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What's So Bad about Unilateral Action to Protect the Environment?

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Abstract

National actions to protect the environment can be more or less unilateral, ranging from those that promote purely national policies at one extreme to those that promote international norms at the other. Although the preference for international action to protect the environment is understandable, sometimes unilateral action can play a catalytic role in the development of an international regime. Moreover, often effective multilateral action is impossible, so the choice is not between unilateralism and multilateralism, but between unilateralism and inaction. Rather than condemning unilateralism outright, we need to evaluate each particular unilateral action (or inaction) to determine whether, on balance, it advances or detracts from desired ends.

Among international lawyers, unilateralism often seems tantamount to a dirty word. To characterize an action as 'unilateral' is to condemn it. Arrogance, disregard for others, domination, even illegality — these are qualities that the term 'unilateralism' evokes. If an action is unilateral, one need not even consider whether it is substantively right or wrong; the fact that it is undertaken by a single state rather than the 'international community', in itself, makes it illegitimate.

In this article, I wish to question the common equation of 'unilateral' with 'improper'. In the environmental realm, this association is far too simple.[1] In many cases, effective multilateral action to protect the environment is impossible, so the choice is not between unilateralism and multilateralism, but between unilateralism and inaction. Moreover, unilateralism is not necessarily destabilizing. Sometimes, it

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[1] For an earlier effort to assess the role of unilateral state action in protecting the environment, see Bilder, 'The Role of Unilateral State Action in Preventing International Environmental Injury', 14 *Vanderbilt Journal of Transnational Law* (1981) 51 *et seq.* As Bilder notes, 'Any perspective [on international environmental law] that ignores the role of unilateral state action . . . is likely to prove incomplete and unrealistic'. *Ibid.*, at 52.

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can play a catalytic role, promoting the development of international environmental regimes.[2] In such cases, another less pejorative term for unilateralism is *leadership*. In what follows, I will begin with some preliminary observations about the concept of unilateralism, and then assess its role in prescribing and enforcing environmental norms.

1 Preliminary Observations

Like many concepts, we tend to know unilateralism when we see it. The Canadian assertion of environmental jurisdiction over Arctic waters in 1970[3] and its arrest of a Spanish fishing vessel in 1995;[4] the British bombing of the *Torrey Canyon* oil tanker in 1967;[5] the United States trade restrictions on tuna and shrimp caught in ways that harm dolphins and sea turtles respectively[6] — in all of these cases, one state proceeded independently, on its own authority, with minimal (if any) involvement by other nations. That is the nub of unilateralism.[7]

Defining what makes unilateralism problematic, however, is more difficult. In most instances, states are entitled to act unilaterally. That is the essence of sovereignty. In demarcating the problem of 'unilateralism', the issue is to define when a state's right to act as a sovereign — that is, to act unilaterally — is appropriate, and when it should yield to an international decision-making process.

One approach to this definitional question is to equate unilateralism with illegality. But the category of illegality is both broader and narrower than that of unilateralism. In criticizing Iraq's burning of Kuwait's oil wells as 'illegal', or the mass murders of Kosovars by Serbia, one is not simply saying that Iraq and Serbia acted unilaterally, without any international sanction. What makes these actions problematic is not their unilateral versus multilateral character, but rather their substance. Conversely,

[2] See *infra* notes 18–23 and accompanying text.

[3] Arctic Waters Pollution Prevention Act, Can. Rev. Stat. c. 2 (1st Supp. 1970), reprinted in 9 *ILM* (1970) 543. Under the Act, Canada asserted jurisdiction to control polluting activities out to a distance of 100 miles from its coastline. For contrasting views of the Act, see Beesley, 'Rights and Responsibilities of Arctic Coastal States: The Canadian View', 3 *Journal of Maritime Law & Commerce* (1971) 7–12; Henkin, 'Arctic Anti-Pollution: Does Canada Make — or Break — International Law?' 65 *AJIL* (1971) 131–136.

[4] See Springer, 'The Canadian Turbot War with Spain: Unilateral State Action in Defense of Environmental Interests', 6 *Journal of Environment and Development* (1997) 27–60.

[5] See R.M. M'Gonigle and M.W. Zacher, *Pollution, Politics and International Law* (1981) 157 *et seq*. In the *Torrey Canyon* case, the British airforce sunk a Liberian oil tanker that had run aground in international waters off the British coast, in order to stop a massive oil spill.

