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By

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I. Overview

On January 1, 2012, the European Union (EU) extended its Emission Trading System (ETS)¹ to a significant part of the global aviation sector² notwithstanding the protests of numerous states³ and objections from some European businesses.⁴ With limited exception,⁵

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aircraft departing from or landing at an aerodrome in an EU Member State, regardless of state of registry, origin of flight, or actual time spent in EU airspace, will be subject to the ETS for the entire length of the flight.\(^6\) This represents a considerable step in the EU’s efforts to promote its robust climate change agenda, efforts that are marked as much by unilateralism and extraterritoriality\(^7\) as they are by multilateral engagement.\(^8\) The EU’s unilateral extension of its municipal law\(^9\) to the global aviation sector is unprecedented only in scale not in originality as other states have likewise acted similarly in other areas of legal life.\(^10\) The ETS has, however,

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\(^5\) Aviation Directive, supra note 2, Annex I I(c) at L8/17. The directive applies to the bulk of international and EU passenger and cargo air traffic that depart from or arrive at an aerodrome in a Member State. Exempt activities include: (1) flights performed on official mission of a reigning Monarch, the immediate family, Heads of State, Heads of Government and Government Ministers of a country other than a Member State; (2) military, customs and police flights; (3) search and rescue, firefighting, humanitarian and emergency medical service flights; (4) flights performed exclusively under visual flight rules as defined in Annex 2 to the Chicago Convention; (5) flights terminating at the aerodrome from which the aircraft has taken off and during which no intermediate landing has been made; (6) training flights performed for the purpose of obtaining a license or a rating provided that the flight does not serve for the transport of passengers and/or cargo or for the positioning or ferrying of aircraft; (7) flights performed for the purpose of scientific research or checking, testing or certifying aircraft or equipment whether airborne or ground-based; (8) flights performed by aircraft with a certified maximum take-off mass of less than 5 700 kg; (9) flights performed in the framework of public service obligations imposed in accordance with Regulation (EEC) No 2408/92 on routes within outermost regions or on routes where the capacity offered does not exceed 30,000 seats per year; and (10) flights performed by a commercial air transport operator operating either (a) fewer than 243 flights per period for three consecutive four-month periods; or (b) flights with total annual emissions lower than 10,000 tons per year. Id.

\(^6\) Id.

\(^7\) See, e.g., Jeffrey N. Shane, Under Secretary for Policy, U.S. Dep’t of Transportation, Speech to American Bar Association Forum on Air & Space Law (Oct. 4, 2007), available at http://www.dot.gov/affairs/shanesp100407.htm (noting that 42 of the delegations comprising the EU and European Civil Aviation Conference entered a formal reservations to the 2007 International Civil Aviation Organization (ICAO) resolution calling on members to refrain from imposing market-based measures on other members absent consent). See also, Joanne Scott & Lavanya Rajamani, EU Climate Change Unilateralism, 23 EUR. J. INT’L L. 469 (2012).


\(^9\) Classifying EU rules as “municipal law” may not be entirely accurate given that its rules arguably occupy a space somewhere between purely “international” and purely “municipal” law. See, e.g., C-402/05 P & C-415/05 P, Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union, Opinion of Advocate General, ¶¶ 21-22 (noting that the EU Treaty “created a municipal legal order of trans-national dimensions[,]”). In this article the term "municipal law" includes EU rules and regulations for ease of distinction. For a general discussion on the nature of the EU lawmaker process, see JOHN McCORMICK, ENVIRONMENTAL POLICY IN THE EUROPEAN UNION 71-75 (2001). This rather simple distinction between international law and municipal law as used in this article does not seek to address the more vexing issue of where on the legal spectrum law promulgated by institutions such as the EU should rest.

become one of the more aggressive and controversial examples of the unilateral use of municipal lawmaker power to affect a wide-range of activities, peoples, and states across the globe. The rationale for the EU’s action is best summed up in the remarks of Climate Commissioner Connie Hedegaard:

So I agree that we cannot now afford to sit in Europe and just wait for whatever comes next in the international negotiations. That is of course precisely why, over the past 18 months or two years, the Commission has come up with a communication on how to move our targets, with our low-carbon roadmap and the energy roadmap; has proposed an energy efficiency directive; has come up with substantial Multiannual Financial Framework proposals with a substantial climate, environment, energy-efficiency and resource-efficiency component; has come up with a proposal on energy taxation; and has come up, as requested, with tasks and values. . . . This is very much proof that we in the Commission do not think we should sit idly waiting for the big international agreement. We must continue to move forward in Europe. 11 (Emphasis added)

As Commissioner Hedegaard’s statement demonstrates, attitudes towards the meaning of the state, the concept of sovereignty, 12 and the traditional mechanisms of international lawmaker power are undergoing dynamic changes. 13 The advent of the United Nations, 14 the wide acceptance of human rights, 15 the use of powerful trading agreements to break down national

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12 See STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 11-22 (1999). Krasner identifies four types of sovereignty: (1) domestic sovereignty referring to internal organization and effectiveness of state authority; (2) interdependent sovereignty referring to the loss of sovereignty when states cannot control movements of goods and ideas; (3) international legal sovereignty as juridical equality; and (4) Westphalian sovereignty referring to principles of non-interference in internal affairs. See also, Case C-154/11, Ahmed Mahamdia v. Algeria, Opinion, unreported (ECJ, May 24, 2012) (state immunity from jurisdiction of European Courts is relative; states are subject to jurisdiction in relation to their non-public functions such as employee relations).
14 UN Charter art. 1.
15 See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), UN Doc A/810 at 71 (1948); Covenant of Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171; Convention Against Torture and Other Cruel, Inhuman
barriers,\textsuperscript{16} the globalization of judicial power,\textsuperscript{17} the rise of institutions such as the EU, the World Trade Organization (WTO)\textsuperscript{18} and non-state actors,\textsuperscript{19} multinational humanitarian interventions,\textsuperscript{20} the formulation of \textit{jus cogens} principles,\textsuperscript{21} and the increasing use of market-based measures (MBMs) to regulate transnational conduct\textsuperscript{22} represent emerging forces that challenge the very foundations of the public international law order. Andrew Halpin and Volker Roeben note that, “The broader canvas of globalisation extends greater artistic license to the legal imagination. In part, this is a matter of opportunity. In part, this is a matter of need.”\textsuperscript{23} The artistic license afforded by rapid globalization has not only affected the types of relationships and behaviors to

