USING THE PROTECTIVE PRINCIPLE TO UNILATERALLY ENFORCE TRANSNATIONAL MARINE POLLUTION STANDARDS

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ABSTRACT

Annex V to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) contains a broad prohibition against the marine disposal of all plastics; however, not all polluting states have ratified this treaty. While it is a principle of international law that treaty obligations are binding only upon the ratifying states, it may be possible to hold nonsignatory states equally liable for marine pollution damage prohibited by this convention under principles of customary international law. A case can be made that the general principles of liability for marine pollution damage as codified in this treaty and elsewhere represent, in fact, customary international law. Since customary international law relies on nation states to enforce its principles, liability for marine pollution damage may be enforced by national courts against all states, including those who have not yet signed or refuse to sign the international antipollution conventions.

Furthermore, a case can also be made that neither these conventions nor customary international law limits unilateral enforcement of stricter pollution standards, including enforcement on the high seas. The protective principle of international law permits a state to assert temporary jurisdiction over a person or a commercial entity whose conduct outside a state's territory threatens its national interest. By utilizing this transnational jurisdiction principle in the field of international environmental law enforcement, substance can be added to general admonitions not to pollute the high seas. As a protective principle case study, this paper analyzes the problem of renegade gillnets lost or cast aside on the high seas of the North Pacific.

INTRODUCTION

One of the tragic legacies of the 20th century is that the ocean has become a final resting place of man's waste products: oil, toxic wastes,

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In R. S. Shomura and M. L. Godfrey (editors), Proceedings of the Second International Conference on Marine Debris, 2-7 April 1989, Honolulu, Hawaii. U.S. Dep. Commer., NOAA Tech. Memo. NMFS, NOAA-TM-NMFS-SWFSC-154. 1990.

dredge tailings, sewage, and garbage drift with the currents, wash up upon the beaches, or settle upon once productive fishing grounds. Each night in the North Pacific, fishing fleets from Japan, Korea, and Taiwan set some 48,270 to 64,360 km (30,000 to 40,000 mi) of driftnet for a total of more than 8 million km (5 million mi) a year (Wolfe 1989; Marine Mammal Commission 1990). Additional driftnet fleets set thousands of miles of large mesh driftnets in the South Pacific and driftnet fleets from Taiwan have also been reported in the western Atlantic. In addition to their targeted catch, driftnets annually entrap close to a million seabirds and tens of thousands of marine mammals. It is estimated that 30 to 50% of the fish caught and killed drop out of the nets before being brought on board. In addition, over 965 km (600 mi) of the driftnets are thought to be lost or discarded from these fisheries annually. These monofilament net fragments may continue to entrap animals for years, including populations well within the 200-mi exclusive economic zone (EEZ) and territorial waters of the United States. In an effort to document and control the destructiveness of this fishery, the United States Government has attempted repeatedly, yet for the most part unsuccessfully, to reach agreements on cooperative arrangements for research, monitoring, and enforcement of flag-state restrictions on driftnet vessels fishing the high seas (U.S. Congress 1987a; Wolfe 1989).

With an ever-growing world population, marine pollution is a problem that won't diminish and seemingly defies solution. Numerous treaties have been drafted, signed, and ratified, all of which universally condemn pollution of the marine environment and obligate nation states to honor international pollution standards (London Dumping Convention 1972; Stockholm Declaration 1972; MARPOL 1973). The problem is how to enforce the admonition. Many states have refused to sign these treaties; those that have frequently fail to enforce the treaties' provisions.

This paper begins with a general discussion of existing conventional and customary international laws of liability for transnational pollution damage. Since international law in its current state of development relies on nation states to enforce its principles, this paper focuses on the strategies available to states and their citizens to enforce both international and national marine pollution standards. One such strategy is the use of the protective principle of international law that permits a state to assert temporary jurisdiction over a person or a commercial entity whose conduct outside a state's territory threatens its national interest (Levi 1979). By utilizing this transnational principle in the field of international environmental law enforcement, substance can be added to general admonitions not to pollute the high seas.

This paper also explores one particular pollution problem as a protective principle case study: that of renegade gillnets which have either been lost or cast aside on the high seas of the North Pacific. It examines existing treaties and domestic United States legislation applicable to the gillnet problem and outlines some remedial paths that may be taken.

The paper concludes with a proposal for a liability enforcement program that will encourage both domestic fishing vessels and foreign

vessels fishing in the United States EEZ under a Governing International Fishing Agreement (GIFA) to comply with United States law prohibiting the dumping of fishing gear overboard. The implementation of a liability fund program and its financing by the owners of fishing vessels will help prevent the "loss" of drift gillnets and provide compensation for any resource and property damage resulting from discards, as well as a source of funds for resource conservation activities, including biodegradable gear research.

TREATY AND CUSTOMARY INTERNATIONAL LAW

International law comes from several sources: (1) multilateral and bilateral treaties and conventions; (2) international custom as evidenced by the practice of states; (3) general principles recognized by states and articulated by learned scholars in treatises; and (4) judicial decisions by the International Court of Justice (ICJ), other international tribunals and, to a lesser extent, the national courts of sovereign states (ICJ Statute 1945). Of all these sources, only the first, treaty law, is considered "hard law." The rest form a body collectively regarded as customary international law. Customary law, however, may be equally as binding as treaty law depending on its general acceptance by nation states and evidenced by the extent to which those states honor and enforce it. All international law, treaty, and otherwise, depends on individual sovereign states for enforcement.

Customary international law, like treaty law, is being continuously created and modified. While it used to take many decades, if not centuries, of common practice by states to establish that a certain general principle of international law imparted an obligation on all states regardless of any treaty, that process may now be accomplished in a few years. A good example is the existence of a customary law against airline hijacking. Another is the recognition that coastal states now have a right to exercise jurisdiction over the resources of a 200-mi-wide EEZ once considered part of the high seas. The rapidly increasing exploitation of the world's resources, accompanied by a corresponding degradation of the world's environment, also supports an argument that there is a rapidly growing body of customary international law that governs resource conservation and pollution abatement.

One of the general principles of international law recognized by states is that conventional law may give rights to nonparty states, but may obligate only parties to a convention. To the extent that a treaty codifies customary law, however, it is binding on all states, whether or not they are parties. In the last two decades, treaties dealing with the environment have multiplied. Most of these conventions have incorporated into them certain common principles, including the obligation of "reasonable use" of shared resources (ICJ 1974) and the obligation of a state to ensure that activities within its jurisdiction do not damage its neighbors (Stockholm Declaration 1972).

Although international environmental law may impose general obligations to protect and conserve the world's resources, it is dependent on

sovereign states to enforce the obligations. Furthermore, it is understood that while international and regional cooperative efforts to protect the environment are important and should continue, they tend to be slow and ineffective. Most states recognize that neither they nor the planet can afford to wait for committee consensus. As a result, almost every pollution convention includes provisions whereby the contracting parties not only obligate themselves to carry out the terms of the convention, but also reserve the right to take unilateral measures to protect themselves against the acts of other states that threaten their environment (International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) 1954; Brussels Liability Convention 1969; Intervention 1969; London Dumping Convention 1972; MARPOL 1973; MARPOL Protocol 1978). This treaty reservation is pervasive, and to the extent that it is backed up by states' practice, it can be considered a rule of customary international environmental law.

