CHAPTER 7: DOMESTIC LAW

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The global environment itself knows no national boundaries. The activities of states affect the global environment whether or not those activities are regulated by international law or by domestic law or both. However, every student interested in the global environment must take into account the interface between domestic and international law.

This Chapter's first essay reviews the considerations involved in the choices of states whether to act unilaterally or collaterally in regard to the environment. The second essay takes up the problems (of ``extraterritoriality'') that result when states, acting unilaterally, affect or preempt the environmental policies of other states. The problem of extraterritorial effects is further examined in the final essay in this Chapter, which takes the position that courts will generally find a presumption against extraterritoriality. The reader may ask whether such a presumption is desirable when global environmental effects are at issue.

A. Unilateral State Action[1]

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

Any perspective that ignores the role of unilateral state action, however, is likely to prove incomplete and unrealistic. First, unilateral state action in the environmental field is already a fact of international life. Second, certain types of environmental problems may inherently require unilateral state action for their effective solution. Indeed, many environmental problems are largely local, in the sense that their principal causes and immediate effects are confined largely within a single nation's territory. Transnational consequences occur principally as spillover from more significant domestic effects. A third reason for the importance of unilateral state action is suggested by the decentralized character of the existing international political system. In practice, individual sovereign states are likely to retain considerable authority to act unilaterally to prevent transnational environmental harm. The most significant problem of international environmental regulation may thus involve the allocation among states of jurisdiction to take unilateral action rather than the restriction of state prerogatives in favor of international authority.

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

1. Types of Unilateral State Actions: Some Distinctions

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

Within the past fifteen years, there have also been a number of unilateral environmental actions that do raise international problems. For example, in 1967, the British Royal Air Force bombed the Liberian-flag supertanker

Torrey Canyon, which had run aground in international waters off Cornwall, in an attempt to halt oil spills from the vessel which were threatening English and French beaches. In 1970, Canada enacted its Arctic Waters Pollution Prevention Act, which asserted Canada's jurisdiction to control shipping up to 100 miles off its Arctic coasts in order to prevent pollution of the Arctic environment. Iceland subsequently asserted a broad claim to a similar zone. Iceland extended its fisheries jurisdiction from 12 to 50 miles off its coasts in 1972, and from 50 to 200 miles in 1975, justifying its actions largely on the alleged need for fisheries conservation. Since then many other coastal states have unilaterally asserted similar claims to 200-mile fisheries zones, relying in part on the broad support for such extensive jurisdiction evidenced in negotiations at the Third United Nations Conference on the Law of the Sea. In 1973, New Zealand and Australia announced a joint naval demonstration against French nuclear tests at Mururoa Atoll in the South Pacific, and New Zealand and Australian naval ships cruised near the atoll to protest the tests and the consequent possibility of radioactive fallout in New Zealand and Australian territory.

In recent years, the United States has itself unilaterally undertaken a variety of environmental actions. For example, it has enacted legislation establishing the 200-mile protective fishery zone and the 200-mile pollution control zone. Regulations have been promulgated barring the dumping of certain substances within United States territorial or contiguous waters; providing for the establishment of design and construction standards for bulk-carrying vessels in foreign trade, including foreign-registered vessels entering United States navigable waters; preventing the importation into the United States of vehicles not meeting United States-established pollution control requirements; prohibiting the importation of certain endangered species or their products; and prohibiting the importation of fisheries products from foreign countries whose nationals are conducting fishing operations in a manner inconsistent with international fishery conservation programs. Other United States regulations restrict the import of DDT into the country and control its export as well as other environmentally harmful substances. In 1972, the Department of State agreed to file Environmental Impact Statements under the National Environmental Policy Act concerning any of its activities which might have a foreign environmental impact.

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

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

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

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

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

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

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

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

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

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

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

Traditional international law recognizes that a state may unilaterally exercise its jurisdiction over persons, activities, or events outside its territory in certain limited circumstances. First, under the so-called ``nationality principle,'' a state may unilaterally establish regulations controlling the extraterritorial activities of its own nationals, companies, vessels or aircraft of its registry, and certain other classes of persons or enterprises having substantial connections with the state. Many states have such regulations controlling their nationals beyond territorial borders, and as concern for pollution continues, more states are passing laws providing for such jurisdiction. Normally, however, a state cannot enforce such regulations against its nationals or enterprises while they are within another state's territory, though it may be able to do so with respect to vessels or aircraft of its registry on the high seas. This unilateral action by a state regulating its own nationals, companies, or vessels on the high seas or in foreign waters to prevent activities which might ultimately cause the state environmental harm, conceivably including even the bombing of its own vessels on the high seas to prevent shoreline pollution, would not appear to raise substantial international legal problems. Of course, where a state sought to apply its unilateral regulations to conduct by its nationals in foreign territory, there might be difficult practical problems of concurrent or overlapping jurisdiction between the state taking the action and the other country concerned, which might also wish to regulate such activities. Second, under the so-called ``protective principle,'' a state may unilaterally regulate extraterritorial activities of aliens in order to protect significant governmental administrative interests, such as the integrity of its currency or visa system. It might be argued that this principle is capable of expansion to deal with certain kinds of environmental threats. Finally, there is some authority to the effect that a state may take unilateral action to regulate not only conduct and activities occurring within its territory, but also conduct and activities occurring outside its territory that produce a substantial effect within its territory. While this theory could conceivably be invoked to support a state's jurisdiction to prescribe rules to prevent extraterritorial actions by aliens threatening environmental harm within its territory, it would not support the application of sanctions against persons or legal entities violating its extraterritorial regulations unless they were ``found'' within its territorial jurisdiction.

In addition to traditional international law theories, a second possible justification for extraterritorial jurisdiction is that emerging international law either already recognizes or is rapidly moving towards recognition of

the appropriateness of extraterritorial exercises of both prescriptive and enforcement jurisdiction for certain environmental protection purposes. Canada invoked this argument as a legal justification for its Arctic Waters Pollution Prevention Act, although it stressed the *lex ferenda* rather than *lex lata* aspect of relevant environmental law. Subsequent developments have buttressed Canada's position in this respect. For example, claims to similar extensive pollution prevention zones have since been asserted by other coastal states, both in the Ocean Dumping Convention, and in the current United Nations Law of the Sea Conference negotiations, which has substantially approved Canada's actions in its Draft Article 234, which gives coastal states special environmental authority over ice-covered areas of ocean within 200 miles of land.