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  \item See, e.g., Steven Bernstein & Erin Hannah, \textit{Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space}, 11 J. INT’L ECON. L. 575, 576 (2008). Bernstein and Hannah note: Institutionally [non-state actors] are notable for establishing their own governing systems, largely independent of state governments, with regulatory capacity to back up those obligations with enforceable rules. Scholars in law, political science, and business have variously labelled them “transnational regulatory systems”, “non-state market driven” (NSMD) governance systems, and “civil regulation”. * * * The goal for many NSMD governance systems is not simply to create niche markets that apply their standards, but to promote their standards as appropriate and legitimate across an entire market sector. (Emphasis added)
\end{itemize}
be regulated, i.e., subjects and subject matters, but perhaps more importantly who decides such issues and in what breadth.

This article examines the EU’s extension of its ETS to the global aviation sector as a compelling example of how the most influential states or blocs of states (hereinafter “states”\textsuperscript{24}) use their municipal lawmaking powers in an attempt to manage behavior well beyond their borders.\textsuperscript{25} Part I examines the ETS, its application to the global aviation sector, and the Court of Justice of the European Union’s (ECJ) analysis of its legality under current principles of international law. Part II discusses the Aviation Directive as an example of an emerging development in international law: the quiet raise of municipal law as a transnational regulatory mechanism that exists independently and apart from traditional multilateral international lawmaking. The Aviation Directive demonstrates that while the last 60 years has witnessed the rise of varied multilateral institutions and efforts, transnational problems can still incentivize influential and powerful states to use their municipal lawmaking machinery aggressively to confront cross-border problems when the international community’s conventional lawmaking tools fail to achieve desired results or prove too inexpedient.\textsuperscript{26}

\textsuperscript{24} It is important to clarify that the EU is not a state as that term is now understood in international law. Rather, the EU is an entity with separate international legal personality. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [Hereinafter “Lisbon Treaty”] at art. 46A. The EU’s legal personality includes (1) an ability to enter into agreements with other states or international organizations and (2) a private law personality (“legal capacity”) that permits the EU to be a party in private legal matters. See Stephen C. Sieberson, Did Symbolism Sink the Constitution? Reflections on the European Union’s State-Like Attributes, 14 U.C. DAVIS J. INT’L L. & POL’Y 1, 18, 19 (2007). Although not technically a state, for ease of use in this article the term “state” is used to include the EU given its unique international standing but also its significant independent legislative and regulatory powers that extend beyond issues normally associated with merely a trading bloc.

\textsuperscript{25} Sometimes others seek to extend municipal law to regulate transnational conduct even in the face of state resistance to such an extension. See e.g., Kiobel v. Royal Dutch Petroleum, No. 10-1491 (U.S. Supreme Court June 13, 2011) (seeking to extend the jurisdiction of US courts using the Alien Tort Statute for human rights violations allegedly committed by Shell Oil in the Niger River delta).

\textsuperscript{26} See, Randall S. Abate, Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context, 31 COLUM. J. ENVTL. L. 87, 90 (2006) (“International environmental law has not, however, trumped the need for extraterritorial application of U.S. laws to protect the environment. If anything, the need for extraterritorial application of U.S. environmental laws is greater now than ever before. Application of U.S. environmental laws beyond its territorial boundaries under
II. The EU’s Aviation Emission Trading System

2.1 Context

Both the authority and the source of public international law are being challenged by global forces that raise new questions regarding what exactly constitutes the parameters of the “public” and “international” the “law” aspects of the system.27 The public international law system is, in theory, premised on the notion of legal coordination of multilateral state action; that is, consent to coordinating frameworks such as formal treaties or generally accepted state practices as the mechanism for regulating state and global conduct.28 The normative hierarchy articulated in Statute of the International Court of Justice largely reflects a predisposition towards both the sanctity of the state as the prime actor in international law and the necessity of its consent to regulation.29 Yet this normative hierarchy of how the system is supposed to work

27 One question the international law community has struggled with is whether there is actually a clearly identifiable normative system that can be called international law. See e.g., Henry H. Perritt, Jr., The Internet is Changing International Law, 73 CHI.-KENT L. REV. 997 (1998) (noting that dualists distinguished sharply between public international law as the law of relations between states, mocked by John Austin, as not really “law,” and private international law as the law governing persons, mocked by Austin as not really “international” although it was “law”). See also, Harold Hongju Koh, Why do Nations Obey International Law?, 106 YALE L.J. 2599 (1997) (discussing the various historical theories of compliance).

28 State practice or customary law arises from giving certain legal character to the perceived and generally accepted practices of sovereign states. See Jun-shik Hwang, A Sense and Sensibility of Legal Obligation: Customary International Law and Game Theory, 20 TEMP. INT’L & COMP. L. J. 111 (2006). However, what exactly constitutes accepted custom is a fluid question. As the International Court of Justice has observed, the period of time over which a practice or custom forms does not alone determine whether it can be considered international law. See, e.g., N. Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 74 (Feb. 20) (noting that “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law”). See also, Andrew T. Guzman, Saving Customary International Law, 27 MICH. J. INT’L L. 115, 157-59 (2005) (discussing the concept of “instant” custom as a possible source of international law). Customary international law has an additional problem. While it is generally accepted that states may withdraw from treaties, the conventional thinking is that states may not withdraw from a rule of customary international law once accepted even if the state objects. See, Curtis A. Bradley & Mitu Gulati, Withdrawing from International Custom, 120 YALE L.J. 202 (2010).

29 Traditionally scholars have pointed to the Statute of the International Court of Justice as defining the sources of international law. Statute of the International Court of Justice art. 38, 33 U.N.T.S. 993, 59 Stat. 1055 (June 26, 1945). According to Article 38 international law is comprised of (1) international conventions, whether general or
has always been somewhat mythical because the creation and implementation of the international legal order is an inherently chaotic business, a contact sport if you will, comprised of many players operating from different motivations, frequently seeking different outcomes, promoting different concepts, complying for different reasons, and using different language with only marginal refereeing. This is most certainly true today despite the emergence of institutions designed to more effectively broker international behavior over a vast array of subjects. The effects of globalization and economic integration have not only led to a broadening of political power across states, it has accelerated the growth of substantial connections between individual behavior in one state and its impact in another. Thus, notwithstanding debates on the exact economic effects of globalization, it is evident that the political and legal order of the last 60 years is being dislodged and replaced by various modalities of transnational regulation and various actors engaged in the regulatory enterprise.