The unilateral measures reserved by states may include prescribing stricter environmental standards than those provided by conventional international law. The jurisdiction to enforce these stricter standards, however, can only be exercised where a state has personal or territorial jurisdiction. A state has primary jurisdiction over acts committed within its territory; it may also have jurisdiction over transnational acts that substantially affect its territory. This extraterritorial jurisdiction is based on the protective principle.

THE PROTECTIVE PRINCIPLE IN INTERNATIONAL LAW

Based on the ancient doctrine of self-defense, the protective principle permits a state to assert jurisdiction over a legal person (including corporate individuals) whose conduct outside a state's territory threatens its national interests (Levi 1979). The "Restatement (Third) of Foreign Relations Law of the United States" outlines the scope of this principle in §402:

> "A state has jurisdiction to prescribe law with respect to. . .(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests." (American Law Institute 1987)

According to the "Restatement (Third)," §402 comment f, the protective principle is considered to be an application of the territorial effects principle. In the U.S. view, if an extraterritorial act produces an effect within a state's territory, that state can assert jurisdiction on the basis of territoriality. The United Kingdom takes a slightly different and more conservative view. If the commission of at least part of an extraterritorial act occurs inside a state's territory, jurisdiction can be asserted on the basis of an "objective territorial principle." When all acts are concluded outside the territory with only the effects felt within the territory, then it falls within a more limited doctrine of "extraterritorial" jurisdiction (Higgins 1984). Whether there is a real distinction between these two viewpoints depends on how jurisdiction is applied to a

particular set of facts. There apparently is no single rule of international law on the applicability of extraterritorial jurisdiction. Different rules are applied to different situations or legal relationships (Weil 1984).

The "Restatement (Third)," §403(1), however, notes that the exercise of any such jurisdiction must not be unreasonable, and §403(2)(a) further notes that states have an obligation to consider "all relevant factors," including whether the extraterritorial activity has a "substantial, direct, and foreseeable effect upon or in the territory." Additional factors to consider that are particularly relevant to transnational pollution activities are included in §402(2)(c) and (f): the importance of the regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted and consistent with the traditions of the international system.

THE PROTECTIVE PRINCIPLE APPLIED TO CIVIL ACTIONS

The jurisdictional regime described by the "Restatement (Third)," §402 and §403, applies to both civil and criminal actions. The civil application of the territorial effects principle to economic activity has been accepted by most Western European states, as well as Canada and Japan. European Economic Community (EEC) law has been applied to extraterritorial enterprises whose anticompetition activities have affected trade within the EEC. The EEC rules on competition, in particular those contained in articles 85 and 86 of the Treaty of Rome, apply to all agreements and practices of "undertakings" that prevent, restrict, or distort competition within the Common Market, even if those undertakings are situated in third countries (Lasok and Bridge 1987).

The United States applies the territorial effects principle in regulating the resale of technically sensitive U.S. products abroad and in antitrust restraint-of-trade actions. In *United States* v. *Aluminum Co. of America* (1945) Judge Learned Hand imposed a twofold test for the extraterritorial application of U.S. antitrust law: intent to affect the commerce of the United States and actual effect on that commerce. In *Timberlane Lumber Co.* v. *Bank of America* (1976), a Sherman Antitrust case, the court held that if commerce had in fact been affected, intent to affect was not required.

The use of the territorial effects principle to obtain relief from damaging acts committed by foreign states, as opposed to private foreign nationals, may be barred by the "act of state" doctrine. Under this doctrine, acts by sovereign states on their own territory are immune from the jurisdiction of foreign courts unless the state has expressly or by implication waived its immunity or the activity falls within the commercial exception (Akehurst 1984). The Foreign Sovereign Immunity Act (FSIA), 28 U.S.C. §1602, states that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned." Section 1603(d) of the FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." In *Mannington Mills, Inc.* v. *Congoleum*

Corp. (1979, p. 1292), another case involving the Sherman Antitrust Act, the court held that the act of state doctrine, which would normally preclude private claims based on the contention that the damaging act of another nation violated either American or international law, does not provide a defense "where the governmental action rises no higher than mere approval." Private foreign nationals, unless they are acting as agent of the state, are not protected by the act of state doctrine and can be sued under principles of private international law.

THE PROTECTIVE PRINCIPLE APPLIED TO CRIMINAL ACTS

The United States Supreme Court first recognized the protective principle in *Strassheim* v. *Daily* (1911, p. 285). Justice Holmes defined the principle as "acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it." Eleven years later, in *United States* v. *Bowman* (1922, p. 98), the Supreme Court applied the principle to a case involving a conspiracy to defraud the U.S. Government by American citizens on American ships on the high seas. The lower court had dismissed the case since the controlling criminal statute did not expressly confer jurisdiction on U.S. courts for fraudulent acts committed on the high seas. The Supreme Court reversed, holding that jurisdiction could be inferred since certain criminal statutes are "not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself. . . ." In 1968, the Second Circuit Court of Appeals applied the principle in *United States* v. *Pizzarusso* (1968, p. 10), a case involving false statements made abroad by a foreign national to a U.S. consular officer for purposes of obtaining an immigrant visa. The court held that because the false statements had a "potentially adverse effect" upon U.S. governmental functions, they were sufficient to infer jurisdiction.

The bulk of U.S. case law implementing the criminal application of this principle, however, focuses on violations of customs statutes by drug smugglers and the high seas enforcement of these statutes by the U.S. Coast Guard under "Regular Coast Guard: Functions and Powers," 14 U.S.C. §89(a). Although the State Department routinely requests the consent of the foreign flag state before authorizing the Coast Guard to board a foreign commercial ship on the high seas, Federal courts have ruled that this consent is not essential if the boarding is reasonable under the fourth amendment to the Constitution (*United States* v. *Conroy* 1979; *United States* v. *Streifel* 1981; *United States* v. *Alomia-Riascos* 1987). In *United States* v. *Verdugo-Urquidez* (1990, p. 1059) the Supreme Court held that the fourth amendment does not apply to search and seizure by U.S. agents of property owned by nonresident aliens and located in a foreign country. Presumably this holding might be applied to searches and seizures of foreign vessels on the high seas under the traditional view that flag vessels are extensions of state territory. The court did not consider whether such warrantless searches and seizures had to be reasonable.

THE PROTECTIVE PRINCIPLE APPLIED TO ACTS ON THE HIGH SEAS

The high seas are a jurisdictional void. International law attempted to fill this void by creating a flag-state regime. Flag states once enjoyed

exclusive jurisdiction over ships flying their flags on the high seas under the old notion that a ship was a floating extension of a state's landed territory (Sohn and Gustafson 1984). This fiction is slowly dissolving under a growing number of exceptions, exceptions based on the protective principle and prompted by abuse of the flag-state prerogative. Many commercial ships fly "flags of convenience." By registering "ownership" in a state such as Panama or Liberia that is not a party to conventions that set international navigation, wage, safety, pollution, and resource conservation standards, shipowners can avoid compliance. This common practice belies the territorial justification for flag-state jurisdiction. In *Cunnard Steamship Co.* v. *Mellon* (1922), the U.S. Supreme Court maintained that flag-state jurisdiction "arises out of the nationality of the ship, as established by her domicile, registry, and use of the flag and partakes more of the characteristics of personal than of territorial sovereignty."

For strictly shipboard matters, the flag-state regime is still an acceptable basis for claiming jurisdiction, but when the effects of a ship's activities spread beyond the confines of the ship, flag-state jurisdiction must be qualified. Ship-generated pollution is only the latest in a long list of activities that have caused nonflag states to assert claims of jurisdiction.