A third possible argument might invoke the doctrine of self-defense as establishing an allegedly inherent or overriding right of a state to take unilateral action to protect its environment, even where the action might otherwise be contrary to law. Canada rested its argument for its Arctic Waters Pollution Prevention Act principally on this ground, claiming that the Act was justified as ``based on the overriding right of self-defense of coastal states to protect themselves against grave threats to their environment.'' Similarly, Iceland based its unilateral extensions of its fisheries jurisdiction from 12 to 50 and from 50 to 200 miles on the ground that the extensions were necessary to protect its fisheries, which allegedly were imminently threatened with destruction from foreign over-fishing. The United States also claimed the need for protection of United States offshore waters when it first unilaterally expanded the United States fishing zone and, later, the pollution control zone to 200 miles. On one occasion, Maurice Strong, former Executive Director of the United Nations Environmental Program, characterized certain environmentally harmful state actions (such as weather modification technology to ``steal'' another country's rainfall), as ``environmental aggression.'' Arguably, ``environmental aggression'' may suggest the existence of a right of self-defense analogous to the right of self-defense against military aggression.

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

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

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

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

interests of other states, the international community is likely to question its legitimacy more seriously. The absence of broad international condemnation of the British bombing of the Torrey Canyon is probably due to the fact that its action, while technically very questionable under existing law, was generally regarded as reasonable. As the risks of environmental harms become better defined, and as the practical impact of unilateral action to these environmental risks becomes clearer, international law will probably move towards a more precise articulation of standards of reasonableness in the form of explicit norms.

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

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

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

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

There are certain other broad international law principles which may be analogous to the alleged right of a nation to act unilaterally to protect the global environment. One possible analogy is the concept of universal jurisdiction under which every state, in order to protect general community interests, is authorized to prescribe and enforce regulations against certain acts deemed offenses against mankind. This concept allows any state to take action against such international crimes, regardless of the locus of the offense, the nationality of the offender, or the place where the offender is found. The usual examples of universal jurisdiction are piracy and war crimes. Slavery, hijacking, and genocide have been given a similar status under treaty, as have ``crimes against internationally protected persons.'' A limited form of jurisdiction has also been proposed in current negotiations in the Third United Nations Law of the Sea Conference under which states would have a general right to act against off-shore radio transmitters and drug smugglers.

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

4. The Effects of Unilateral State Action

a. Possible Advantages of Unilateral Action

A principal advantage of unilateral state environmental action is the promptness with which state power and sanctions can be effectively brought to bear against conduct or activities threatening environmental injury. Thus, the incentives to catch endangered species will be immediately reduced when a significant importer unilaterally imposes state restrictions against importing these species or their products. In some cases, the alternatives to unilateral action may be no regulation at all, less effective regulation, or long delays until regulation is implemented. There may be various political, economic, military, or technical reasons why multilateral agreement is likely to prove impossible or extremely difficult to achieve. And even if mutual agreement on a regulatory regime is reached, it may only be at the level of the lowest common denominator, with the state most resistant to effective regulation in effect setting maximum standards for all participants. In practice, unilateral action is frequently justified on the ground that the urgency and gravity of the threat to which it is a response simply does not permit the delays and uncertainties involved in attempts to secure multilateral action. Canada used this argument to justify its Arctic Waters Pollution Prevention Act; Iceland used it to justify the extension of its fisheries limits; and the United States invoked this argument in its unilateral adoption of interim steps to protect its fisheries resources until such time as an acceptable LOS treaty would be adopted.

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

Third, unilateral action may in certain circumstances have a wide ranging and even global beneficial environmental impact, far exceeding any immediate effect within the acting state's territory or on its nationals. This may especially be true if the acting state occupies a position of particular leverage because of its size, wealth, or economic or geographical position. One type of environmental leverage may derive from a state's special international trade position. For example, any measures to reduce environmental risks taken by a state that is an exporter of potentially polluting products or technology help to protect not only the acting state, but also all countries which import its products and technology. An illustration might be United States regulation designed to ensure the incorporation of adequate pollution-prevention design features on United States manufactured oil drilling equipment, a considerable quantity of which is exported. Conversely, a state that is a leading importer of certain products or technology may, through establishing environmental standards applicable to such imports, influence foreign manufacturers and exporters to take environmentally desirable measures that will produce benefits wherever such products or technology are used. Thus, United States pollution standards covering aircraft or automobiles will, because of the importance of the United States as both an exporter and importer of these products, have a major impact on their use and design in other countries. Another type of environmental leverage can derive from the fact that a state's nationals or companies control enterprises in other countries. Thus, a state that is the base for multinational corporations, or one having important direct investments abroad, is at least in theory in a position to bring considerable influence to bear to ensure that its national companies comply with desirable environmental policies in their foreign operations. Finally, a state may be in a position to exercise widespread influence over environmental standards by virtue of its geographic position or control over vital air or sea routes. Indonesia's and Malaysia's plans to impose certain traffic regulations on vessels passing through the Straits of Malacca have caused international concern since ships of many nationalities must regularly use this passage.

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

conference resulted in a Convention for the Prevention of Pollution from Ships.

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

b. Possible Disadvantages of Unilateral Action

A principal disadvantage of unilateral action is that it tends to discourage the growth of international order based upon mutual accommodation, cooperation, and international law. Unilateral action by one state may encourage similar unilateral action by others, which may be subject to domestic pressures to protect their national interests. Moreover, where unilateral action is perceived by other states as harmful to their interests, and particularly where it is contrary to existing international norms, the other states may in response take retaliatory actions. As a consequence, nations may turn to highly competitive rather than collaborative foreign policies, and patterns of international cooperation may degenerate. In short, apart from any possible limitations of unilateral state action with respect to the specific objectives of environmental control, it may, by its inherently individualistic character, exact broader social costs in terms of the international political and legal process.