In understanding the impact of the developments and what they may mean for the future of public international law as a system it is necessary to step back from formalistic definitions and categories, (e.g. municipal law versus international law, positivism versus natural law theory) and consider the question of what constitutes international law from a more pragmatic relational, behavioral and functional perspective – that is, what peoples, relationships,

31 See e.g., Ruchir Sharma, Broken BRICs, FOREIGN AFFAIRS (November/December 2012) (arguing that international economic convergence is a myth).
institutions and activities are being regulated, by whom, and how legitimate and successful is the regulatory effort. The legitimacy of any regulatory enterprise is hugely dependent upon its successful implementation. As will be discussed, the globe’s most influential states have significant reserves of economic and political power available that can be deployed to promote success and therefore legitimacy, formal categories to the contrary notwithstanding. When examined from this more pragmatic viewpoint, therefore, it is clear that formal treaties and recognized customs are not the only legal mechanisms by which states shape global behavior. Law acts upon institutions and individuals not in a vacuum. Accordingly, while the study of public international law has tended to reflect an almost hypertensive concern for categorical subject matter “fragmentation”, the real story in international law today is the extent to which formal normative mechanisms of international lawmaking, e.g., treaties and state custom, are being augmented if not displaced by a rapidly growing list of more informal normative mechanisms, e.g., non-state regulators, MBMs, extraterritorial application of municipal law.

The Aviation Directive is a case study in this latter development. It illustrates that states, particularly the most powerful and influential states, have a variety of legal tools available outside of formal international lawmaker by which to regulate and shape global behavior, not

32 For a discussion concerning the “fragmentation” of public international law, see International Law Commission, 58th Session, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi), available at http://untreaty.un.org/ilc/guide/1_9.htm. See also, David Kennedy, International Law: One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream, 31 N.Y.U. REV. L. & SOC. CHANGE 641 (2007). While the “fragmentation” problem may be of great concern to academics, this has hardly stopped the development of new legal regimes. The challenge facing international law, as evidenced by the Aviation Directive, is not subject matter fragmentation but rather the fact that it is the product of a segmentary society; that is, a social structure (the international community) lacking a strong central authority to coordinate the development and enforcement of law and one who actors place a premium on maintaining their sovereignty and autonomy. As a result, there is a constant push and pull between the center of global legal system evidenced in such institutions as the UN, WTO and ICJ, and the interests of the system’s segments (states) to collaborate in solving common problems but not at the expense of their autonomy.

33 See e.g., Keith R. Fisher, Transnational Competition Law and the WTO, 5(2) INT’L TRADE L. & POL’Y 42 (2006) (noting more developed economies have sufficient market “clout” to unilaterally assert extraterritorial jurisdiction in a meaningful way but smaller economies can rarely expect to make a plausible threat to prohibit conduct by large firms that might have negative effects within their borders).
the least of which is giving transnational effect to their municipal laws premised upon the notion of substantial connectedness. Extending the ETS to the global aviation sector cannot be seen simply as an act of regulating the activities of a particular industry with commercial ties to the EU. It is, rather, an attempt to reshape global behavior while protecting domestic interests by giving extraterritorial effect to what Dan Danielsen calls “local rules”, in spite of protests to the contrary. Does this mean that the sanctity of state is becoming irrelevant? Hardly. It does suggest, however, that as interdependencies and connections between states grow the regulation of transnational conduct will not be defined solely by formalistic notions of international law and conventional modes of international lawmaking. Rather, pluralism, non-state action,

34 One question that remains relatively unresolved is what exactly do we mean by “transnational” and “international” law? Vicky Jackson, for example, speaks of transnational law as both international law and the laws of foreign countries. See generally, VICKY JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2011).
35 For example, according to 2011 figures provided by just Heathrow Airport, 22.8% of 69.4 million or 15,823,200 passengers departing or landing were on North American-oriented flights. http://www.heathrowairport.com/about-us/facts-and-figures.
36 Dan Danielsen, Local Rules and a Global Economy: An Economic Policy Perspective, 1 TRANSN’L LEGAL THEORY 49 (2010). See also, Opinion of Advocate General, Air Transport Association of America and Others, Case C-366/10 ¶ 147 (Oct. 6, 2011) (“Admittedly, it is undoubtedly true that, to some extent, account is thus taken of events that take place over the high seas or on the territory of third countries. This might indirectly give airlines an incentive to conduct themselves in a particular way when flying over the high seas or on the territory of third countries, in particular to consume as little fuel as possible and expel as few greenhouse gases as possible.”). See also, NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 2 (2010) (“The classical distinction between the domestic and international spheres that had sustained them is increasingly blurred, with a multitude of formal and informal connections taking the place of what once were relatively clear rules and categories.”).
37 See, e.g., Opinion of Advocate General, supra note 36 at ¶ 156.
39 See, e.g., ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER 20 (2001) (noting that the “nation-state remains of supreme importance”). See also, DAVID J. BEDERMAN, GLOBALIZATION AND INTERNATIONAL LAW, 147-150 (noting that the Westphalian model of the nation-state is tested but it has not collapsed or been rendered irrelevant).
40 See e.g., Austen L. Parrish, Domestic Responses to Transnational Crime: The Limits of National Law, 23(4) CRIM. L.F. 275 (2012) (discussing the growth of transnational crime and the increased use of municipal law to it but challenging the desirability of this development); Jaye Ellis, Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns, 25(2) LEIDEN J. INT’L L. 397 (2012) (observing that there are reasons to believe that unilateral exercises of extraterritorial authority may become more common); Shohit Chaudhry & Kartinkey Mahajan, The Case for an Effective Extraterritorial Jurisdiction of Competition Commission of India in Light of International Practices, 32(6) EUR. COMP. L. REV. 314 (2011) (describing the role of
extraterritoriality, and unilateralism are becoming as much a part of the globe’s legal frameworks as is traditional multilateralism.\textsuperscript{41} This maybe an unnerving development for international law purest seeking clean divides between “public”, “international” and “municipal”, but it is a real and largely uncoordinated development nonetheless; one that is difficult to categorize and even harder to contain.