Legal inroads into the tradition of exclusive flag-state jurisdiction can be found in the 1958 United Nations Convention on the High Seas (Law of the Sea (LOS) Convention 1958), a codification of customary international sea law up until that date. Article 22 of the LOS Convention (1958) acknowledges that the exclusive jurisdiction of the flag state over its vessels on the high seas is subject to some exceptions: the boarding of foreign merchant ships by warships is permitted if they are suspected of piracy, slave trading, or if they are in fact the same nationality as the warship. Article 28 of the LOS Convention (1958) also codified the protective principle embodied in the doctrine of "hot pursuit." Hot pursuit of a foreign ship is permitted when authorities of a coastal state have good reason to believe that the ship has violated the laws and regulations of that state. Coastal states are allowed to pursue offenders committing illegal acts in the territorial sea and contiguous zone out into the high seas, subject to the limitation that the pursuit be uninterrupted. Pursuit must be terminated when the ship being pursued enters the territorial sea of another coastal state.

The 1982 United Nations Convention on the LOS codified an expanding application of the protective principle in article 110, adding "unauthorized broadcasting" to the 1958 Convention's list of exceptions (LOS Convention 1982). Hot pursuit was expanded in article 111 to include the right to pursue ships committing illegal acts in the EEZ and over the Continental Shelf. In article 108, the LOS Convention (1958) acknowledges by implication that states are applying the protective principle to high seas drug trafficking and attempts to modify unilateral actions by authorizing flag states to request the cooperation of other states in the suppression of such traffic on the high seas.

THE PROTECTIVE PRINCIPLE AND JURISDICTION OVER HIGH SEAS RESOURCES

The expansion of coastal state jurisdiction over the resources of the high seas is a recent phenomenon prompted in large measure by actions of the United States. In 1945, President Truman issued two proclamations, one claiming jurisdiction over the natural resources of the United States' Continental Shelf, the other over high seas fishery resources adjacent to its territorial sea. Prompted by World War II and a growing dependence on foreign sources of fossil fuels, the President proclaimed:

> "[T]he Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States [and] subject to its jurisdiction and control." (Presidential Proclamation No. 2667, 1945.)

In 1953, this proclamation was enacted into law by Congress in the Outer Continental Shelf Lands Act, 43 U.S.C. §1,331-§1,343.

The second Presidential proclamation announced the policy that conservation zones would be established by treaty in areas of the high seas contiguous to the territorial waters of the United States (Presidential Proclamation No. 2668, 1945). In these zones, all fishing would be subject to U.S. regulation and control. Although nation states had been regulating the exploitation of coastal fishing stocks by treaty for more than a hundred years, overfishing still occurred, prompting the United States to invoke a unilateral policy (Sohn and Gustafson 1984). The fishing proclamation was never enacted into statutes, but the United States did thereafter conclude treaties which extended a regional jurisdictional regime over some high seas fishery resources (North Pacific Convention 1952; Halibut Convention 1953).

The Truman proclamations prompted Chile, Ecuador, and Peru to sign the Declaration of Santiago on the Maritime Zone in 1952, whereby each nation claimed complete sovereignty over a 200-mi-wide zone adjacent to its coast (Sohn and Gustafson 1984). In 1958, the High Seas Fishing Convention attempted to limit unilateral extensions of territorial jurisdiction into the high seas that were based on the protective resource conservation rationale. The convention acknowledges that coastal states have a "special interest" in the high seas resources adjacent to their territorial seas, but grants them limited preferential rights in article 6. Article 7 of the convention permits unilateral conservation measures by coastal states only if resource management negotiations between all interested parties have failed.

The concept of a 200-mi EEZ was developed by the Third United Nations Conference on the Law of the Sea in the 1970's. Simultaneously, other states unilaterally claimed their own exclusive zones. In 1972, Iceland established a 50-mi exclusive fishery zone, which was contested by the United Kingdom and the Federal Republic of Germany before the ICJ (1974). In 1976, the United States unilaterally established a 200-mi fishery conservation zone in which it assumed "exclusive fishery management authority over

all fish, except highly migratory species, and. . .authority beyond such zone over such anadromous species and Continental Shelf fishery resources" (Magnuson Fishery Conservation and Management Act (MFCMA) 1986, 16 U.S.C. §1801-§1882). Article 56 of the LOS Convention (1982) gives coastal states "sovereign rights" to explore, exploit, conserve, and manage the natural resources of a 200-mi-wide EEZ, and article 64 permits coastal state jurisdiction over highly migratory species found within that zone. Furthermore, the right to fish on what is left of the high seas is no longer absolute. The right to fish for anadromous stocks on the high seas is contingent upon negotiated agreement (article 66), and the remaining high seas fishing rights are subject to the interests of coastal states (article 116). The convention imposes on all states the duty to cooperate with other states and to take "such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas" (article 118).

The protective principle is also applied in the LOS Convention (1982) to the conservation of marine mammals. The convention specifies that "[n]othing in this part restricts the right of a coastal State. . .to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this part" (article 65). It also specifies that these provisions apply to the conservation and management of marine mammals on the high seas (article 120). The LOS Convention (1982) seems to sanction the high seas enforcement of coastal state conservation measures, if the high seas activities of foreign nationals "exploit" protected marine mammals.

POLLUTION ENFORCEMENT AND THE PROTECTIVE PRINCIPLE

The protective principle can also be found in the pollution provisions of the LOS Convention (1982). Exclusive flag-state jurisdiction over vessels beyond the territorial sea had not succeeded in eliminating vessel-source pollution or in protecting the environment of coastal states from it (Boyle 1985). The LOS Convention (1982) authorizes port states to investigate and prosecute foreign vessels voluntarily coming into their jurisdiction who have violated international pollution rules and standards on the high seas (article 218(1)). Presumably these standards are those embodied in the International Convention for the Prevention of Pollution from Ships (MARPOL 1973) and the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention 1972). This provision represents an expansion of port state jurisdiction beyond that authorized by MARPOL, which limits port states to inspection and the reporting of any violation of the 1973 convention to the flag state.

Coastal states under the LOS Convention (1982) may enforce their own pollution rules and standards against foreign vessels voluntarily coming into their ports, but only with respect to acts committed in their territorial waters and EEZ's (article 220(1)). As for stopping ships in transit passage, a coastal state may enforce its own laws for acts committed in its territorial waters (article 220(2)), but may enforce only international pollution standards for acts committed in its EEZ, provided they result "in a discharge causing major damage or the threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone" (article 220(6)).

Both port state and coastal state jurisdiction can be preempted by the flag state (article 228(1)), subject to the provision that the flag state continue the proceedings within 6 months and unless there is major damage to the coastal state or the flag state "has repeatedly disregarded its obligations to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels" (article 228(2)).

The 1982 LOS Convention is not yet in force. However, aside from the provisions regarding the deep seabed in part IX, it may be considered to represent a codification of both existing and developing customary international law. Those provisions which are not found in other multilateral treaties or do not represent the practice of a majority of states are, of course, not yet part of international law. Yet most of the provisions cited above represent only an expansion of existing principles already established. For example, LOS Convention (1982) provisions dealing with marine pollution represent an extension of the standards set forth in a plethora of conventions which came into being as a result of maritime oil disasters. The obligations in each of the pollution conventions cited below are applicable only to the states' parties, but taken in aggregate, the conventions establish the right to a pollution-free environment that is shared by all states. Many of the provisions noted in the following conventions represent an emerging regime of customary international pollution law, law that is based on the protective principle.