[6] See Anderson, 'Unilateral Trade Measures and Environmental Protection Policy', 66 *Temple Law Review* (1993) 751–784; Cheyne, 'Environmental Unilateralism and the WTO/GATT System', 24 *Georgia Journal of International and Comparative Law* (1995) 433–465; Reinstein, 'Trade and Environment: The Case for and against Unilateral Actions', in W. Lang (ed.), *Sustainable Development and International Law* (1995) 223–237.

[7] See *American Heritage Dictionary of the English Language* (3d ed., 1992) (defining 'unilateralism' as 'a tendency of nations to conduct their foreign affairs individualistically, characterized by minimal consultation and involvement with other nations, even their allies').

not all actions condemned as unilateral represent violations of international law. The efforts by the United States to renegotiate the terms of the UN Convention on the Law of the Sea, or to add elements to the Kyoto Protocol on climate change (such as meaningful participation by developing countries), are sometimes criticized as 'unilateral',[8] but clearly are not illegal. A state may seek to modify a treaty, or decline to ratify the treaty unless such modifications are made, without falling foul of international law. So we need some alternative formulation of the problem of 'unilateralism', not tied solely to the question of legality.

Another preliminary point: ordinarily, we think of unilateralism in terms of various kinds of actions by states — the adoption by Canada of the Arctic Waters Pollution Prevention Act of 1970, for example, or the imposition of import restrictions by the United States. Indeed, Richard Bilder's classic article on environmental unilateralism was entitled, 'The Role of Unilateral State *Action* in Preventing International Environmental Injury'.[9] But inaction can also raise issues of unilateralism — for example, the failure by the United States to ratify the Biological Diversity Convention or to accept the Land Mines Convention.

In the case of action, what makes unilateralism problematic is the fact that a state's action directly impacts on another state. Although states have the right to act unilaterally with regard to their domestic affairs, they should not be able to impose their will on others.[10] But that is exactly what they do when their actions affect the rights or interests of other states. Fairness suggests that all those who will be affected by a decision should be able to participate in the decision-making process, and that unilateral action is therefore presumptively illegitimate; it represents a kind of hegemony and imperialism.

Unilateral *inaction* raises a somewhat different concern. What seems to underlie this concern is a belief in an international community with shared objectives such as the protection of the environment and human rights abuses — objectives that cannot be achieved by individual states, but require collective action. If collective action is necessary to achieve a community objective, then the refusal by a state to join the international effort, although within the state's rights under traditional conceptions of international law, frustrates the achievement of that community objective. This is perhaps the basis for criticisms of the US rejection of the International Criminal Court or the Land Mines Convention.

Both with respect to action and inaction, the increasing concern about unilateralism should not be surprising. Unilateral action by states was not a problem so long as it did not affect other states or the global commons; what a state did within its own territory was a matter for its own domestic jurisdiction. But now many actions have effects on other states or on the global commons. In the environmental arena, the

[8] See Boisson de Chazournes, 'Unilateralism and Environmental Considerations: Issues of Perception', this issue; Dupuy, 'The Place and Role of Unilateralism in Contemporary International Law', 11 *EJIL* (2000) 19–31.

[9] Bilder, *supra* note 1 (emphasis added).

[10] Cf. Stockholm Declaration on the Human Environment, principle 21; Rio Declaration on Environment and Development, principle 2.

effects are often physical, given the increasingly transnational nature of pollution. But, even when there are no physical spillovers, actions can affect other countries economically, due to the global trading system. As a result, actions that once might have been seen as a valid expression of sovereignty, are now seen as 'unilateral acts' and are hence tainted.

The emerging sense of an international community, which calls into question unilateral inaction, is of perhaps even more recent vintage. Thus far, it is most evident in the human rights domain, particularly at the regional level. But the need for collective action to address such problems as destruction of the stratospheric ozone layer may foster a similar sense of global environmental community.

Of course, both the concepts of unilateralism and its converse, internationalism, are ideal types. Even so-called international decision making often reflects the will of a particular state, or a small group of states, which can impose their will on others, rather than an 'authentic' decision of the international community. This is a criticism sometimes levelled against the Security Council. Conversely, few 'unilateral' decisions are taken by a state in complete isolation — usually, a state must at least consider the views of other states and how they will react.

This points to a final general observation about unilateralism: the unilateral character of a decision is not all or nothing, but rather more or less. Consider, for example, various types of national actions to protect wildlife. At one extreme was the United States trade measure to protect dolphins killed by tuna fishing, which GATT panels found inconsistent with the GATT in *Tuna-Dolphin I* and *Tuna-Dolphin II*.[11] Dolphins are not a threatened species, and were not protected internationally at the time. The United States trade measure was thus unilateral in several senses. Not only was the decision to impose trade restrictions against countries whose tuna fisheries cause high rates of dolphin mortality unilateral, but the underlying policy of dolphin protection was itself unilateral. The US trade measure reflected what might be regarded as an American desire to protect marine mammals, rather than an international policy.