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

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

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

Finally, unilateral action may involve substantial competitive risks for the acting states. These risks may lead

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

5. Accommodating Individual State Action within a Multilateral Framework

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

First, the international community could attempt, through broad and comprehensive international agreements, expressly to substitute overall multilateral solutions for unilateral ones. These agreements could delineate the parties' specific duties for the avoidance of transnational environmental harm and might also clarify the rights and remedies of states threatened by environmental injury. The Nuclear Test Ban Treaty and the Ocean Dumping Convention are examples of such multilateral agreements. Agreements that successfully reduce international environmental threats may obviate the need for unilateral action in those cases and may ease the pressures on states to respond unilaterally to any remaining threats. Moreover, any remedies created by international agreement may prove to be attractive alternatives to unilateral action. It is unlikely, however, at least in the near future, that international environmental agreements will create a multilateral authority with the power of enforcement. In most cases, matters of implementation and enforcement will probably be delegated to the parties, often with a considerable range of discretion. Thus, the role of state action, while somewhat limited, will still be significant. The Ocean Dumping Convention, for example, requires the parties to regulate dumping, but leaves matters of implementation and enforcement largely in the hands of the participating states. The Convention entirely prohibits the dumping of certain very harmful substances, but certain other substances may be dumped pursuant to special or general permits granted by each state itself. The provisions restricting oil pollution in the conventions and agreements administered by the IMCO have generally left the licensing and basic supervision of ships to the flag state, leading to charges that flag of convenience shipping is the largest and worst pollution offender. Indeed, where multilateral agreement delegates very broad discretion to the participating states, it may be doubtful whether the problems of unilateral action are actually avoided. Clearly, any discretionary agreement is subject to abuse by the member states. Thus, it may ultimately prove useful to distinguish between multilateral agreements that are serious attempts to find cooperative solutions to international environmental problems, and those which primarily serve to cloak unilateral discretion under the guise of multilateral cooperation.

A second way of dealing with the problem of state discretion would be the clarification of the geographical zones subject to unilateral action by each state to prevent international environmental harm. The most significant aspect of this problem concerns the limits of state jurisdiction to control pollution in the oceans.

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

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

The Convention stipulates the conditions that allow protective measures to be taken and the procedures to be

followed. It also imposes upon a state that exceeds what is reasonably necessary to achieve the ends stated in the Convention the obligation to pay compensation for any resulting damage. Provision is made for the settlement of disputes arising out of any measure purported to be taken under the Convention. In effect, the Convention legitimates individual state action to deal with such specific environmental threats, but does so within a multilateral framework which provides certain safeguards and mechanisms for dispute settlement.

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

B. Extraterritorial Regulation

1. Appropriate Circumstances[2]

The body of customary norms and international agreements that comprise the public international legal system do not provide comprehensive environmental protection. In those areas in which public international law does not protect the environment, international environmental protection is only as strong as the sum of individual states' domestic environmental regimes. Consequently, any treatment of international environmental law must consider how domestic environmental regimes may add to the protection of the global environment.

The efficacy of an international regime constructed from the environmental regulation of individual states will depend on two factors. First, each country must set stringent standards and must extend the protection of its standards to foreign citizens injured by transboundary pollution emanating from that country. Second, each country must have the power to enforce these standards domestically. In recent years, environmentalists have criticized the international community's reliance on a regime that depends on the ability and willingness of each state to regulate the potentially harmful activities that occur within its own borders. Commentators note that this system might work well if every state had a strong environmental regime and provided foreign citizens equal access to its domestic procedures for seeking redress. They conclude, however, that an international system consisting of discrete national policies fails to protect the environment because some states have weak environmental regimes that is, some states either set low environmental standards, do not allow foreign citizens to invoke these standards, or lack the power to enforce these standards.

To remedy these weaknesses, environmentalists and commentators have urged states with strong environmental regimes, such as the United States, to extend the reach of their legal systems to govern conduct in other countries.[3] This approach circumvents the need to secure foreign states' adherence to strict environmental standards set forth under public international law. Rather, it simply subjects individuals acting in territory governed by weaker regimes to the stricter environmental standards of other states. States can extend the reach of strong domestic regimes by two means: extraterritorial legislation,[4] and extraterritorial adjudication.[5] These methods are collectively referred to here as extraterritorial regulation.[6] An example of extraterritorial environmental legislation would be a federal statute requiring foreign subsidiaries of US corporations to adhere to the standards promulgated by the Environmental Protection Agency (EPA). Extraterritorial adjudication occurs when a US court hears a private claim against a US corporation whose manufacture and export of pesticides causes harm abroad. Although there have been few instances of actual extraterritorial environmental regulation by US courts and legislatures, at least one recent court decision suggests that extraterritorial regulation may become more common.[7]

Expansive application of one state's domestic legal regime may not always be appropriate. Many commentators believe that a tradeoff exists between environmental protection and economic growth. To the extent that one state's extraterritorial regulation successfully raises the environmental standards to which actors in another country must adhere, it may reduce the second country's rate of economic growth and disrupt its economic development. Proponents of extraterritorial regulation rarely detail either how effective their plan will be in protecting the environment or the costs regulation will impose on economic development. Even more rarely do they discuss the manner in which these costs and benefits will be distributed among states with weaker and stronger regimes or the criteria according to which states' competing interests should be weighed. As a result, it is difficult to determine whether, in a particular instance, extraterritorial environmental regulation would be desirable.

A state with a strong environmental regime can regulate extraterritorially in two distinct ways: through

legislation and adjudication. A general understanding of how domestic environmental legislation and adjudication operate in both strong and weak environmental regimes may be helpful for understanding the details of extraterritorial regulation.

1. Environmental Regulation in Strong and Weak Regimes-(a) Legislation. Most countries have enacted some sort of regulatory regime that establishes environmental standards for domestic activities. The amount of environmental protection that these laws provide, however, varies widely among countries. For example, the United States heavily regulates domestic land use in order to prevent air, water, and noise pollution. Similarly, the United States regulates the domestic use of environmentally hazardous items such as chemicals and pesticides by requiring that these items be approved by the EPA as environmentally acceptable before they are sold in the domestic market. By contrast, many states have adopted significantly more lenient pollution standards. For example, many allow the use of pesticides such as DDT that the United States has prohibited as environmentally unacceptable.

Domestic regimes differ not only in the standards they set, but also in the effectiveness of their enforcement. Even stringent standards require robust enforcement mechanisms to ensure adequate protection. Although many states have created agencies to enforce environmental regulations, many of these agencies lack the resources and expertise to detect and prosecute violations.

(b) Adjudication. Most states also provide some system of adjudication in which private harm including environmental harm can be redressed through the courts. Whether adjudication successfully protects the environment depends in part on the substantive rules that govern liability. The most protective rule is strict liability, which most American courts will apply to an environmentally hazardous activity.

The efficacy of domestic adjudication in providing environmental protection may also depend upon factors that are less related to the substantive environmental standards than to the adjudicatory process itself. For example, US courts aid injured plaintiffs by allowing such procedural advantages as broad discovery and class actions. American plaintiffs' lawyers also facilitate environmental suits by working on a contingency fee basis. Similarly, the remedies awarded by US courts tend to be significantly higher and, therefore, of greater deterrent value than those awarded by foreign courts. In contrast, adjudicatory systems in many states discourage environmental litigation through such means as damage award caps.