THE PROTECTIVE PRINCIPLE IN THE MARINE POLLUTION CONVENTIONS

The protective principle is incorporated into the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL 1954: article 11), the Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention 1969, article 1), the International Convention on Civil Liability for Oil Pollution Damage (Brussels Liability Convention 1969), the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention 1972, article 7, 13), the Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other Than Oil (High Seas Protocol 1973, article 1), and the International Convention for the Prevention of Pollution from Ships (MARPOL 1973, article 9). For example, Intervention (1969) specifies:

> "Parties to the present convention 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" (article 1(1)).

This same provision can also be found in the High Seas Protocol (1973). "Substances other than oil" in this treaty include, inter alia, other substances "which are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea" (article 1(2)).

Relevant provisions in the 1973 MARPOL Convention, conceived in the early seventies, are considerably more conservative in terms of the protective principle than current states' practice and evolving customary international law as is evidenced by the LOS Convention (1982). The MARPOL Convention, while imposing universal obligations not to pollute, essentially leaves its high seas pollution enforcement up to the flag state, limiting the port state to inspection and reporting activities. Coastal states are given the option of either reporting a violation occurring within their jurisdiction to the flag state or initiating proceedings on their own (MARPOL 1973, article 4(2)). The extent of coastal state jurisdiction, however, was the source of considerable controversy during the drafting of the treaty. The issue was never resolved, and as a result the phrase "within the jurisdiction of any Party" (article 4) must be interpreted according to current interpretations of the term in international law (Timagenis 1980).

The MARPOL negotiators also disagreed over the power of states to take stricter regulatory measures than those expressly provided for in the convention. The compromise text, adopted by a majority of the delegates, but not by the required two-thirds, provided that

> "(1) Nothing in the present Convention shall be construed as derogating from the powers of any Contracting state to take more stringent measures where circumstances so warrant, within its jurisdiction, in respect of discharge standards" (article 8, now article 9).

In its final form, MARPOL defers to future decisions by the United Nations Conference on the LOS, stipulating only that nothing in MARPOL "shall prejudice. . .the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction" (article 9(2)). It leaves interpretation of the term "jurisdiction" up to customary international law (article 9(3)).

With the failure of the compromise text, Australia reserved the right to impose unilateral conditions within its jurisdiction to protect its "adjacent" marine environment from pollution (Timagenis 1980, p. 503). The Canadian delegation stated that since there was no provision restricting the powers of the contracting states to take measures within their jurisdiction, the Canadian Government reserved the right "to take any and all measures within its jurisdiction for the protection of its coasts and the adjacent marine environment from pollution from ships" (Timagenis 1980, p. 505). Ireland and the Philippines made similar statements (Timagenis 1980, p. 506).

THE PROTECTIVE PRINCIPLE AND STATES' PRACTICE--A CANADIAN EXAMPLE

In 1970, Canada unilaterally implemented the protective principle in response to a pollution threat to its Arctic coastline. Fearful of a devastating accident associated with the United States' development of the Alaskan North Slope and the use of the Northwest Passage for transport of crude oil to refineries on the east coast, the Canadian Parliament passed

the Arctic Waters Pollution Prevention Bill, extending Canadian jurisdiction 100 nmi into the Beaufort Sea for purposes of regulating marine pollution. The act held both prospector and ship owner liable for all costs associated with any discharge of wastes into this region (Canadian Arctic Waters Pollution Prevention Bill 1970). In reply to a protest letter from the United States, the Canadian Government responded "that a danger to the environment of a state constitutes a threat to its security. . . . The proposed anti-pollution legislation is based on the overriding right of self-defense of coastal states to protect themselves against grave threats to their environment" (Canadian Reply 1970). This unilateral declaration caused considerable controversy in the world community. The 1982 LOS Convention resolved the controversy with a special provision granting coastal states the right to adopt and enforce laws and regulations to prevent and control pollution in ice-covered areas within the EEZ (article 234).

THE PROTECTIVE PRINCIPLE IN UNITED STATES ENVIRONMENTAL LEGISLATION

In 1961, Congress passed the Oil Pollution Act, 33 U.S.C. §1001-§1015, implementing OILPOL. Over the next decade the convention was amended and more legislation was enacted as marine pollution and public awareness grew. In 1974, the Intervention on the High Seas Act, 33 U.S.C. §1471-§1487, implemented Intervention 1969 and its companion treaty dealing with substances other than oil. This legislation, extending the protective principle to pollution activities on the high seas, empowers the United States to take measures to "prevent, mitigate or eliminate" danger to its coastline caused by oil pollution casualties on the high seas when they "may reasonably be expected to result in major harmful consequences" (§1472).

The 1973 version of MARPOL did not enter into force before it was superseded by the Protocol of 1978, which extensively modified Annex I (Regulation for the Prevention of Pollution by Oil) and Annex II (Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk). The modifications in the pollution prevention standards were the result of an international conference convened at the request of the United States following 16 major tanker accidents in waters around the United States in 1976-77 (U.S. Congress 1980). Although the MARPOL Protocol did not come into force until 1983, many of its provisions were immediately implemented by Congress in the Port and Tanker Safety Act of 1978, 33 U.S.C. §125, §128-§1232 and 46 U.S.C. §391(a), §1221, §1224. The Senate ratified the 1978 MARPOL Protocol in 1980 and implemented the balance of its provisions that year in the Act to Prevent Pollution from Ships, 33 U.S.C. §1901-§1911. The other three original MARPOL annexes are optional. Annex III and Annex IV have not been ratified by the United States and are not in force.

Annex V of the original 1973 MARPOL Convention came into force in December 1988, with U.S. ratification. Not revised by the Protocol of 1978, Annex V prohibits the disposal at sea of garbage and plastic waste; however it excepts the accidental loss of synthetic fishing nets incidental to the making of repairs from its general prohibition. Congress implemented Annex V on 29 December 1987 with an amendment to the Act to Prevent Pollution from Ships, adding simply the word "garbage" to its list of prohibited discharges, 33 U.S.C. §1907(d)(1) and (e)(1). Although the

Annex V amendments continue to defer to the flag-state enforcement scheme of the MARPOL Protocol as enacted into U.S. law in 1980 (§1907(c)), they also include a preemption requirement mandating that "[e]xcept as specifically provided. . ., nothing in this title shall be interpreted or construed to supersede or preempt any other provision of Federal or state law. . .[or] any State from imposing any additional requirements" (33 U.S.C. §1901(a)).

The MFCMA regulations regarding fishing gear disposal were also amended in 1987. Previously these regulations had exempted all accidental gear loss from its general prohibitions. Now any gear discards, including accidental discards, are strictly prohibited except in case of emergency or with specific Coast Guard authorization (50 C.F.R. §611.12). This is a stricter discard standard than that of MARPOL Annex V.

In conjunction with implementation of Annex V, Congress also enacted the Driftnet Impact Monitoring, Assessment, and Control Act of 1987, 16 U.S.C. §1822. This act requires the Secretary of Commerce to assess the impact of driftnets on U.S. marine resources and the Secretary of State to initiate

> "negotiations with each foreign government that conducts, or authorizes its nationals to conduct driftnet fishing that results in the taking of marine resources of the United States in waters of the North Pacific Ocean outside of the exclusive economic zone and territorial sea of any nation, for the purpose of entering into agreements for effective enforcement of laws, regulations, and agreements applicable to the location, season, and other aspects of the operations of the foreign government's driftnet fishing vessels." (16 U.S.C. §1822)

The act further specifies that if the foreign government fails to enter into and implement such an agreement within 18 months, certification under the Pelly Amendment will result (16 U.S.C. §1822, 22 U.S.C. §1978(a)). The Pelly Amendment provides that when the nationals of a foreign country, directly or indirectly, are (1) conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, or (2) engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary in charge of the finding shall certify the fact to the President. The President in turn may then direct the Secretary of the Treasury to prohibit the bringing or importation in the United States of fish products of the country whose nationals are engaging in such conduct (22 U.S.C. §1978(a)).