A lesser degree of unilateralism was at issue in the more recent *Shrimp-Turtle* case, which again involved a US trade measure, in this case to protect sea turtles against shrimp fishing, including through the use of 'turtle excluder devices' (TEDs).[12] The United States trade measure prohibited the importation of shrimp harvested in ways that are harmful to endangered sea turtles. As in the *Tuna-Dolphin* case, neither the standard requiring that shrimp be harvested in ways safe for sea turtles, nor the prohibition on importation of shrimp harvested in other ways, had been agreed

[11] GATT Panel Report, 'United States — Restrictions on Imports of Tuna', General Agreement on Tariffs and Trade: Basic Instruments and Selected Documents (hereinafter GATT, BISD) 39S/155, reprinted in 30 *ILM* (1991) 1594 (*Tuna-Dolphin I*); GATT Panel Report, 'United States — Restrictions on Imports of Tuna', 16 June 1994, GATT Doc. DS29/R, reprinted in 33 *ILM* (1994) 839 (*Tuna-Dolphin II*).

[12] WTO Appellate Body, 'United States — Import Prohibitions of Certain Shrimp and Shrimp Products', 12 October 1998, WT/DS58/AB/R, reprinted in 38 *ILM* (1999) 118; see Richards and McCrory, 'The Sea Turtle Dispute: Implications for Sovereignty, the Environment and International Trade Law', 71 *University of Colorado Law Review* (2000) 295 *et seq.*

internationally; both were unilateral decisions by the United States.[13] But, in contrast to the *Tuna-Dolphin* case, the international community had at least recognized that sea turtles are endangered and require protection.[14] The US trade measure thus advanced an internationally agreed policy objective.

A still lesser degree of unilateralism is involved when a state acts unilaterally to enforce an internationally agreed regulatory norm. In such cases, only the enforcement action is unilateral, not the norm that is enforced. United States trade measures against countries that violate the requirements of the International Whaling Convention or the Convention on International Trade in Endangered Species (CITES) fall into this category.[15] The same was arguably true of Canada's enforcement action in 1995 against a Spanish fishing vessel catching turbot in excess of the limits established by the Northwest Atlantic Fisheries Organization.[16]

At the far end of the spectrum from pure unilateralism, a state can take enforcement actions that are themselves contemplated or authorized by international law. Assertions of universal jurisdiction over international crimes are unilateral in the sense that they are undertaken by a single state, acting on its own. But not only is universal jurisdiction aimed at enforcing internationally agreed norms; the power of individual states to take enforcement actions is itself recognized by international law. In the environmental realm, for example, port state jurisdiction to enforce international pollution standards is recognized under the UN Convention on the Law of the Sea.[17] Some might question whether it makes sense to consider these cases as 'unilateralism' at all. But compared to multilateral enforcement (for example, by an international body such as the new International Criminal Court), universal jurisdiction still involves a substantial element of state discretion and hence unilateralism.

2 The Role of Unilateralism in Environmental Protection

A *Unilateralism in Lawmaking*

The preference for international action to address environmental problems is easy to understand. When an environmental problem has sources in many countries, it is

[13] Although regional agreements had required the use of TEDs.

[14] Several species of sea turtles are listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, UNTS 993, 243; http://www.wcmc.org.uk/CITES/eng/append/fauna12.shtml (listing Appendix I species).

[15] Pelly Amendment to the Fisherman's Protective Act of 1967, 22 USC § 1978(a) (prohibiting imports of fish products from countries determined to be conducting fishing operations that 'diminish the effectiveness of an international fishery conservation program').

[16] See *supra* note 4 and accompanying text. Outside the environmental field, an example of national enforcement of international norms is the US Alien Tort Statute, 28 USC § 1350, which allows aliens to bring tort actions in US courts to enforce international legal standards. See e.g. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (tort action for torture).

[17] UN Convention on the Law of the Sea, Art. 218, 10 December 1982, UN Doc. A/CONF.62/122 (1982), reprinted in 21 *ILM* (1982) 1261 (entered into force 16 November 1994).

beyond the control of any single country and requires collective action to combat effectively. When it has effects that cross an international border, then multiple parties have a stake in the problem and therefore a legitimate claim to take part in the decision-making process. And even when both the causes and the effects of an environmental problem are confined to a single country, the increasing integration of the global economy makes different national standards potentially disruptive, and suggests the need for greater harmonization.