It is always dangerous to use a single event as a general indicator of future happenings. But as Commissioner Hedegaard’s statement evidences, global interdependencies and transnational problems are accelerating the need for coordinated action at the very moment the international community’s ability to reach consensus solutions in several critical areas languishes.\textsuperscript{42} In response, the EU has chosen to push the “international community”, whoever that may be at any one moment in time, into addressing problems such as climate change by unilaterally imposing its ETS on much of the global aviation sector, with all indications that it will not stop there.\textsuperscript{43} The mere act of landing or departing from an aerodrome in a Member State

\textsuperscript{41} See Krisch, supra note 36. See also, David Kennedy, \textit{The International Style in Postwar Law and Policy}, 1994 \textit{Utah L. Rev.} 7, 10.
now subjects a non-exempt aircraft and its owner (and therefore tangentially its passengers and/or cargo recipients) to the “unlimited jurisdiction” (i.e., global jurisdiction) of the EU for purposes of aviation emissions from the beginning to the end of the flight regardless of origin, destination or duration. A public international legal order that was, in theory, premised on respect for the symmetric horizontal relationships of sovereign equals is being displaced by complex, asymmetric relationships where influential states and multiple actors use their regulatory powers to augment, provoke or even circumvent multilateral efforts aimed at shaping global behavior. As a consequence, traditional conceptual curbs on state overreach, e.g., freedom from external control, and even the very nature of state authority, e.g., exclusive sovereignty over a defined population within a given geographical territory, are becoming both ambiguous and less effective. There has never been any question concerning the authority of a state to regulate relationships and behaviors within its borders regardless of an individual’s citizenship, save that of diplomats. But increasingly more influential states seek to regulate the behavior of individuals with substantial connections to territory or economy or politics regardless of their actual physical location on the planet. Globalization has effectively created a virtual world for the political and regulatory powers of the most influential and powerful states.

44 See Air Transport Association of America v. Secretary of State for Energy and Climate Change, C-366/10, ¶ 125 (Court of Justice of the European Union (Grand Chamber), 2012) [Hereinafter “Air Transport Case”]. But see, Brief of the Federal Republic of Germany, et al., as Amicus Curiae in Support of Respondents, Kiobel v. Royal Dutch Petroleum, No. 10-1491 (U.S., Feb. 2, 2012) (U.S. assertion of universal jurisdiction over a foreign corporation under the Alien Tort Statute should only be available if plaintiffs show no legal remedy available in country of incorporation or center of management); Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, No. 10-1491 (U.S., Feb. 2, 2012) (continued recognition of principle that broad assertions of extraterritorial jurisdiction arising out of aliens’ claims against foreign defendants for alleged injuries in foreign jurisdictions should be avoided).

45 See, e.g., Air Transport Case, supra note 44, ¶ 129 (“Furthermore, the fact that . . . certain matters contributing to the pollution of the air, sea or land territory of the Member State originate in an event which occurs partly outside that territory is not such as to call into question . . . the full applicability of EU law in that territory.” (Citations Omitted)).

46 Traditionally, the four attributes of the state were: (1) a definable population; (2) identifiable territory; (3) a functioning government exercising authority over its population and territory; and (4) sovereignty. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 70-72 (7th ed. 2008).
encouraging them to see an ever broadening array of connections between extraterritorial
conduct and domestic interests thus rationalizing the greater use of municipal law in response.47

The Aviation Directive, therefore, is one of several illustrations of the impact that
globalization is having on the development of international law, modes of international
lawmaking, and the process by which the most influential and powerful states identify and
confront global issue, sometimes using their municipal law systems as a principal response tool
to perceived threats or transnational problems. With the language of integration infused into
virtually every discussion concerning the globe’s legal systems, the degree to which the most
influential states use their municipal authority to shape state and individual behavior48 across the
globe is an often overlooked but profoundly important theme; an undertow sometimes working
with and sometimes against traditional structures of public international law and multilateralism
as states jockey to shape a broad range of global conduct. With the emergence of the rule of law

47 Nicolas van de Walle notes that one potential consequence of globalization is the “marketization” of public policy
and public institutions through liberalization, privatization and deregulation. Therefore, the globalization of the
world’s economy and the marketization of public policy are distinctive but intertwined developments. See generally,
Nicolas van de Walle, Economic Globalization and Political Stability in Developing Countries (1998),
http://www.iatp.org/files/economic_globalization_and_political_stability.pdf. See also, Ahlstrom v. Commission
Case, 1988 E.C.R.519, 4 C.M.L.R. 901 (1988) (endorsing the extraterritorial application of EU competition law);
Brendan Sweeney, Reflections on a Decade of International Law: International Competition Law and Policy: A
Work in Progress, 10 MELBOURNE J. OF INT’L LAW 58 (2009) (discussing both national and international
developments in competition law). David Bederman observes that:

For millennia, commerce has been the solvent of sovereignty. Throughout all epochs of
globalization * * * international trade and all its attendant phenomena and consequences have
been signal contributors to the processes of political, social, and cultural change around the world.
Indeed, we tend to regard globalization as, first and foremost, a set of economic processes that
bind international actors (States, individuals, corporations, and other polities) together in a web of
mutual interdependence.
Commerce is subversive of established States and political order precisely because it allows for
the free communication and transport of people, goods, services, and information across
recognized national boundaries and cultural zones of influence. Throughout much of human
history, the peoples of radically different cultures, ethnicities, religious traditions, and imperial
regimes have nonetheless sought to trade with each other and to proposer from the consequent
economic benefits that accrue from such economic interaction.