Congressional intent on the extent of jurisdiction can be found in the final committee report to the House. The Merchant Marine and Fisheries Committee expressly stated that no extension of U.S. jurisdiction was to be construed by passage of the legislation. It affirmed, however, "the sovereign rights of the United States to conserve and manage marine resources within its exclusive economic zone and anadromous species on the high seas to the extent provided for in United States law" (U.S. Congress 1987a).

UNITED STATES MARINE RESOURCE CONSERVATION ENFORCEMENT AND THE PROTECTIVE PRINCIPLE

In only a few instances has the United States asserted through active enforcement the protective principle codified in its various conservation and pollution laws. Current case law reveals an enforcement focus on violations of the MFCMA in the EEZ by foreign fishing nations signing GIFA's with the United States. A GIFA is an executive agreement between the United States and a foreign state which gives the foreign state the right to fish for specified quantities of designated species in the United States EEZ for a specified period of time. In return, the foreign fishing nation agrees to abide by the terms of the MFCMA (Japanese GIFA 1982; Korean GIFA 1982; Taiwanese GIFA 1982). Consent to be boarded and inspected for suspected violations, included in the agreement, considerably simplifies jurisdictional questions. Federal courts have assumed GIFA jurisdiction for violations of the MFCMA in the EEZ in *United States* v. *Tsuda Maru*, 470 F.Supp. 1223 (D. Alaska 1979); *United States* v. *Marunaka Maru No. 88*, 559 F.Supp. 1365 (D. Alaska 1983).

The signatory state also must agree to comply with any administrative measures taken in accordance with the agreement and to pledge not to kill or harass any marine mammal within the EEZ without express authorization. If the state fails to agree to acceptable monitoring and enforcement arrangements, the Secretary of Commerce has the authority to deny fishing permits to any of its vessels. In addition, Federal regulations implementing the MFCMA prohibit a foreign fishing vessel from throwing overboard any article that may damage any marine resource, including marine mammals and birds (50 C.F.R. §611.12(c)). This regulation is now reinforced by legislation implementing Annex V of the MARPOL treaty.

A GIFA is enforced by both overflight and boarding inspections by the Coast Guard and by placing National Marine Fisheries Service (NMFS) observers on board some foreign vessels fishing in the EEZ. A few observers have also been placed on the Japanese salmon mothership fleet operating in the high seas of the North Pacific (Marine Mammal Commission 1990). In addition, three United States observers were permitted to observe commercial squid driftnet operations on board Japanese vessels in 1982 (Cary and Burgner 1983) and 1986 (Tsunoda 1989) and on a Korean vessel in 1988 (Gooder 1989). A few additional observations have been made by observers from the vantage point of Coast Guard cutters (Ignell et al. 1986) and private vessels. In 1989, following a mandate from Congress (Driftnet Impact Monitoring, Assessment, and Control Act 1987) agreements were concluded with Japan, Korea, and Taiwan to place a few observers on board commercial driftnet vessels. Japan agreed to allow 9 United States and 5 Canadian observers on board 14 of its commercial squid driftnet vessels during the 1989 season (Japan-United States Agreement 2 May 1989). Agreements with Korea and Taiwan were concluded too late to implement a foreign observer program for 1989. Korea agreed to deploy "at least 13" United States observers on board its "commercial driftnet vessels for at least 45 days each to observe 45 or more driftnet retrievals on each vessel" (Republic of Korea-United States Agreement Annex II, 13 September 1989). Taiwan agreed only to deploy "observers of the parties. . .aboard

commercial driftnet vessels. . .for at least 30 days to observe 30 or more driftnet retrievals on each vessel" (American Institute of Taiwan-Coordination Council for North American Affairs Agreement article VII, 13 July 1989).

Data from the joint Canadian-Japan-United States observer program were collected between early June and early October 1989, by observers on board commercial Japanese driftnet vessels chosen by lot fishing between long. 170°E and 145°W, and between lat. 36° and 45°N. The results were released on 30 June 1990 (Joint Report Fisheries Agency of Japan, Canada Department of Fisheries and Oceans, NMFS, and Fish and Wildlife Service (FWS) 1990). In summary 1,402 operations were observed involving 1,427,225 tans of net (50-m each). The catch included 3,119,061 neon flying squid, 914 dolphins, 22 marine turtles, 9,173 seabirds, and 1,580,068 nontargeted fish, including 79 salmonids, 1,433,496 pomfrets, 59,060 albacore, 10,495 yellowtail, 7,155 skipjack tuna, and 58,100 blue shark. The data did not indicate what percentage of the huge incidental catch of assorted fishes were actually brought on board and kept.

Estimates of incidental catch rates of nontargeted species vary greatly depending on the year, the vessel, its location, the time of year, who is doing the reporting, and the proximity of the observer. The total number of sets observed and recorded is extremely small compared to the total amount of driftnet fishing actually done. Obtaining statistically significant data may be an impossible goal. Between 1978 and 1983 the amount of fishing effort by the driftnet fleet rose dramatically and exponentially; since then it has increased much more gradually. Thus the maximum incidental catch of long-lived species such as marine mammals and turtles would have occurred in the early eighties at a time when practically no data were being kept. Incidental catches today probably reflect the impact of driftnet fishing on much reduced populations. Fishermen have also been observed shaking undesired species free of the nets before hauling them on board (Gooder 1989; Tsunoda 1989), a factor which would distort vessel owners' reports of total incidental takings. Although there have been few observations of torn netting being discarded at sea, this may have been influenced by the fact that observers were watching.

In 1984, a NMFS observer on board a Japanese vessel fishing in the EEZ near Dutch Harbor, Alaska, saw its crew members on five separate occasions toss several 0.45 × 0.76-m (1.5 × 2.5-ft) fragments of synthetic trawl netting overboard. At a hearing before a National Oceanic and Atmospheric Administration (NOAA) administrative law judge, expert testimony revealed that some 30% of documented fur seal entanglements involve net fragments in the same size range as those discarded and some 40% of the seals caught in such net fragments die (*In the Matter of Kenji Nakata, Ohoura Gyogyo Co. Ltd.*, 4 O.R.W. 814 (NOAA 1987)). In his decision, the judge indicated that every vessel discarding such net fragments must be held responsible for the cumulative effect on the fur seal population and that the civil penalties assessed for such violations must be large enough to serve as a deterrent and not be considered as a mere cost of doing business. The owners of the offending vessel were fined $15,000 total for two violations. The MFCMA authorizes up to $25,000 assessment for each violation (16 U.S.C. §1858(a)).

Although it has been asserted that lost sections of driftnet ball up within a week and thus no longer ghost fish, evidence indicates that tangled driftnets continue to ghost fish, both on the surface (DeGange and Newby 1980; Henderson 1984; von Brandt 1984; Gooder 1989) and on the bottom (Way 1977; Carr and Cooper 1987). In 1978, a 3,500-m section of lost driftnet was found floating in the North Pacific (lat. 49°15'N, long. 168°14'E). Entangled within the 1,500 m brought on board were 75 newly snared salmon and at least twice that many rotten ones, plus assorted other fish and some 99 seabirds (DeGange and Newby 1980). Endangered Hawaiian monk seals have also been found entangled in masses of monofilament driftnet (Henderson 1984).