But, although all of these factors point to the desirability, in the long term, of multilateral approaches to address environmental problems, unilateral action can still serve important functions. First, unilateral action, or its threatened use, has often played a critical role in the development of international standards to protect the environment. In the evolution of the international regime to prevent oil pollution, for example, unilateral action helped catalyse international standard-setting at many key steps along the way.[18] In 1967, for example, the bombing by Great Britain of the *Torrey Canyon* to protect its coastal waters from a massive oil spill led to the negotiation of the 1969 Intervention Convention, which recognizes the right of coastal states to take unilateral measures 'to prevent grave and imminent danger to their coastline' from oil pollution.[19] Similarly, in the 1970s, the threat by the United States to impose unilaterally double-hull standards on oil tankers entering its ports spurred the international community to adopt the 1973 MARPOL Convention and its 1978 Protocol.[20]

The seemingly paradoxical role of unilateral action in promoting multilateral standard-setting is not difficult to explain. It is a familiar phenomenon in the development of customary international law, where unilateral national actions, sometimes of doubtful legality, can stimulate similar actions by other states, leading to the emergence of a new customary norm. The development of the continental shelf doctrine and the exclusive economic zone, in response to unilateral extensions of national jurisdiction, are prominent examples of this lawmaking process. In the environmental realm, multilateral negotiations are particularly prone to bog down, and tend to gravitate to the least common denominator, given the increasing reliance on consensus decision making. In this context, the threat of unilateral national regulation, which other states wish to forestall, can be one of the principal motivations to develop international standards.[21] As in the customary lawmaking process, unilateral action is primarily available to powerful states, and a thin line may at times divide leadership on the one hand from coercion on the other (although the extension by Iceland of its fisheries jurisdiction in the 1970s,[22] and the declaration of a nuclear

[18] See generally M'Gonigle and Zacher, *supra* note 5.

[19] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, Art. 1, 1969, UNTS 970 212.

[20] International Convention for the Prevention of Pollution from Ships (MARPOL), London, 2 November 1973, reprinted in 12 *ILM* (1973) 1319; Protocol of 17 February 1978.

[21] See Bilder, *supra* note 1, at 82.

[22] Resolution of the Althing Concerning Fisheries Jurisdiction, 15 February 1972, reprinted in 11 *ILM* (1972) 643; see Bilder, 'The Anglo-Icelandic Fisheries Dispute', 1973 *Wisconsin Law Review* (1973) 37 *et seq*.

free zone in the South Pacific in 1985,[23] demonstrate that even smaller, less powerful states can sometimes act unilaterally). Nevertheless, as the oil pollution case demonstrates, the threat of unilateral action can produce multilateral regimes that command widespread support and are consequently stable over time. This suggests that unilateral action, although questionable from a process standpoint, may nevertheless be justified by its substantive objectives and results. When unilateral action is aimed at developing multilateral standards that are impartial and advances shared objectives, rather than parochial national interests, then it can play a beneficial role in the international standard-setting process.

Even when an international regime has been negotiated, unilateralism may still be substantively justified as environmentally desirable. Although we have a tendency to assume that 160 heads (or, in this case, states) are better than one, and that therefore an international regime commanding the support of most states must have merit, the majority view may not always be correct.[24] This is particularly true in the international system, where multilateral agreements often reflect the lowest common denominator, or lack coherence because they were negotiated in haste, against an unrealistically short deadline, or had to accommodate the conflicting demands of different states. In some cases, there may not even be enough time at the end of a negotiation to go through the text to see whether it is self-consistent. In such circumstances, for a state to refuse to accept what it regards as a bad agreement could be regarded as a form of leadership, particularly if directed at developing a better agreement. If an environmental agreement is desirable, then a state should join, whether or not others do; but if the agreement is defective, then the opposite is true. On this basis, France and Australia's unilateral decision to abandon the Antarctic Minerals Convention,[25] the product of many years of intense multilateral negotiations, and to push instead for the development of the Antarctic Environment Protocol, could be defended as leading to a substantively desirable result, rather than disqualified automatically as 'unilateral'.

Finally, although international law often seems to contain a presumption in favour of multilateralism, it is good to remember that, in general, unilateral action (sovereignty) remains the norm in environmental policy and international action the exception, requiring special justification. This is the message contained in the principle of subsidiarity (or, in the United States, federalism): policies should be addressed at the lowest governmental level possible.[26] Even in an increasingly interconnected world, not every environmental problem requires a collective

[23] South Pacific Nuclear Free Zone Treaty, 6 August 1985, reprinted in 24 *ILM* (1986) 1442.

[24] Cf. J. Stuart Mill, *On Liberty* (1859), ch. 2. ('If all mankind, minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind'.)