Bederman, supra note 39at 27. See also, Pascal Lamy, The Place of the WTO and its Law in the International Legal

48 See e.g., Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty
and Article 54 of the EEA Agreement against Microsoft Corporation, Case COMP/C-3/37.792 — Microsoft, 2007
O.J. L32/23 (ordering Microsoft to disclose certain software information to competitors).
culture over the last 60 years, the extraterritorial application of municipal law can become a surrogate means by which powerful states advance their many objectives. Through law these states are capable of projecting their values, policies and power globally while protecting their domestic interests by wrapping them in a blanket of law that can often go unchallenged given the absence of super-national law enforcement institutions capable of meaningfully containing state adventurism.

2.2 Environmental and economic policy in the EU – Greening the planet, green protectionism or both?

James Carville, the noted strategist for Bill Clinton’s successful 1992 presidential campaign famously coined the phrase, “It’s the economy, stupid.” The linkage between a state’s economy and its many other systems, including its legal system, is inexorable. Anti-trust and competition law is premised on the idea that the diffusion of commercial power is far better for a community than monopolism. Parochial trade laws of the 1920’s and 1930’s intended to insulate national markets from global economic forces became accelerants to the Great

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51 Cf., Foreign Account Tax Compliance Act (FACTA), 26 U.S.C.§§1471-1474 (2012) (affirmatively requires foreign banks to locate any American account holders and disclose their balances, receipts, and withdrawals to IRS or be subject to a 30% withholding tax on income from U.S. financial assets held by the banks).

52 See e.g., Steve Charnovitz, The Enforcement of WTO Judgments, 34 YALE J. INT’L L. 558, 562 (2009) (“[T]he WTO dispute system has been effective because there is an expectation that decisions will ultimately be complied with.”). But see, Born, supra note 17 (arguing that so-called second generation international adjudicatory bodies have far more enforcement powers than first generation bodies such as the ICJ).

Depression producing massive social and political dislocation. More recently, the widespread integration of the world’s economies has spurred new regulatory systems (both state and non-state driven) seeking to balance trade with other considerations including development, the environment, labor rights, and natural resources exploitation. Economics is, in short, one of if not the foremost imperative behind a state’s political, social, and legal order, as well as largely defining a state’s capacity to affect events across the planet. Accordingly, the architecture of the global economy is not only undergirded by a complex system of international and regional treaties, customary law and emerging non-state regulation, it is also influenced by municipal laws with significant extraterritorial reach. The globalization of a state’s economy has, in some cases, encouraged and even hastened the need to globalize a state’s municipal law and regulatory regimes.

Over the last 40 years economics and the environment have become intertwined as states and the international community recognizes the impact human activity has on transnational ecosystems and international relations. This impact is not always empirically quantifiable leading at times to sharp disagreements over just how much influence environmental considerations should have on economic activity. The result is virtual combat in some states between environmental considerations and economic development. Such conflict is nothing


new. But the emergence of truly global ecological problems, spurred in part by demands for more robust worldwide economic growth, is compelling some states to take a more nuanced view of the competing interests, not simply to address transnational problems but also to stimulate innovation and development at home. As Michael E. Porter and Claas van der Linde have observed:

The relationship between environmental goals and industrial competitiveness has normally been thought of as involving a tradeoff between social benefits and private costs. The issue was how to balance society’s desire for environmental protection with the economic burden on industry. Framed this way, environmental improvement becomes a kind of arm-wrestling match. One side pushes for tougher standards; the other side tries to beat the standards back.

Our central message is that the environment-competitiveness debate has been framed incorrectly. The notion of an inevitable struggle between ecology and the economy grows out of a static view of environmental regulation, in which technology, products, processes and customer needs are all fixed. In this static world, where firms have already made their cost-minimizing choices, environmental regulation inevitably raises costs and will tend to reduce the market share of domestic companies on global markets.

The application of the ETS to the global aviation sector may be seen as evidence of the EU attempting to globalize the Porter/van der Linde proposition that the environment and the economy are synergetic and therefore must be regulated together. From a purely regulatory approach to finding solutions and allows industry to block anything a particular industry does not find congenial to its interests).


See e.g., The Ilulissat Declaration, Arctic Ocean Conference, Greenland, May 27-29, 2008, http://arctic-council.org/filearchive/Ilulissat-declaration.pdf. See also, Cinnamon P. Carlarne, Arctic Dreams and Geoengineering Wishes: The Collateral Damage of Climate Change, 49 COLUM. J. TRANSNAT’L L. 602 (2011); See e.g., Tessa Mendez, Thin Ice, Shifting Geopolitics: The Legal Implications of Arctic Ice Melt, 38 DENV. J. INT’L L. & POL’Y 527 (2010) (geopolitics is tied to resource use and control; the Arctic as virgin territory lacks geopolitical stability established in most other areas of the world).


See Valeria Costantinia & Massimiliano Mazzanti, On the Green and Innovative Side of Trade Competitiveness? The Impact of Environmental Policies and Innovation on EU Exports, 41(1) RESEARCH POL’Y 132-153 (2102) (EU
perspective, the U.S. has arguably reduced its international environmental leadership footprint in response to domestic politics that often see environmental and economic interests as opposing forces, even placing itself at a strategic disadvantage sometimes. In contrast, the EU has used its vast regulatory power over the Common Market to drive its economies to progressively incorporate environmental concerns as root considerations in commercial policies. Whether this largely top-down approach -- as distinguished from the market approach -- will prove to

energy tax policies and innovation efforts positively influence export flow dynamics, revealing a Porter-like mechanism. See also, Hans Vedder, The Treaty of Lisbon and European Environmental Policy, 22 J. ENVTL. L. 285 (2010).

It is important to make a distinction between regulatory leadership and environmental impact. As recent studies have shown, the U.S.’s shift to greater use of natural gas has resulted in a significant decline in Greenhouse Gas (GHG) emissions as power companies switch from coal to generate electricity. This is occurring even in the absence of regulatory-imposed emission reduction system. See Xi Lu, Jackson Salovaara & Michael B. McElroy, Implications of the Recent Reductions in Natural Gas prices for Emissions of CO2 from the US Power Sector, 46(5) ENVTL. SCI. TECH. 3014 (2012). In contrast, the EU’s ETS, meant to drive down GHG emissions in point of fact it has had a smaller impact for a variety of reasons. See EUROPEAN ENVIRONMENT AGENCY, WHY DID GREENHOUSE GAS EMISSIONS INCREASE IN THE EU IN 2010?, available at http://glossary.eea.europa.eu/terminology/sitesearch?term=why+did+greenhouse+gases.