THE NORTH PACIFIC DRIFTNET FISHERY--A CASE FOR APPLICATION OF THE PROTECTIVE PRINCIPLE

The 20th century development of nylon and plastics has greatly benefited human "progress" and greatly burdened the global environment. Except for the hulls of vessels, plastics dominate the fishing industry: polystyrene and polyurethane foams are used for flotation in lifejackets and fishnet floats; polyethylene is used to make cable coverings, buckets, packaging film, and shipping containers; polyamide (nylon), polyester, polyethylene, and polypropylene are used for ropes and nets (Pruter 1987). Gillnets, one of the most efficient fishing methods ever developed, are made of monofilament nylon. Strong, transparent, and durable, nylon is the perfect material for constructing the miles of pelagic drift gillnets used by high seas salmon and squid fishermen. Gillnets are also cheap, difficult to mend, and easily replaced, usually after only one season of use (Eisenbud 1985). Pelagic gillnets are made in panels 6-8 m deep and may be over a 100 m long. These individual panels are strung together by the fishermen on lines with floats on surface and weights on the bottom to create an invisible wall which may stretch for miles. Set at night, the gillnets are either left to drift free until the following morning, or remain attached to the catcher boat at one end.

There are two Japanese salmon driftnet fisheries: a mothership fishery in the Bering Sea and a land-based fishery that operates south of the Aleutian Islands. They are regulated by the International North Pacific Fisheries Commission, established to implement the provisions of the 1952 North Pacific Convention. The North Pacific Convention is a tripartite agreement between the United States, Canada, and Japan to: "1) ensure cooperation in scientific research and data collection on salmon and other fish species in the North Pacific Ocean and Bering Sea; 2) minimize interceptions of North American origin salmon by Japan; and 3) facilitate cooperation in marine mammal research" (Beasley 1984). Each party agreed to enact and enforce the necessary domestic laws and regulations to implement the convention provisions (North Pacific Convention, article 9(2); 16 U.S.C. §1021-§1035).

In 1976, the MFCMA claimed exclusive management authority over anadromous species of U.S. origin throughout their range, unless they are within the jurisdiction of another nation (16 U.S.C. §1812). The MFCMA required that the North Pacific Convention be renegotiated to the extent that it was in conflict with the act (16 U.S.C. §1822(b)). In 1978 a

protocol was signed amending the North Pacific Convention and shifting the eastern boundary of the salmon mothership fishing area from long. 175°W to 175°E, except for a small enclosed area of high seas in the middle of the Bering Sea known as the donut hole (North Pacific Convention Protocol 1978). The Japanese land-based fleet is limited to an area south of lat. 46°N east of long. 170°E, and south of lat. 48°N west of long. 170°E. The Japanese also have a treaty with the Soviet Union which excludes all salmon fishing within the Soviet EEZ and regulates high seas salmon fishing outside of this zone (Japan-U.S.S.R. 1956). In May 1990, the Soviet Union seized a fleet of more than 10 "North Korean" driftnet vessels for harvesting thousands of tons of Soviet salmon. The fleet had previously been spotted by the U.S. Coast Guard fishing south of the Aleutian Islands. North Korea is not a party to any of the North Pacific fishing agreements. Following arrest it was discovered that the fleet and more than 140 fishermen were actually Japanese and were fishing under the North Korean flag to circumvent treaty restrictions.

The high seas driftnet fisheries are condemned by many as an economically inefficient method of fishing. They catch salmon before they reach full size and can bring the maximum market price, as well as nontargeted species, which are discarded; 50% of the fish caught are estimated to drop out of the nets before they can be brought on board; the various salmon stocks mingle on the high seas making it almost impossible to manage individual stocks; and driftnets are lost or discarded at sea where they continue to entrap fish (Sathre 1986). Furthermore, the high seas squid driftnet fisheries of Japan, the Republic of Korea, and Taiwan have high "incidental" catches of salmon which may not be so incidental (the Japanese squid fishery uses driftnets similar to those used by the salmon fishery) (Anderson 1989; Matsen 1989). Begun in 1978, the Japanese squid fishery now extends across much of the North Pacific and by agreement is supposed to stay in waters too warm for salmon (15°-22°C). However, the Coast Guard has sighted numerous Japanese vessels fishing north of the boundaries established by Japanese regulations (Gordon 1985). Furthermore, neither the Republic of Korea nor Taiwan is bound by the 1978 Protocol's salmon fishing boundary restrictions, although Taiwan has agreed to respect a squid fishing boundary similar to Japan (Gordon 1985). In 1988, the Soviets seized three Taiwan driftnet vessels reportedly carrying 3,357,000 kg (9 million lb) of immature salmon (Anderson 1989). As for MARPOL prohibitions against abandoning old driftnets, only Japan is currently a party to Annex V.

Driftnets fish indiscriminately. While mesh size is targeted for a particular species, the nets are capable of catching almost anything that swims or dives: small whales, porpoises and dolphins, seals and sea lions, turtles, and almost every kind of diving seabird have been found trapped in them (DeGange and Newby 1980). Lost and discarded net sections from high seas gillnet fisheries frequently drift into the U.S. EEZ and continue to entrap large numbers of migratory seabirds and marine mammals. This gear may ghost fish for years before settling on the bottom or washing up on a beach. Although the "act" of losing this deadly gear may have occurred on the high seas, the effect constitutes a taking of migratory seabirds and marine mammals within U.S. EEZ and territorial waters that is in direct

contravention of both treaty and U.S. domestic law. This entrapment of birds and mammals by ghost nets drifting into the EEZ is arguably illegal under the "taking" provisions of the Marine Mammal Protection Act (MMPA), 16 U.S.C. §1361-§1407, the Endangered Species Act (ESA), 16 U.S.C. §1531-§1542, the North Pacific Fur Seals Act, 16 U.S.C. §1151-§1175, and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §703-§712.

The MMPA defines the term "take" as meaning to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal (16 U.S.C. §1362(12)). Pursuant to this act, a permit is required for any incidental take of marine mammals in the course of commercial fishing operations (§1362(14)). The goal, however, is that incidental takes "be reduced to insignificant levels approaching zero" (§1371(a)(2)). The MMPA also authorizes the Secretary of the Treasury to ban the importation of fish products from fish which have been caught using technology that results in killing or seriously injuring marine mammals "in excess of United States standards" (§1371(a)(2)). Amendments to the MMPA passed in 1988, however, permit exemptions from the incidental taking provisions until 1 October 1993, provided that fishing vessels keep detailed annual records of all such takings (Public Law 100-711, 23 November 1988, adding §114; 50 C.F.R. part 229).