A related issue is the ability of plaintiffs who reside in one country but who were harmed by the activities of a company in another country to seek redress under the environmental laws and judicial procedures of the source state. For example, the United States allows foreign states and their citizens standing in US courts and provides them roughly the same degree of protection from environmental harms that originate in the United States as it affords its own citizens. Other states, however, do not allow such relief to foreign nationals.

2. The Need for and Power of Extraterritorial Regulation. Public international law has traditionally limited its concern to environmental harm that spreads from one state to another, such as drifting smoke and harm that affects the global commons, such as the destruction of the ozone layer. Environmentalists contend that extraterritorial regulation should apply not only to these harms but also to environmental harms contained within the territory of a single state, such as the destruction of a lake. They argue that the environmental threat posed by weak regimes is never purely local because the global environmental is interconnected. In addition, they claim that the operation of competitive international markets means that the existence of weak environmental regimes undermines the willingness of any state to enact stricter environmental standards. Because firms subject to rigid environmental regulation are likely to have higher costs than firms in a country with little regulation, domestic political pressures to equalize the commercial playing field by relaxing standards may result in a race to the bottom in environmental regulation.

To remedy the danger that weak regimes pose to international environmental protection, environmentalists have called upon the United States to intervene and apply its stricter environmental regime extraterritorially. Incidents that have prompted plaintiffs to resort to US courts include the pesticide plant disaster in Bhopal, India, the dumping of mercury into Lake Erie by a Canadian company, and the use of hazardous pesticides in Costa Rica. These and other incidents have also generated numerous legislative proposals for extraterritorial legislation.

(a) Extraterritorial Adjudication. Three conditions must be met for plaintiffs to obtain effective extraterritorial adjudication: first, US courts must have jurisdiction to hear the case; second, the substantive environmental law being applied must be strong enough to establish liability; and third, courts must be able to enforce the judgment against the polluter.

United States courts have broad jurisdictional powers that permit them to hear claims concerning environmentally harmful activities that occur in the territory of other states. There will always be at least one US court with general personal jurisdiction over a given US citizen; thus, some US courts can hear any claim brought against a US defendant, no matter where that claim arose. As a result, many foreign plaintiffs, attracted by the

advantages of the American legal system, have sued American corporations in the United States for activities and harms that have occurred abroad. For example, Pepsi was recently sued in the United States for the harm caused by a bottle that exploded in Jamaica. An analogous case has arisen in the environmental context. In *Dow Chemical Co. v. Alfaro*,[8] Costa Rican farm workers were permitted to bring suit in a US court for injuries caused by a pesticide manufactured in the United States and exported to Costa Rica. Filing suit in the United States was clearly more favorable to the *Alfaro* plaintiffs because American attorneys were willing to represent the injured indigent farm workers for a contingency fee and because litigating in the United States allowed the plaintiffs to avoid a $1,500 cap that Costa Rica places on recovery in personal injury cases. Environmentalists believe that suits of this sort will reduce US corporations' willingness to export environmentally hazardous pesticides.

United States courts may also have personal jurisdiction over foreign corporations. If corporations maintain ``continuous and systematic'' business contacts within the United States, courts can constitutionally claim general jurisdiction over these entities and hear any claims brought against them. Thus, a foreign corporation that produces pesticides in a foreign factory and sells pesticides to Costa Rica might, like Dow in *Alfaro*, find itself subject to a suit in US courts if it has maintained sufficient contacts with the United States to support an assertion of general jurisdiction.

Jurisdictional bases for extraterritorial environmental regulation have been augmented by the courts' ability to pierce the corporate veil. Because a corporate parent and its subsidiary are two distinct entities that may have different citizenships, a US court might lack jurisdiction over a foreign corporate entity. Using doctrines of alter ego and agency, however, courts can extend their reach to environmental activities that occur abroad. For example, in *In re Union Carbide Corp. Gas Plant Disaster*,[9] Indian plaintiffs, injured by a cloud of toxic gas released from a pesticide factory owned by Union Carbide of India (UCIL), brought suit in US courts against the American parent, Union Carbide Corporation (UCC). Bypassing capital-poor UCIL, whose contacts with the United States might not have been sufficient to justify jurisdiction in American courts, the Indian plaintiffs directly sued UCC, a corporation over which the American court could clearly exercise personal jurisdiction.

In many instances, access to US courts may be at least as important to plaintiffs as the standards applied by those courts. Not only do plaintiffs benefit from favorable procedures in US courts, but also the simple ability to bring suit will give plaintiffs greater leverage to force defendants to settle.

If a court does exercise jurisdiction, it must apply a standard stringent enough to provide meaningful environmental protection. In some instances, plaintiffs may prefer to sue in the United States because US laws offer stricter standards of liability and US courts are more likely, under American choice-of-law rules, to select US law to govern the dispute. Even when the United States and the foreign state maintain similar standards, US courts tend to apply standards more stringently.

The effectiveness of extraterritorial adjudication would be significantly reduced if judgments could not be enforced. Most judgments rendered in the United States will be easily enforced because many polluters are US citizens, have assets in the United States, or trade with the United States. Even if the defendant corporation does not have assets in the United States, US courts can pierce the corporate veil to ensure that judgments are satisfied by the assets of closely related companies or corporate affiliates. If unilateral enforcement within the United States proves impossible, the plaintiff may be able to obtain enforcement of the judgment abroad.

(b) Extraterritorial Legislation. Almost any type of extraterritorial legislation enacted by Congress will be enforced by US courts. Currently, several US laws govern activities conducted in foreign territory. Some legislation, like the antitrust laws, bind all corporations acting anywhere in the world if the corporation's actions have a substantial effect on the US market. Other laws, such as the Export Administration Act, apply only to US corporations and their subsidiaries operating overseas.

With increasing frequency environmentalists have been lobbying for the enactment of environmental legislation that would apply extraterritorially. Their proposals include extending the National Environmental Policy Act (NEPA) to require environmental impact statements to be completed for activities carried out under the auspices of the US government in foreign countries. The Bhopal tragedy has prompted many environmentalists and legal commentators to advocate the enforcement of US environmental regulations against foreign subsidiaries of US multinational corporations. Similarly, environmentalists and politicians have also begun considering limitations on waste shipment and the export of pesticides to developing countries.