See, e.g., John A. Cartner & Edgar Gold, Commentary in Reply to “Is it Time for the United States to Join the Law of the Sea Convention “, 42 J. MAR. L. & COM. 49 (2011) (arguing that the failure to ratify UNCLOS places the U.S. at a significant disadvantage). Cf., Sharon E. Foster, While America Slept: The Harmonization of Competition Laws Based Upon the European Union Model, 15 EMORY INT’L L. REV. 467 (2001) (arguing that the EU has harmonized competition laws and is influencing other states to adopt its model while the US denies the very to do so enabling the EU to have greater influence in the development of global competition law).


But see, Adam Weiss, Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union, 41 COLUM. J.L. & SOC. PROBS. 81 (2007) (arguing that free moment of goods and peoples differ in the US and EU with the former favoring a centralized approach while the latter vacillates between centralization and competition).

Cf., Gitanjali Deb, Atrazine: A Case Study in the Differences between Regulations of Endocrine Disrupting Chemicals in the EU and the US, 25 TEMP. J. SCI. TECH. & ENVTL. L. 173 (2006) (noting that while both the EU and US have elements of precaution in their environmental regulatory systems, the underlying drivers are very different).
have long range effectiveness in addressing ecological problems remains to be seen. Nevertheless, as Noah M. Sachs notes, “Since 2000, the EU has embarked on ambitious environmental lawmaking in areas such as chemical regulation, energy efficiency, hazardous waste, and climate change. Europe has in many cases supplanted the United States as the leading originator and exporter of environmental law innovation.” The ETS is evidence of the EU’s effort to link environment wellbeing to the Common Market’s economic interests. As stated by the Ecologic Institute in the Sixth Environmental Action Programme (6EAP):

In relation to international environmental governance, it should be noted that the EU emerged as a global “green leader” in the second half of the 1980s. Observers have identified, among other factors, the withdrawal of the US as a leader in international environmental policy making, the EU’s (competitive) interest in promoting its own rather stringent environmental standards at the international level, and the EU’s desire to shape its identity as a civilian world power as possible reasons for the active role of the EU in international environmental policy making. (Emphasis added)

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68 Cf., Issachar Rosen-Zvi, You are too Soft!: What can Corporate Social Responsibility do for Climate Change?, 12 MINN. J.L. SCI. & TECH. 527 (2011) (arguing, in part, that the failure of the Copenhagen Summit rested in part on the declining effectiveness of the regulatory state and the rise of non-state governance actors).
70 See, e.g., Commission Communication Developing an EU civil aviation policy towards Brazil, at 1.1 COM (2010) 0210 final (May 5, 2010) (“the European Commission has proposed to launch targeted negotiations seeking to achieve comprehensive aviation agreements with selected key partners in all regions of the world, with the aim of strengthening the prospects for promoting European industry and ensuring fair competition, while at the same time seeking to reform international civil aviation.”) (Emphasis added); European Environment Agency (EEA), The European environment — state and outlook 2010: synthesis 9 (2010) available at http://www.eea.europa.eu/soer (“Continuing depletion of Europe’s stocks of natural capital and flows of ecosystem services will ultimately undermine Europe’s economy and erode social cohesion.”). See also, JAMES CONNELLY & GRAHAM SMITH, POLITICS AND THE ENVIRONMENT: FROM THEORY TO PRACTICE 241 (1999) (describing EU environmental policy as dependent upon the “ecological modernisation” to minimize conflict between environmental quality and economic growth by betting on technological advances).
The result is the emergence of the EU as a leading environmental regulator with reach well beyond the Common Market given the integrated nature of today’s economies and the size of its internal market.\footnote{See David A. Wirth, The EU’s New Impact on U.S. Environmental Regulation, 31(2) THE FLETCHER FORUM OF WORLD AFFAIRS, (Summer 2007), Boston College Law School Research Paper No. 144, available at SSRN: http://ssrn.com/abstract=1028733. See also, Miranda A. Schreurs, Henrik Selin & Stacy D. VanDeveer, Expanding Transatlantic Relations: Implications for Environment and Energy Politics, in TRANSATLANTIC ENVIRONMENT AND ENERGY POLITICS: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 1-18 (Miranda A. Schreurs, Henrik Selin & Stacy D. VanDeveer, eds., 2009).}

The EU’s assumption of this role, however, cannot be seen solely as an altruistic effort aimed at improving global living conditions writ large. As Michael E. Porter further notes, “The performance of any company can be divided into two parts: the first attributable to the average performance of all competitors in its industry and the second to whether the company is an above- or below-average performer in its industry.”\footnote{Michael E. Porter, Michael E. Porter on Competition, 44 ANTITRUST BULL. 841, 844 (1999).} Arguably, the same can be said of states. To the extent that a state’s internal market and regulatory systems can operate as an “above-average performer” across a range of activities through innovation, regulation, and process improvement, it holds a comparative and strategic advantage over states that are simply average or below-average performers. Singapore, for example, is arguably a case study in support of this principle.\footnote{See generally, GAVIN PEEBLES & PETER WILSON, ECONOMIC GROWTH AND DEVELOPMENT IN SINGAPORE: PAST AND FUTURE (2002).} The reason for this is simple: states with above-average performing internal markets and efficient regulatory systems not only possess significant economic clout, they position themselves to set favorable global standards (legal and otherwise).\footnote{Cf., Sachs, supra note 69. See also, Commission, Product Environmental Footprint (PEF) Guide, supra note 43.} As all but the most sophisticated manufacturing and servicing activity is globalized through integration and corporate restructuring,\footnote{See Gilpin, supra note 39 at 289.} those states that control the standards setting process, even
informally, can position themselves to address long-term environmental problems while promoting domestic innovation and internal market development. Consequently, while there are philanthropic aspects to the EU’s global environmental efforts, it also reflects a keen desire to weave sustainability, energy efficiency, health, and clean environment issues into its practical economic objectives with the end result being an economy based on innovation and growth in emerging technologies. As the late U.S. House Speaker Thomas “Tip” O’Neill so famously observed, “All politics is local.” That includes global politics and its interaction with parochial economic and environmental interests.