[25] Convention on the Regulation of Antarctic Mineral Resource Activities, Wellington, 2 June 1988, AMR/SCM/88/78, reprinted in 27 *ILM* (1988) 868.

[26] See Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism', 17 *Fordham International Law Journal* (1994) 846 *et seq.*

response. Where possible, states should be allowed to pursue their own environmental values and policies. The problem is to draw the dividing line between issues that require a multilateral response, and those where states can properly act on their own. The GATT Uruguay Round agreements create a presumption in favour of multilateral product standards, in order to promote free trade, and require states to provide some scientific basis for stricter national laws.[27] But, as the *Beef Hormones* case[28] suggests, it remains to be seen whether this is a workable test for distinguishing between a valid exercise of sovereignty by a state in pursuing national environmental values, and an improper, unilateral deviation from the international norm. Determining which actions fall into which category is likely to occupy the attention of international environmental lawyers for years to come.

B *Unilateralism in Enforcement*

Unilateralism in enforcement can be combined with unilateralism in standard-setting, but the two need not be associated — a state may also take unilateral measures to implement an international policy or standard. For example, the US Pelly Amendment authorizes the President to impose unilateral trade sanctions against countries found to be undermining the effectiveness of international wildlife regimes such as the International Whaling Convention and the Convention on International Trade in Endangered Species (CITES).[29]

Unilateral enforcement of an international environmental standard creates a tension between unilateralism and internationalism. On the one hand, a unilateral action, even to enforce an international standard, may produce conflict, and thus be disruptive to the international system. That is why unilateral enforcement tends to be disfavoured in international law, and why there is an understandable preference for multilateral enforcement processes.

Nevertheless, unilateralism still has an important role to play, since often multilateral enforcement mechanisms may be either non-existent or ineffective. In such cases, there is no real multilateral option: the choice is between unilateralism and doing nothing, rather than between unilateralism and multilateralism.

The question is, when is it appropriate for a state to act on its own, rather than in concert with other states, in order to promote an interest of the international community? In making this choice, we must weigh the benefits to the environment of a unilateral action against the costs of that action to the stability of the international system. Several factors are relevant to this assessment:

Necessity: Is unilateral action truly necessary to promote an international standard, or is there a prospect of developing an effective multilateral regime? And if the latter,

[27] See Wirth, 'The Role of Science in the Uruguay Round and NAFTA Trade Disciplines', 27 *Cornell International Law Journal* (1994) 817 *et seq.*

[28] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998).

[29] See *supra* note 15.

is there sufficient time to pursue the international option, given the nature of the environmental threat? This has been a recurring question in trade and environment cases. In the most recent case, the *Shrimp-Turtle* decision, the WTO Appellate Body criticized the United States at least in part for not sufficiently pursuing international negotiations to resolve the problem, before imposing trade measures.

Effect on other states: To what degree does a unilateral decision impact on the legitimate interests of other states? For example, does it attempt to coerce other states through, say, the imposition of trade sanctions? This was a significant factor in the second *Tuna-Dolphin* decision, where the Panel found the US law to be problematic, because it attempted to force other states to adopt the approach favoured by the US.

Self-help: Is a state acting, at least in part, to protect its own environment? When a state acts to protect its own environment, such as in the *Torrey Canyon* case, it is on particularly strong grounds. Conversely, when a state is acting to protect the global environment, its claim is weaker. In the first *Tuna-Dolphin* case, for example, a GATT panel criticized the United States for imposing trade sanctions in order to protect a species found outside its borders.

Generality: Could the unilateral action be universalized? Does is it reflect a general rule that other states could use as well, as was the case for example of the Truman Proclamation? If so, then unilateral action could be seen as a type of leadership.

3 Conclusion

In the modern world, legitimacy is usually viewed in process terms.[30] A decision must be the product of 'right process' in order to be legitimate. Although defining 'right process' is extremely difficult,[31] it is clearly not right for one state to make decisions that affect the international community. From this perspective, unilateralism seems a dangerous anachronism.

But, despite the growth of multilateral decision making, international cooperation often remains unachievable or illusory. In such cases, where there is no real prospect for effective international action, unilateral action may be the only means of promoting and enforcing shared values. Although such actions do not comport with how we think decisions should ideally be made, they may nevertheless further important substantive goals, such as the protection of human rights or the environment. Rather than rejecting them outright, we should evaluate each particular unilateral action (or inaction) to determine whether, on balance, it advances or detracts from desired ends.

[30] T.M. Franck, *The Power of Legitimacy among Nations* (1990).

[31] Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *AJIL* (1999) 596 *et seq.*