3. The Proper Scope of Extraterritorial Environmental Regulation. Although the United States may have the power to regulate extraterritorially it may not always be desirable for it to do so. Commentators who urge regulation in particular cases have not articulated a coherent framework for determining when the United States should attempt extraterritorial regulation. Thus, they often fail to balance the value created by environmental protection against the costs protection imposes on economic development. For example, some states prefer lenient pollution standards as a

method of encouraging the development of certain industries and strengthening their competitive advantage in those industries. Thus, environmental standards may have a significant impact on the goods and jobs that a country produces and the foreign exchange reserves that it maintains, and weak environmental regimes may encourage strong economic development.

In the absence of legislative guidance, courts should determine whether to regulate extraterritorially by openly balancing the likely effects of their actions. To ensure uniform and informed balancing of the interests that arise in environmental regulation, courts should adopt a rebuttable presumption that foreign environmental regulations should govern activities conducted in foreign territory.

a. Identifying Costs and Benefits. Courts should conduct two distinct inquiries to determine whether extraterritorial environmental regulation is reasonable. Courts must determine the costs and benefits associated with such regulation in terms of environmental protection and burdens on economic development. In addition, they should consider whether independent political and ethical values favor or disfavor extraterritorial regulation.

The effectiveness of the United States' extraterritorial environmental regulation cannot be assumed. In some circumstances, the United States may enhance environmental protection by forcing polluters to internalize the costs of their pollution. In other instances, however, a `substitution effect' may undermine the benefits of extraterritorial regulation: those foreign polluters who escape liability in US courts may capture the market share of those firms subject to liability. For example, by holding Dow liable for the export of hazardous pesticides to developing countries, the Texas court in *Alfaro* may force Dow to internalize the costs of the environmental harm that its product can cause, thereby increasing the cost of its product compared to foreign competition. Significant price increases may lead to the replacement of the Dow product with foreign products whose prices do not reflect the costs of potential environmental liability. When foreign firms maintain lower environmental standards substitution might actually result in a *reduction* of environmental protection.

The benefits of stronger environmental protection must be weighed against the constraints that regulation will impose on economic development. In weighing costs and benefits courts should distinguish between economic growth and development. GNP and foreign exchange measure only economic growth, whereas development includes not only aggregate economic growth, but also the manner in which the benefits of that growth are distributed. Economic growth and the distribution of its fruits are merely means of improving the quality of human existence. Focusing on the purely economic costs of environmental regulation may fail to capture the true costs the regulation places on development.

Regardless of whether US regulatory efforts are desirable as environmental policy, the decision to intervene may be influenced by ethical and political considerations. For example, the United States prohibits the export of certain highly concentrated polychlorinated biphenyls (PCBs). Supporters of this type of action frequently argue that even if this ban fails because PCBs are being acquired from foreign suppliers, the ban at least satisfies the United States ethical interest in not being directly responsible for the PCB-related environmental harm. Courts, however, often confuse these values with the more tangible costs and benefits of environmental regulation rather than considering them as one of several equally valid factors.

b. Weighing the Costs and Benefits. Case-by-case calculation of the costs and benefits of extraterritorial environmental regulation would be time-consuming, expensive, and wasteful; it would require a greater level of expertise and more resources than are available to courts. In particular, it may be difficult for a US court to assess the burdens environmental regulation imposes on a foreign nation's development. United States courts, however, need not make these determinations because foreign governments, in formulating their own environmental regulations, have already determined the optimal balance between development and environmental protection. Foreign governments are likely to make their decisions on the basis of more complete information and are likely to be more sensitive to local economic, political, and social conditions than US judges. Thus, the balance reached by a foreign government best reflects the entire range of relevant costs and benefits.

In addition to the jurisdictional presumption developed in section B, in which US courts would decline jurisdiction over a case governed by foreign environmental law, US courts should adopt a rebuttable presumption that foreign regulations governing environmentally harmful activities embody the appropriate balance between costs and benefits. Under this regime, US courts should initially refrain from applying domestic law extraterritorially when a foreign regulatory standard exists. They would instead assume that the existence of a foreign regulatory standard demonstrates the foreign government's interest in the policy area in question and that the foreign standard embodies the best environmental policy to apply. The foreign government need not calculate its interests ``correctly'' for such a presumption to be valuable. In many cases, in fact, the foreign regulation may not be the best policy because it is the product of inadequate analysis, corruption, or insufficient information. The presumption may still be valuable, however, to the extent that it provides a basis from which to focus discussion on the relevant costs and

benefits. The presumption requires plaintiffs to justify any extraterritorial application of US standards by providing information explicitly concerning the need for the extension, the likely effectiveness of such action, and the ramifications the action will have for environmental protection and economic development. Any subsequent decision regarding intervention will thus be better informed.

A party could rebut the presumption that foreign law would apply or the presumption that US courts should decline jurisdiction when foreign law governs a dispute either by showing that deference would not promote sound environmental policy or by demonstrating that independent considerations of fairness and moral foreign policy recommend retaining jurisdiction. Shifting the presumption on the basis of sound environmental policy would require a two-step inquiry. The first inquiry should focus on whether the foreign regime promotes sound environmental policy. In this inquiry the court will examine either the foreign state's environmental standard or the ability of its courts to enforce this standard. A party could show that the standard poses an unreasonable risk to the environment. Even when the foreign regulatory standard is the best policy, the plaintiff could demonstrate that the foreign government is incapable of enforcing its standards. If, for example, foreign plaintiffs have no meaningful redress for environmental injuries, US courts may retain the case to protect the environment. Second, when deference to a foreign environmental regime provides insufficient environmental protection, the court still should examine whether unilateral action by US courts will effectively correct the deficiency in the foreign regime. In particular, the court should examine whether a substitution effect will undermine the presumed benefits of extraterritorial environmental regulation.

Alternatively, a party may shift the presumption by demonstrating that retention will further US goals of fairness and moral foreign policy. For example, as mentioned above, even if foreign states will not ban the export of PCBs, thereby rendering unilateral action ineffective, the United States may decide to prevent the export of PCBs because it refuses to contribute to the environmental harm that these cause. A court will have to consider, however, whether such a ban is justified as moral foreign policy or is really an instance of unwanted paternalism and will be perceived by the foreign country as US imperialism.

c. Applying the Presumption The following hypotheticals demonstrate how a presumption against extraterritorial regulation will help focus courts' analyses on the most important policy issues raised by environmental regulation. Courts will focus their inquiries on the efficacy of a foreign state's environmental regime and on the ability of US courts to improve environmental protection through unilateral action. In addition, courts will separately consider values that may justify extending US standards extraterritorially or retaining jurisdiction.