Some fourteen principles now drive EU environmental and economic policy including the polluter pays, a focus on sustainable development, a linking of environment, health, safety and consumer protection, a requirement that environmental problems be rectified at the

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77 See e.g., Commission, Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU’s 2020 Strategy, at 7, COM(2010)612 (“We [EU] will urge our major trading partners to join and promote the use of existing sectoral regulatory convergence initiatives such as the UN-Economic Commission for Europe (ECE) regulations on automobiles, and to participate actively in the development of international standards or common regulatory approaches in a broad range of sectors. Indeed experience shows that it is much easier to tackle potential barriers before regulatory practices become entrenched, both in well established EU industry sectors such as automotives, machine tools and chemicals, but particularly in rapidly emerging sectors such as online services or biotech.”). See also Id. at 11 (“The biggest remaining obstacles lie in the divergence of standards and regulations across the Atlantic, even though we [and the U.S.] have very similar regulatory aims.”).


81 Id. art. 100a(3).
source, the integration of environmental and health concerns into all aspect of EU policy-making, and, perhaps most influential, the notion of precaution to prevent problems and lower risk. These principles impact a wide-range of industrial and economic interests, e.g., construction, transportation, energy, and drive the EU’s policies towards an interconnected environmental-economic regulation scheme within the Common Market and increasingly transposed across the globe. Directives on the use of renewable energies and bio-mass fuels serve the dual propose of promoting sustainability while propelling innovation and protecting established and nascent European industries by imposing standards that others must adjust to as a condition of market access. According to Tom Howes, “[T]he growth of renewable energy depends on new technologies and processes, and ongoing efforts to improve the technology and

82 Id. art. 130r(2).
83 Id. See also, Id. art. 130r(3).
90 See, e.g., Directive 2009/28/EC, supra note 78.
91 See e.g., WILL STRAW, DAVID NASH AND REUBEN BALFOUR, EUROPE’S NEXT ECONOMY: THE BENEFITS OF AND BARRIERS TO THE LOW-CARBON TRANSITION, INSTITUTE FOR PUBLIC POLICY RESEARCH 12, 13 (2012), at http://www.ippr.org/publication/55/9182/europes-next-economy-the-benefits-of-and-barrriers-to-the-low-carbon-transition (energy intensive industries are at risk from competitive pressures relating to the low-carbon transition and, “Therefore, the loss of these companies to jurisdictions outside the EU would harm Europe’s low-carbon transition and cost jobs and economic output. . . . Given these complexities, compensating the energy-intensive sectors and using diplomatic channels to ensure that other jurisdictions commit to binding emissions reduction targets is a better approach than reducing the EU’s own ambition, which could make a global agreement less likely and reduce current incentives for technological innovation.”).
bring down costs. Consequently, there is a clear technology innovation drive from the sector and a clear economic and employment benefit: the sector employs over 1.4 million people[]." The EU’s use of the “precautionary principle” does not simply express its clean environment interests, it compels those in other states to alter their domestic practices as a condition of gaining access to the Common Market93 all the while promoting environmental innovation as a core economic driver at home.94

The willingness of the EU to go forward with the Aviation Directive in the face of significant global opposition reflects: (1) its unique character and market size; (2) its linkage of economic security with the environment; (3) its desire to be a global environmental regulator significantly contributing to if not outright commanding the standards setting process; and (4) its willingness to use its collective political and economic clout to achieve the strategic policy objectives of the Member States and the Brussels’ bureaucracy, largely through the use of law and regulation.95 It also reflects the keen economic interests of the EU, which originated as a

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94 See, e.g., Porter & van der Linde, supra note 60 at 101 ("Innovation offsets can be broadly divided into product offsets and process offsets. Product offsets occur when environmental regulation produces not just less pollution, but also creates better-performing or higher-quality products, safer products, lower product costs (perhaps from material substitution or less packaging), products with higher resale or scrap value (because of ease in recycling or disassembly) or lower costs of product disposal for users.”).
trading bloc.\textsuperscript{96} By integrating and projecting its market and regulatory power, the EU can position itself to set environmental standards across a wide-range of industries, services, and technologies, which benefit its own economic interests.\textsuperscript{97} Although David Bederman notes that international organizations are essential in setting global standards, in part, because “[n]o single nation, or even group of countries, can unilaterally raise standards,”\textsuperscript{98} this is true only to an extent. Notwithstanding growing economic integration and interdependency, the most influential states continue to possess significant capacity to dominate global regulatory systems\textsuperscript{99} often by conditioning access to vast internal markets on compliance with domestically driven standards.\textsuperscript{100} As G. John Ikenberry observed, “All states have an interest in arriving at an

\begin{itemize}
  \item Expand the EU ETS to include imported energy-intensive goods: serious consideration should be given to extending the ETS into imported goods from energy-intensive sectors if binding emissions commitments for 2020 are not agreed by 2015.
  \item Raise the price of carbon: the EU should act to raise the price of carbon, which is worryingly low.
  \item Focus the EU’s multiannual financial framework on innovation: in addition to the demand-side measures described above, the EU should develop a set of supply-side policies.
  \item Protect ETS revenues for low-carbon projects: the ETS is partly undermined by concerns that it has become a fiscal policy to raise revenue rather than a climate policy to reduce emissions. More revenue from the EU ETS should be directed towards low-carbon projects like the EU’s NER 300 programme.
  \item Provide industry with greater regulatory certainty: industry participants from France, Germany and the UK called for more stability in the EU’s regulatory setting process.
  \item Maximise the EU’s role as a standard setter: for example, the EU has been successful in setting new vehicle emissions standards for passenger and light commercial vehicles.
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\textsuperscript{97} Cf. Michael Byers, \textit{The Complexities of Foundational Change}, in \textit{UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW} (Michael Byers & George Nolte, eds. 2003)

