any state might take action in necessity in order to safeguard an essential interest of the international community as a whole – subject however, to the strict conditions to be found in draft Articles 33(1)(b) and 33(2). Arguably in practice, the whole difficulty with draft Article 33 is going to be to make this provision ‘usable’ — in the light of the tight restrictions which the draft Article contains — but not ‘abusable’.

This raises the question of whether the notion of ‘state of necessity’ is the appropriate one to encompass all actions to be taken in the name of preserving essential environmental interests? If not, is there room for another notion to accommodate considerations related to the precautionary principle? There too, there is an issue of ‘use’ and ‘abuse’ when ascertaining whether a state is entitled to take action unilaterally in the name of the preservation of essential environmental interests.

A middle ground may be found with treaty provisions incorporating concerns related to the precautionary approach and the need to preserve essential interests in cases of scientific uncertainty. Resort to primary norms obviates the need to go through secondary norms such as ‘state of necessity’ as a circumstance precluding wrongfulness. The existence of such norms would also respond to the calls made by states to be able to invoke their essential interests in certain circumstances deemed to be exceptional. These preoccupations would have to be clearly stated to ensure security and predictability. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), might be an example of such a treaty-based approach. Article 5.7 states that a WTO member country may provisionally adopt sanitary and phytosanitary measures and, in doing so, restrict imports ‘where

<sup>96</sup> *Fisheries Jurisdiction Case (Spain v. Canada)*, Counter-memorial of Canada (Jurisdiction), February 1996, at 16, para. 29.

<sup>97</sup> In December 1999, the revised draft Article 33, as provisionally adopted by the ILC’s drafting committee, read:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
  - (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and
  - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
  - (a) The international obligation in question arises from a peremptory norm of general international law;
  - (b) The international obligation in question excludes the possibility of invoking necessity; or
  - (c) The State has contributed to the situation of necessity.

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relevant scientific evidence is insufficient'. The decision handed down by the WTO Appellate Body in the *EC Measures concerning Meat and Meat Products (Hormones)*<sup>98</sup> and the reactions that followed, have shown that the Agreement may not fully take into account the concerns reflected in the precautionary principle, as expressed in Principle 15 of the Rio Declaration. Indeed, the precautionary principle states that even in cases of scientific uncertainty, when the environmental risks are predicted but not provable in scientific terms, precautionary action should be taken.<sup>99</sup> This difficulty for the precautionary principle to find a place within the SPS Agreement emerges even more clearly in the light of the interpretation of Article 5.7 given by the Appellate Body in the case concerning *Japan – Measures Affecting Agricultural Products*.<sup>100</sup> In that case the Appellate Body stated:

89. Article 5.7 of the *SPS Agreement* sets out four requirements which must be met in order to adopt and maintain a provisional SPS measure. Pursuant to the first sentence of Article 5.7, a Member may provisionally adopt an SPS measure if this measure is:

1. imposed in respect of a situation where 'relevant scientific information is insufficient'; and
2. adopted 'on the basis of the available pertinent information'

Pursuant to the second sentence of Article 5.7, such a provisional measure may not be maintained unless the Member which adopted the measure:

1. 'seek(s) to obtain the additional information necessary for a more objective assessment of the risk'
2. 'review(s) the . . . measures accordingly within a reasonable period of time'

These four requirements are clearly cumulative in nature and are equally important for the purpose of determining consistency with this provision. Whenever *one* of these four requirements is not met, the measure at issue is inconsistent with Article 5.7.<sup>101</sup>

The Appellate Body, in its quest for objectivity in its application of the rule of law, has in fact made it very difficult, perhaps impossible, to take full account of the precautionary principle within the context of the SPS Agreement. For the sake of guaranteeing stability of a treaty-based relationship between parties and of introducing reasonableness in its application, it seems to have put aside the element of doubt which is the intrinsic component of the precautionary principle.

## Concluding Remarks about the Legitimacy of Unilateral Measures

Unilateralism is a notion which does not have a legal meaning per se. It is nonetheless widely used to describe various types of acts and measures, demonstrating by the same token that such conduct is part of daily international life. Unilateral measures are

<sup>98</sup> Report of the Appellate Body, 16 January 1998, *supra*.

<sup>99</sup> The Appellate Body in the *Hormones Case* also used the concept of more than a mere possibility, namely a probability, to constitute a 'risk' under the SPS Agreement.

<sup>100</sup> WT/DS76/AB/R (22 February 1999).

<sup>101</sup> *Ibid.*, at 23-24.

resorted to in a wide array of situations. This said, it should be stressed that the ‘unilateral’ character of a particular course of conduct does not of its own accord confer legitimacy on the resort to such an act. Nor indeed does it necessarily mean the act is unlawful.

Whether it is possible to prevent the resort to unilateral measures for environmental purposes is one thing, and whether it is desirable is another: in certain circumstances, unilateral measures may be better suited to certain fields than others, if only because of the objectives pursued. Their legitimacy should, however, to the greatest extent possible, be harnessed by international law, either through the application of substantive norms or by resorting to checks and balances for assessing their legality. Dispute settlement mechanisms play a key role in this respect. Moreover, the elaboration of such legal processes contributes to the levelling of the playing field among partners of different economic power.

Another question relates to the legitimacy in exceptional circumstances of unilateral measures which are illegal *per se*, but which may be coupled with the claim of being necessary ‘civil disobedience’ actions. Such an issue may arise when essential interests are at stake. The invocation of essential interests seeks to excuse a violation of international law, or possibly even ground a right to protect such interests, thereby countering any challenge to their lawfulness. Such an argument is not new. It echoes the ‘fundamental rights’ theory developed in the nineteenth century, with the worrisome risks of abuse that it entails. The public policy framework of action developed in the second half of the twentieth century<sup>102</sup> should be kept in mind as a means of restricting such conduct.

This said however, one may note the general feeling that there is a need for a forum for resolving public policy issues and dilemmas in order to curb unilateral action. The WTO is tending to become the focal point for resolving many of these emerging public policy issues, be they political, as for example with the implementation of the Helms Burton Act, social when it comes to the protection of workers’ rights, or environmental. This raises the problem of the adequacy of the WTO forum for resolving these issues. They are in fact problems of governance of an international community in search of a new identity in an age of increasing complexity and vulnerability; the latter being heightened by the risks attached to the development of science and technology.

<sup>102</sup> See Gowlland-Debbas, ‘The Right to Life and Genocide: The Court and an International Public Policy’, in L. Boisson de Chazournes and P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 315.