Case 1: A US corporation exports a hazardous product to a developing country. The product meets the country's environmental standards but causes an environmental disaster. Injured plaintiffs sue in the United States. In this case, there would be a presumption in favor of the US court declining jurisdiction based on the existence of a foreign regulatory standard. That presumption may be rebutted, however, because the disastrous harm caused by the product suggests that the cost-benefit analysis embodied in the foreign country's regulatory laws may undervalue environmental protection. The burden rests on the plaintiffs to prove that the foreign regulatory standard poses an unreasonable risk to the environment.

If the court determines that the developing country's regulatory standard is unreasonable and therefore exercises jurisdiction it then must determine whether extraterritorial regulation would be effective and, if so, which country's tort standard to apply. Given the difficulty US courts may have in identifying foreign liability standards, they may choose to apply US tort law.

Case 2: A US corporation's activities in a foreign country violate foreign regulatory standards, but the plaintiffs are unable to redress their grievances locally. Here, the presumption against jurisdiction may be rebutted by the fact that the plaintiffs were denied a remedy, despite the defendant's violation of the standard. This scenario suggests that the foreign country's legal system cannot fairly compensate injured plaintiffs and does not effectively enforce its environmental standards. If the court were to determine that extraterritorial regulation in the form of access for plaintiffs to the US court system would be effective, it may exercise jurisdiction and apply the foreign regulatory standard.

Case 3: A US corporation sells a nuclear reactor to a foreign country with a well-developed legal system. The reactor meets the foreign standards, but an environmental group sues in the United States, claiming that the defendant violated US nuclear safety legislation. Even if Congress intended the legislation to apply abroad, the US court must determine whether in this instance exercising jurisdiction would be reasonable under principles of international comity. Given the existence of a foreign regulatory standard, the US corporation's compliance with that standard, and the availability of legal recourse in the foreign country, the court may exercise extraterritorial jurisdiction only if the plaintiffs show that the foreign standard itself is unreasonable. If the plaintiffs successfully bear this burden, a court deciding whether to retain jurisdiction could also consider the ethical interests in regulation,

notwithstanding the efficacy of the foreign country's regulatory efforts.

4. Approaching the Question of a Reasonable Environmental Regime. Although a presumption in favor of a foreign government's regulations may help focus attention on the policy considerations unique to extraterritorial environmental regulation, it cannot ensure that courts will uniformly agree when the presumption should stand. Inquiries into reasonableness and effectiveness are bound to rely on indeterminate standards and will often degenerate into a choice between more environmental protection or more economic development. In some instances, these competing interests can be reconciled because declining jurisdiction strengthens the foreign country's environmental regime and at the same time broadens its understanding of economic development.

Deference to a foreign country's environmental regime might actually help improve the system for global environmental protection in the long run. When US courts engage in extraterritorial regulation they may, in many instances, discourage the development of regulatory regimes in foreign countries. The Bhopal tragedy illustrates this point. India's legal system was not prepared to handle litigation of complex environmental torts of the sort ensuing from the disaster. It lacked contingency fee attorneys, the power to implead necessary defendants, broad discovery rules, and a formal class action mechanism. In addition, because so few tort cases had previously been brought in India, some uncertainty surrounded the liability standards that Indian law would apply; India did not clearly embrace either a negligence standard or a more rigorous strict liability standard for ultrahazardous activities. Since the accident, the Indian government has enacted measures to increase access to the Indian court system. For example, if a plaintiff is indigent the government may set aside the usual requirement that a tort plaintiff pay a tax for bringing suit. Additionally, Indian attorneys filed a suit that amounted to a class action, a device rarely used in India. Such innovation seemed to stop once the case was consolidated in US courts and resumed only after the US court eventually dismissed the suit on forum non conveniens grounds. Soon after the dismissal, the Supreme Court of India announced a strict liability standard to govern torts involving ultrahazardous activities. The Indian tort system probably would have not undergone such an evolution had the United States reduced the pressure for change by intervening more aggressively.

The Bhopal litigation also suggests that the type of case most likely to inspire US intervention one involving a large American multinational corporation is precisely the type of case that might prompt the strengthening of the foreign environmental regime. Domestic political pressure to ensure a recovery against a foreign multinational may force rapid change in the legal system of a country that does not provide an adequate remedy. Thus, the Bhopal tragedy may have prompted India to reconsider the balance between environmental protection and economic development in its system and may have encouraged the development of a stronger legal regime that protects the environment against both Indian and US polluters.

2. Impediments to Extraterritorial Regulation: The American Judicial Presumption Against Extraterritoriality[10]

United States employment and environmental statutes are generally not given extraterritorial application.[11] The reason for this legal isolation is an often used, but poorly understood, tool of judicial construction: the presumption against extraterritoriality. Ostensibly, this presumption simply requires a plaintiff to show that Congress actually intended for a particular law to apply outside U.S. borders. In fact, in the interpretation of ambiguous antitrust and securities laws, the presumption has proven little impediment to extraterritorial application. This is not, however, true in other areas. Unlike extraterritorial antitrust and securities cases, extraterritorial employment discrimination and environmental claims have been roundly rejected, making the presumption an almost complete barrier to victims of extraterritorial employment or environmental misconduct.

Although the presumption can be traced back to the early 1900s,[12] this rule of construction has been largely ignored by commentators who prefer to deal with more controversial questions of international comity and jurisdiction. This is ironic since the presumption has been increasingly used by courts precisely to avoid these seemingly more attractive questions. Presented with a statute that is silent on extraterritorial jurisdiction, courts often appear to gravitate toward a narrow interpretation of the statute itself and thereby circumvent thorny, unresolved questions of international law. The relative obscurity surrounding the presumption is equally remarkable given its wide past use, and its even wider potential use, to limit major legislative programs. Congress often fails to consider the extraterritorial applications of new regulations. The proper use of the rule of construction, therefore, can be vitally important to a plethora of different legislative program.