The ESA was created to "provide for the conservation, protection and propagation of endangered species of fish and wildlife by Federal action. . ." (U.S. Congress 1973). The ESA makes it "unlawful for any person subject to the jurisdiction of the United States to take any protected species on the high seas" (16 U.S.C. §1538(a)(1)(C)). Any exceptions require permits (16 U.S.C. §1539 and 50 C.F.R. §10.1 et seq.). The ESA further authorizes the Secretaries of Commerce and State to enter into bilateral or multilateral agreements for the protection and conservation of endangered and threatened species and to encourage citizens of foreign states "who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial purposes. . .to carry out. . .conservation practices designed to enhance such fish or wildlife or plants and their habitat" (16 U.S.C. §1537(b)). The enforcement provisions of the ESA permit any U.S. citizen to bring a civil suit to enjoin any person, including the United States Government, who may be in violation of the ESA (§1540(g)). Worldwide service of process may be implied in the language of the ESA, 16 U.S.C. §1540(c), which specifies that "the several district courts of the United States. . .shall have jurisdiction over any action arising under this chapter." According to reporters' notes 7 and 9 of §421 of the Restatement (Third), where nationwide jurisdiction is conferred by statute, jurisdiction of a Federal court no longer depends on the laws of the state where the court sits. Evidence of an intent to apply the ESA extraterritorily has been found by courts (*Defenders of Wildlife* v. *Hodel* 1989) in the broad definition of "endangered species," §1532(6), which includes many species not native to or present in the United States, along with §1538(a)(1)(C), which prohibits takings on the high seas, coupled with §1532(13), which defines "persons" to include foreign governments.

Japan and the United States are parties to the bilateral 1972 Migratory Bird Convention, which prohibits the taking of migratory birds in

the territories of both countries (Migratory Bird Convention 1972). The annex to the convention lists 189 protected species; virtually all are species listed in regulations implementing the ESA and the MBTA (50 C.F.R. §10.13). In addition to prohibitions, the convention also includes some affirmative duties. The Migratory Bird Convention mandates that each contracting party "shall (a) [s]eek means to prevent damage to such birds and their environment, including, especially, damage resulting from pollution of the seas. . ." (article 6(a)). Article 6(a) also specifies that "[e]ach Contracting Party agrees to take measures necessary to carry out the purposes of this Convention." Of the 800,000 seabirds estimated to die each year in the gillnets of the Japanese mothership and land-based salmon fisheries of the North Pacific, many belong to species that are listed in the Migratory Bird Convention Annex (U.S. Congress 1987b). Data from the 1989 Canadian-Japan-United States squid driftnet observer program included birds from at least five species listed in the annex (331 Laysan albatrosses, 38 northern fulmars, 20 horned puffins, 5 tufted puffins, and 17 Leach's storm petrels). Ghost driftnet data have also reported catches of listed birds. In one mass of tangled driftnet, DeGange and Newby (1980) identified birds from 6 listed species (4 Laysan albatrosses, 15 northern fulmars, 15 tufted puffins, 14 sooty shearwaters, 40 slender-billed (short tailed) shearwaters, and several fork-tailed storm petrels).

The Migratory Bird Convention is implemented in part in the MBTA (16 U.S.C. §703-§712. The MBTA prohibits the taking of listed migratory birds without a permit from the Department of the Interior (16 U.S.C. §703 and 50 C.F.R. §10.13 and §21.11). In recent testimony given by the Department of the Interior on driftnet takings of migratory seabirds by the Japanese salmon fisheries, there was no mention of any permits having been issued (Lambertson 1985), possibly because the FWS does not believe it has jurisdiction. However, under customary international law, as codified in the 1982 LOS Treaty and recognized as such by Presidential Proclamation No. 5030 on 10 March 1983, the United States has jurisdiction over all "living resources" of its EEZ. The term "marine resources" has been defined by Congress in the 1986 amendments to the MFCMA as including "fish, shellfish, marine mammals, seabirds, and other forms of marine life or waterfowl."

Japan is also a party, along with the Soviet Union, Canada, and the United States, to the 1957 Interim Convention on the Conservation of North Pacific Fur Seals prohibiting the taking of fur seals in the North Pacific Ocean (Fur Seal Convention 1957). The Fur Seal Convention empowers any party to board and inspect another party's fishing vessel anywhere except in territorial waters if there is reasonable cause to suspect that the vessel is violating the prohibition against sealing (article 6). Pelagic "sealing" is defined as the killing, taking, or hunting in any manner whatsoever of fur seals at sea" (article 1). If the suspicion is well founded, the vessel may be seized and the persons on board arrested. Judicial proceedings, however, are left to the flag state. This treaty has been enacted into U.S. law in the North Pacific Fur Seals Act, 16 U.S.C. §1151-§1175. The act, however, permits U.S. flag fishing vessels to refuse boarding if they are within the U.S. EEZ (§1152). Fur seals are, of course, also covered under the MMPA. Although the NMFS has issued permits to GIFA holders for the incidental taking of fur seals and sea lions, NMFS was enjoined by an order of the U.S. District Court in Washington, D.C., from

issuing a permit for the 1988 season (*Kokechik Fishermen's Association* v. *Secretary of Commerce*, 839 F.2d 795 (D.C. Circuit 1988)). The court ruled that the northern fur seal, *Callorhinus ursinus*, incidentally taken by the Japanese mothership salmon driftnet fleet are depleted below optimum levels and that the MMPA prohibits the issuance of a permit to take any such depleted marine mammals.

ACTION TO BAN DRIFTNETS BY THE INTERNATIONAL COMMUNITY

Several foreign states have already taken action to ban driftnet fishing in waters under their jurisdiction, including Japan, Australia, Canada, the Cook Islands, the Federated States of Micronesia, New Zealand, Peru, French Polynesia, American Samoa, and Vanuatu. In July 1989, the South Pacific Forum states signed the Tarawa Declaration, which expressed regret that Japan and Taiwan "failed to respond to the concerns of regional countries" about pelagic driftnet fishing and called for a ban on driftnet fishing in the South Pacific. Korea had already announced its intention to withdraw its driftnet vessels from the South Pacific area. In November 1989, several South Pacific states signed the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific. The convention bans driftnet fishing within the 200-mi EEZ's of the signatory states and within certain adjacent high seas areas. In December 1989, the United Nations General Assembly unanimously adopted a resolution that condemns the commercial use of driftnets and calls for a ban on driftnet fishing in the South Pacific, beginning 1 July 1991, and a worldwide ban beginning 30 June 1992. [On 26 June 1990, Taiwan announced that it would prohibit its driftnet fleet from fishing in the South Pacific by July 1991.]

REMEDIES FOR VIOLATIONS OF INTERNATIONAL ENVIRONMENTAL STANDARDS

If activities within a state's jurisdiction cause significant damage to its neighbors or the common environment, that state is responsible to all injured states for violation of its obligations. A state may be obligated by either treaty or customary international law. If the obligation is owed to the international community as a whole, any state may bring a claim before the ICJ without showing that it has suffered a particular injury (American Law Institute 1987, §902(1), §602 comment a). Consent to jurisdiction of the ICJ by the defendant state is not necessary under the Statute of the ICJ. In general, the state seeking redress has the burden of proving the existence of an international obligation and its breach; the responding state has the burden of establishing any justification or excuse. The burden of proof may shift to the party that has control of the evidence (American Law Institute 1987, §901 comment a). Thus any state may call on the violating state to terminate activities which are causing significant injury to the general environment.

If the obligation is owed to a particular state or states, the injured states may also file international claims. Treaties generally include a dispute resolution clause in their text. If the method chosen does not produce results, or if there is no such clause, the injured state(s) may take its grievance before an international tribunal with the consent of the responding state or the ICJ without the responding state's consent. The enforcement power of the ICJ, however, is that of world opinion and

voluntary compliance by sovereign states. If a citizen of a state has a cause of action, it must be taken up by his parent government before the ICJ. Article 34 of the Statute of the ICJ gives it jurisdiction only over states. The injured person must also have exhausted local remedies (American Law Institute 1987, §703 comment b).