In interpreting ambiguous environmental regulations, courts in the United States have generally adopted the approach taken in employment cases. Without expressly considering the possible ``territoriality" of a given violation, courts demand a clear expression of congressional intent and predictably do not find it in these ambiguous statutes. Thus, while exceptions exist, both general and specialized environmental regulations (like the Occupational

Safety and Health Administration Act) are generally limited to domestic applications. The consideration of the extraterritoriality issue in the environmental area has, thus far, largely centered on interpretations of the National Environmental Policy Act of 1969 (NEPA), though other statutes have been subject to extraterritorial review. Enacted in 1969, NEPA was drafted as an ``Environmental Bill of Rights.'' It provides that federal agencies must issue an environmental impact statement (EIS) for any major federal project or action. The EIS must address any significant environmental consequences that would likely result from the action. In framing the purpose and scope of the statute, Congress used sweeping language that avoided geographical limits; ``recognizing the . . . critical importance of restoring and maintaining environmental quality to the overall welfare and development of man,'' congressional lawmakers declared that ``it is the continuing policy . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . .'' Unlike the statutes, Congress in fact expressly required agencies under NEPA to adopt a transnational view and to ``recognize the worldwide and long-range character of environmental problems . . . .'' However, like Title VII and the ADEA, NEPA's broad statutory language has not overcome the presumption against extraterritoriality.

Whether the division of extraterritoriality cases is the result of conceptual or political bias, or simply some precedential anomaly, the presumption against extraterritoriality remains an unevenly applied, highly chauvinistic canon of construction. As long as the courts require a clear expression of congressional intent for extraterritorial jurisdiction in nonmarket cases, the presumption will continue to produce curious results. By definition, ambiguous statutes will not contain such expressions. While this test may make sense on the question of prescriptive jurisdiction (where Congress can legitimately ignore international law), the application of the clearly expressed intent standard to the question of whether Congress intended to give a court subject matter jurisdiction abroad is misdirected. There will be many cases where Congress was not clearly expressive either for or against extraterritorial application. Many of these statutes, however, may be logically or practically extraterritorial in scope (as the courts found in market statutes). To confine such statutes domestically, in direct contravention of the likely (albeit unexpressed) congressional intent, is clearly inefficient and counterproductive. Yet eliminating the clearly expressed intent standard is only a partial solution to the confusion in this area. The question of the proper presumption for these cases remains. Answering this question requires a re-examination of the original rationales behind the presumption against extraterritoriality in light of contemporary circumstances.

In the 1930s and later years, national boundaries, and even national allegiances, became increasingly irrelevant in the world of finance. Courts eventually realized in antitrust (and later in securities cases) that the strict territorial view of the world was archaic and that any antitrust regulation would have to be concomitant with the market. The antitrust market was transnational and, therefore, the regulation had to be transnational as well. Thus, while it took a number of years for courts to recognize the changes in the financial market, the test for extraterritoriality in market cases was revamped to reflect the new reality.

Courts must similarly re-examine the original dual rationales supporting the presumption against extraterritoriality in light of modern transnational conditions. In Foley Bros. and Blackmer,[13] the Court clearly defined the two fundamental rationales behind the presumption. First, courts viewed Congress' ``normal concerns'' to be strictly domestic in nature; second, courts assumed that Congress as a rule tends to avoid violations of international principles. The combination of these two rationales, in the context of the conditions of the period, led courts to adopt a strict territorial view of congressional intent. The nonmarket cases strongly reflect that original territorialist view.

Much has changed since Foley Bros. and Blackmer. At the time of these cases, Congress (like the nation as a whole) was still heavily ensconced in an isolationist mentality. World policing, whether in political or legal form, ran against the American grain. Congress' concerns, however, have clearly grown with the scope of the problems in the late twentieth century. The world's expanding workplace and shrinking living space have forced Congress to broaden its view of, and its solutions to, national problems.

When the presumption against extraterritoriality developed in the early-twentieth century, few environmental concerns existed in Congress, much less environmental statutes. Congress permitted industrial pollution--both domestically and transnationally--with minimal restraints. In the 1960s and 1970s, however, a series of environmental tragedies focused world attention on transnational pollution. The United States and other nations moved to curb the dumping of hazardous wastes and release of toxic pollutants. Domestically, Congress went further and passed a number of major environmental laws regulating the nation's waterways, scenic areas, and the air. The statutory language reflects the international concerns that led to enactment. Thus, Congress' environmental record presents to some extent a different situation than its labor record, where congressional concerns expanded with the expanding world workplace. National environmental concerns (and legislation) developed much later than the labor laws and Congress' ``normal'' environmental concerns have been primarily transnational. This

transnationalist perspective of environmental problems was strengthened with recent transboundary disasters in the chemical and nuclear industries. In fact, figures indicate that the rate of large industrial accidents is rising exponentially in the late-twentieth century.

The second rationale traditionally supporting the presumption against extraterritoriality was that Congress as a rule tends to avoid violations of international principles. While this rationale is largely identical to the prescriptive jurisdiction analysis, it is based on the essentially sound assumption that when Congress wishes to circumvent (or ignore) international principles it will generally say so explicitly in deliberation or in the statutory text. Yet, the import of this rationale has changed over time. What constitutes a legitimate exercise of jurisdiction by Congress under international law is now far broader than at the origination of the presumption. Prescriptive jurisdiction is liberally interpreted according to the effects and conduct tests and thus Congress' intent not to violate these broad norms will rarely be determinative in these cases. If Congress' presumed intent is tied to international theories of jurisdiction, the presumption would generally cut more in favor of extraterritoriality than against it.

Both an analysis of the past case law and the original dual rationales behind the presumption against extraterritoriality strongly support a reversal of the rule of construction. Instead of beginning with a presumption that Congress intends all statutes to apply only territorially, it would make more sense to presume that, unless expressly limited, Congress intends statutes to apply extraterritorially. Consequently, in cases like *Boureslan,*[14] courts would presume congressional intent to apply Title VII extraterritorially in their analysis of subject matter jurisdiction. Then they would ask, as they do in market cases, whether the particular case at hand involves adequate effects or conduct to justify prescriptive jurisdiction under international law. This structure, of course, would still allow courts to deny jurisdiction in employment--or environmental--cases that fall short of the necessary territorial effects or conduct. Under this two-step structure of analysis, however, the question of subject matter and prescriptive jurisdiction would be distinct. Courts would also interpret the statutes on a case-by-case basis, as they have in the market cases, instead of limiting entire statutes to domestic applications. Perhaps more importantly, the presumption on extraterritoriality would be reflective of the world as it is at the dawn of the twenty-first, not the twentieth, century.

A reversal of the presumption, however, is not the only possible way of achieving better consistency in statutory interpretation. If consistency and notice were the primary objectives in choosing a test, a proper application of the original canon would achieve these objectives just as well as the presumption favoring extraterritoriality. If courts took heed of the current confusion and applied the original presumption correctly, Congress would have a predictable and reliable rule by which to draft legislation. Under that canon, courts would simply adopt a strict textualist approach to all extraterritoriality cases. Congress would then be on notice that, absent a direct, express statement on extraterritorial application, courts would construe all laws as applying solely within the United States.

While any consistent, unified approach is better than the current confusion, the application of the original canon comes with a number of possible liabilities. The first liability is the loss of the conceptual base for the presumption, as contained in the two prongs of Blackmer and Foley Bros. Basing the first prong of the extraterritoriality test on Congress' likely regulatory intent makes a great deal of interpretative and institutional sense. When intent was uncertain, courts felt it was more likely that Congress did not have transnational interests in legislation. As shown earlier, this assumption is no longer valid; Congress has expanded its regulatory interests to meet growing transnational markets and problems. To enforce a strict territorial result in extraterritorial cases is to ignore the more likely contemporary intent of Congress. Thus, if either presumption would satisfy Congress' need for predictability, the presumption favoring extraterritoriality would give the added benefit of at least gravitating toward the most likely congressional preference: a transnational intent.

A second problem with returning to the original presumption is the practical de-emphasis of the prescriptive jurisdiction tests. The prescriptive jurisdiction tests largely replaced the original presumption in market cases as the tests for subject matter jurisdiction. This substitution was clearly due in part to a feeling by the courts that extraterritorial review fit more naturally under a prescriptive test. The various conflicts tests stress elements that courts probably assumed Congress would have considered in enacting legislation, if it considered the extraterritorial question at all. If the original presumption is strictly (and consistently) enforced, extraterritorial cases arising in circumstances with clear domestic effects or conduct would nevertheless be denied relief. Under an inverse presumption, courts would essentially assume subject matter jurisdiction, absent an express congressional mandate, and thereby emphasize the prescriptive question by balancing transnational interests.

Lastly, the original presumption raises some troubling political problems for both the courts and Congress. In the past, courts have not applied the presumption consistently and there is little reason to expect change, absent a change in judicial perceptions of transnational conditions. Moreover, while any rule of interpretation can be manipulated, the original presumption is particularly susceptible to manipulation. It is very easy for a court to ignore evidence of congressional intent by stating that such evidence is not ``express'' or ``unequivocal.'' It is more difficult

for a court to manufacture evidence of an intent to apply a law strictly territorially. Constructing a positive case for limiting statutes to solely territorial applications will be unconvincing and transparent absent a direct limiting instruction by Congress.

The original presumption also raises a troubling public choice problem. A canon of construction conveys to Congress the likely result of a judicial interpretation so that Congress will know how to draft legislation to achieve a particular result. This can be an efficient device, when used consistently, to reduce costly legislative mistakes. It can also have a negative institutional role, however, when it is used to hide special interests. The Madisonian view of a representative democracy was to keep such special interests in check through open, deliberative debate. This process is circumvented when Congress knows that, absent a direct statement, a statute will be limited through judicial construction. It is doubtful that many representatives would openly lobby for a limitation on employment and environmental protections, given the increasing transnational movement of United States citizens. The present canon, however, permits special interest legislation on extraterritorial protection without public debate or action. Special interest groups looking for protection from regulation can ``buy'' votes on the ``legislative market'' to guarantee ambiguity, which in turn guarantees the non-extraterritorial result. This is the type of hidden vote-buying denounced by the ``public choice'' school of legislation in recent years as a failure of the traditional legislative model. By applying an inverse presumption, representatives would be compelled to expressly limit regulation domestically if they want to protect multinational interests. Legislators would thus be forced to pay the full political price for advocating or opposing transnational applications of United States laws.

FOOTNOTES CHAPTER 7

[1] Richard B. Bilder, *The Role of Unilateral State Action in Preventing International Environmental Injury*, 14 VAND. J. TRANS. L. 51, 52-53, 55-58, 63-75, 79-90 (1981). Copyright 1981. Reprinted by permission.

[2] Editors of the *Harvard Law Review*, 104 HARV. L. REV. 1484, 1609-23, 1631-39 (1991). Copyright 1991. Reprinted by permission.

[3] *See* Bilder, ``The Role of Unilateral State Action in Preventing International Environmental Injury,'' 14 VAND. J. TRANSNAT'L L. 51, 90-95 (1981); Turley, ``When in Rome'': Multinational Misconduct and the Presumption Against Extraterritoriality, 84 NW. U.L. REV. 598, 655-62 (1990).

[4] As used here, extraterritorial legislation refers to the application of one state's statutes and regulations to activities occurring within another country's territory.

[5] As used here, extraterritorial adjudication refers to the use of courts (usually U.S. courts) to resolve common law disputes, such as private torts, that arise out of activities carried on in foreign territory. In some instances the term also encompasses the decision whether to apply U.S. or foreign tort law to determine the standard of care.

[6] Extraterritorial regulation concerns the use of the domestic legal system to control activities occurring in foreign territory. We divide the discussion of extraterritorial regulation between statutory claims and common law or tort claims. This typography corresponds roughly to a division between public and private law. It also reflects two frequently used legal approaches to environmental regulation. Such a functional approach permits a clear discussion of the issues that motivate proposals for regulation and therefore provides a base on which to examine the different doctrines that courts employ in determining how to respond to such proposals.

[7] *See* Dow Chem. Co. v. Alfaro, 768 S.W.2d 674, 679 (Tex. 1990) (holding that the Texas legislature has statutorily abolished the *forum non conveniens* doctrine in its suits to enforce a personal injury or wrongful death claim in Texas courts), *cert. denied*, 111 S. Ct. 671 (1991). As a result, foreign citizens from certain countries will be able to sue in Texas courts whenever they are injured by environmental harm caused by US companies over which Texas courts have personal jurisdiction.

[8] 768 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

[9] 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987).

[10] Jonathan Turley, ``*When In Rome'': Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 599-01, 627-34, 655-62 (1990). Copyright 1990. Reprinted by permission.

[11] For the purposes of this Article, ``extraterritoriality'' refers to the operation of a United States law outside the borders of the country so as to encompass actions or activities that occur in whole or in part on the territory of another sovereign power, or alternatively, in international waters.

[12] *See, e.g.,* American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

[13] Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949); Blackmer v. United States, 284 U.S. 421 (1932).

[14] Boureslan v. Aramco, 857 F.2d 1014 (1988), *aff'd on rehearing,* 892 F.2d 1271 (5th Cir. 1990) (en banc)

(refusing to apply Title VII of the Civil Rights Act of 1964 extraterritorially).