A state may also sue a fellow sovereign state in any domestic court that will accept jurisdiction, but because of the principle of sovereign immunity, domestic courts will generally accept jurisdiction only if a state waives its sovereign immunity or if the offending acts attributable to the state involve commercial activities (Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(2)). Because of the vagueness of customary international law and the domestic court's general unfamiliarity with it, plus the fact that, at least in the United States, foreign policy issues are reserved to the executive branch, adjudication in a domestic forum stands a better chance of success if arguments are based on domestic law.

Private persons, including organizations, may also bring suit when international environmental standards are violated. Injured persons may bring a claim directly against a foreign state in an international forum when that state has consented to the forum's jurisdiction, or in any domestic court that will accept jurisdiction (American Law Institute 1987, §906, §907). In the United States, Federal courts have jurisdiction over cases arising under international law and international agreements of the United States. However, "international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts" unless the provisions are "self-executing" (American Law Institute 1987, §907 comment a).

Whether a treaty of its own force makes law depends on two requirements: (1) the treaty-drafters must have intended that the treaty provision be self-executing as ascertained by the applicable international rules of treaty interpretation (Vienna Convention on the Law of Treaties 1969) and (2) the treaty provision in question must have the force of legislation without any further action by a legislative body (Henry 1928). Treaty obligations not to act, or to act only subject to limitations, are generally self-executing. Self-executing obligations may also arise under customary international law. In conjunction with driftnet fishing there are two customary obligations that may be considered self-executing: (1) "fisheries for anadromous stocks shall be conducted only in waters landward of the outer limits of exclusive economic zones" (LOS Convention 1982, article 66(3)(a)) and (2) "the taking of endangered species is prohibited" (implied in a whole host of multilateral and bilateral treaties). Rules of customary international law are part of U.S. law and as such may permit domestic remedies. Again, suits against foreign states may be barred by sovereign immunity unless there is a waiver or the activity falls within the commercial exception.

Private persons can also bring claims directly against private foreign polluters. The chief hurdle is obtaining personal jurisdiction over the polluter. While filing suit in the foreign polluter's home state may cure this problem, it may cause others. The laws and courts of that state may be less than friendly and the costs and inconvenience of doing so are

usually a severe limitation. Procedural and discovery problems are also magnified in transnational cases.

In the United States, citizens and private organizations may also sue their government, its agencies, and its officials for nonenforcement of environmental laws which implement treaty provisions. The Act to Prevent Pollution From Ships, 33 U.S.C. §1910(a), permits any person having an interest adversely affected to bring an action not only against a private violator, but against the Coast Guard for failure to perform a nondiscretionary act and the Secretary of the Treasury for failure to enforce the ship clearance provision (§1908(e)). The ESA allows a citizen to sue (A) to enjoin any person, including the United States or its agencies, if it is in violation of the ESA; (B) to compel the Secretary of the Interior to apply ESA prohibitions with respect to the taking of any threatened species; and (C) the Secretary if he fails to perform a nondiscretionary duty (16 U.S.C. §1540(g)(1)). Other legislation may also permit citizens to sue public officials for acts which are arbitrary, capricious, involve an abuse of discretion or are contrary to law (Administrative Procedure Act, 5 U.S.C. §553, §701 et seq.). Citizens may or may not be able to recover attorney's fees (33 U.S.C. §1910(d), 16 U.S.C. §1540(g)(4)).

Adjudication has many advantages, including the availability of immediate injunctive relief when it is needed and serving as a catalyst for change by goading inactive commissions, legislatures, and the public into action. Adjudication can also prevent further damage. However, there are other, less confrontational methods of mitigating or preventing environmental harm. One of these methods is the liability fund.

A LIABILITY ENFORCEMENT PROGRAM TO DISCOURAGE GEAR LOSS

Liability funds to compensate for damage caused by environmental pollution are not new to the oil and ultrahazardous waste industries, but are a new idea for curing generally pervasive types of environmental pollution such as acid rain and the disposal of garbage at sea. They have the virtue of serving both as a deterrent to future pollution, if set at punitive levels, and as a source of funds for those damaged by the polluting party's activities. They are also in line with the liability provisions contained in the LOS Convention (1982, article 235). The convention includes compulsory insurance and compensation funds as methods that states should employ in order to provide adequate compensation for pollution damage caused by persons under their jurisdiction (article 235(3)). A liability enforcement program such as the one that follows should encourage both domestic fishing vessels and foreign vessels fishing in the U.S. EEZ under a GIFA to comply with U.S. law prohibiting the dumping of fishing gear overboard. The conclusion of bilateral and multilateral liability fund agreements with high seas fishing nations who have not signed GIFA's should also be considered.

Specifically, the owner of a fishing vessel fishing in the EEZ would be entitled to limit his liability for lost driftnets and any damage caused by them if he constitutes a fund for the total sum representing the limit of his liability. The fund can be constituted either by depositing the sum with the administering agency or by producing an acceptable bank guarantee

or proof of insurance. The liability ceiling would be established according to the risk each fishing enterprise poses to the resource. The risk can be calculated using conventional measures of fishing effort: size and number of vessels, amount and type of gear, and number of days fished.

Control methods would utilize an inventory reporting system to account for all gear purchases, gear retirement, and "lost" gear. Penalties for lost gear would be paid out of the fund. Credit and a lowering of total liability would be awarded for expenditures made for conservation measures such as investing in gear with biodegradable panels and knots. Failure to report could result in a tripling of the normal penalties assessed and a doubling of the liability ceiling. Exceptions may be made for natural disasters and intentional acts by third parties.

A liability fund has several advantages. For the fisherman, contributions can be internalized as a cost of doing business; fishing vessels will no longer be subject to seizure for violations and judgment payments; other assets will be immune from attachment; and fishery allocations will not be jeopardized for inadvertent gear loss. For those specifically injured by renegade gear, the fund will provide a source of compensation for resource and property damage. For the government, proceeds from penalties assessed may be used to finance resource conservation activities and the development of traceable and biodegradable fishing gear. The fund also would be easier to enforce than current methods of trying to catch vessels in the act of discarding gear on the high seas.

CONCLUSION

While additional information on the effects of driftnet fishing is useful, it is not necessary in order to legally proceed against persons whose high seas fishing activities damage the coastal resources of the United States. The effective management of marine resources within the EEZ necessitates that the United States regulate foreign fishing activities on the high seas and in fact legislation already exists that implements this application of the protective principle. Although there are as yet few cases where the United States has extended the protective principle codified in its various conservation and pollution laws to the high seas, such an extension is already legal under both domestic and international law. If the protective principle can be used to enforce narcotics laws on the high seas, it can be used to enforce environmental laws.

The Stockholm Declaration on the Human Environment (1972) directs states to "take all possible steps to prevent pollution of the seas by substances that are liable to. . .harm living resources and marine life. . ." (article 7). The doctrine of "reasonable use" of the high seas, addressed in a 1974 decision by the ICJ, establishes that "[t]he former laissez faire treatment of the living resources of the sea in the high seas has been replaced by recognition of a duty to have due regard to the rights of other states and the need of conservation for the benefit of all" (ICJ 1974, p. 175). It is the role of international treaties and tribunals to establish global environmental standards; it is the role of individual sovereign states to enforce those standards. International and regional cooperative efforts are important and should be promoted, but the global community cannot

afford to wait. Under conventional and customary international law, states not only have the right, they have the obligation to protect the global environment using all the tools available to them.

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