\textsuperscript{98} See, \textit{e.g.}, Commission Regulation (EC) No 1235/2008 of 8 December 2008 laying down detailed rules for implementation of Council Regulation (EC) No 834/2007 as regards the arrangements for imports of organic products from third countries, 2008 O.J. L334/ 25; Marine Mammals Protection Act, \textit{supra} note 10. See also, Willy,
agreement that coordinates policy – particular in areas of business and trade regulation – but the leading state[s] can use its power advantages to get other states to adopt its rules and regulations.”\textsuperscript{101} Even where these attempts have been successfully resisted in venues such as the WTO,\textsuperscript{102} the fact remains that with regularity environmental and economic interests converge with the most influential states using their extensive lawmaking capacities to achieve advantageous outcomes within that convergence.\textsuperscript{103} From REACH to the ETS to the Aviation Directive to its emerging “environmental foot printing” efforts, the EU is positioning itself to be a global innovator and regulator across a range of economic activities by using its environmental regulatory systems.\textsuperscript{104} To the extent that the EU is successful in projecting its environmental standards on the global plane it forces the commercial bases, markets, and political establishments of other states, particularly in the developing world, to either adjust to its vision

\textsuperscript{101} G. John Ikenberry, Liberal Leviathan: The Origins, Crisis and Transformation of the American World Order 113 (2011).


\textsuperscript{103} Pascal Liu, Alice Byers & Daniele Giovannucci, Value-Adding Standards in the North American Food Market - Trade Opportunities in Certified Products for Developing Countries, FAO Trade and Markets Division (2008), available at SSRN: http://ssrn.com/abstract=1107382; Michael W. Meredith, Malaysia’s World Trade Organization Challenge to the European Union’s Renewable Energy Directive: An Economic Analysis, 21 Pac. Rim L. & Pol’y J. 399 (2012) (discussing how the EU’s directive is seen by some as green protectionism, the practice of adding non-environmental objectives that are discriminatory, or overtly trade restrictive to environmental policy).

of the environment-economics equation or find themselves outside a huge market.  

This is arguably no different than the U.S. using its position as the world’s leading financial system to achieve favorable domestic results in that field.  

The fact that the Aviation Directive pulls a good part of a global sector into the EU’s carbon market illustrates the capabilities that the most influential states have in setting global standards, creating and regulating markets, and shaping conduct well beyond their borders by using their vast economic power.  

In the end, James Carville is largely correct.

So why does this matter to public international law? For a very long time the field of public international law has been fixated on state-to-state relationships defined by the symmetrical status of equal sovereigns. Yet one of the most powerful and undervalued influences on the international legal order is the extent to which the extraterritorial application of municipal law by powerful states increasingly shapes and alters behavior patterns given global integration. As the Aviation Directive illustrates, the most influential states have immense lawmaking and law-projecting capabilities, often legitimatized by their perceived democratic nature and/or backed by enormous economic strength as measured by the size of their internal markets and their global trading profiles. These states also have a remarkable aptitude for

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deploying their law projecting capabilities globally to achieve certain policy objectives through the use of municipal regulatory systems.\textsuperscript{108} When measured on the global scale, regulations set by the most influential states matter well beyond their borders; regulations set by small and developing states generally do not. Consequently, this lawmaking and law-projecting capability enables some states to dominate the global legal order – and therefore global behavior – even outside of comprehensive multilateral frameworks or cooperation-based agreements.\textsuperscript{109} If the EU can successfully use its municipal lawmaking capability to rework the landscape of global environmental law in its economic favor,\textsuperscript{110} it expands its global leadership, encourages the development of new industries and technologies at home,\textsuperscript{111} forces other nations to adjust to its policy initiatives and standards, and plays a more dominant role in shaping global markets and behavior by pushing its standards ahead of others.\textsuperscript{112} Basically, through the extraterritorial projection of its environmental-focused municipal law the EU can become a powerful economic policy determiner.


\textsuperscript{112} See, e.g., Michael E. Porter, \textit{Preemptive Capacity Expansion}, 16 J. Reprints Antitrust L. & Econ. 631 (1986) (noting that one approach to economic dominance is preemptive capacity expansion in which a competitor “locks-up” a major portion of the market thereby discouraging other entrants).
The EU’s assertiveness in global environmental regulation is not, therefore, the product of happenstance or the pursuit of purely laudatory objectives. It also reflects a keen and strategic effort to protect its long-range commercial interests as transnational ecological problems become prime considerations in economic development and economic innovation. This is precisely why some perceive the EU’s ETS and other aggressive environmental undertakings as trade protectionism wrapped in a flag of law-based environmentalism or so-called “green protectionism”. History is replete with examples of influential states shaping global behavior. What is new is the extent to which the broadening use of municipal law (in scope and subject) can be used to achieve global and domestic policy objectives given the increasing integration of state economies and the proliferation of transnational problems.

Whether the EU will be successful in increasing its influence over the global environment-economic-legal order remains an open question. The Aviation Directive demonstrates an interesting paradox in the unilateral use of municipal law to confront global problems. Global economic integration works in two directions: the most influential states can dominate legal systems or they can be forced by other influential states (and sometimes not-so-
influential states) to accommodate alternatives standards\(^\text{117}\) or run the risk of disruptive trade practices.\(^\text{118}\) Thus, while the combination of economic power, political acumen and provocative transnational problems can incentivize a powerful state to aggressively extend its municipal law transnationally, the success of that endeavor is hugely dependent upon other similarly influential states yielding to the exercise. When they do not, as is now the case with the Aviation Directive, not only is a specific project placed in jeopardy but so too is the legitimacy of that state to act in a similar manner as new problems arise. Stated differently, international relations is still a game driven primarily by power politics and largely dominated by self-interest, no matter how much we may try to convince ourselves that it has evolved to higher standards of selflessness.\(^\text{119}\)

2.3 Relevant history of the ETS

The genesis of cap-and-trade systems predates the United Nations Framework Convention on Climate Change (UNFCCC)\(^\text{120}\) and the Kyoto Protocol (Kyoto Protocol).\(^\text{121}\) However, these two agreements gave global legitimacy to carbon trading systems well beyond their historic roots in the U.S.\(^\text{122}\) In addition to the EU’s ETS, so-called “cap-and-trade” systems


\(^{120}\) (1992) 31 I.L.M. 849


now exist or are under consideration in Australia, China, Korea, and the U.S. The UNFCCC recognizes the “common but differentiated responsibilities and respective capabilities . . . to protect the climate system for the benefit of present and future generations of humankind.” The recognition of “differentiated responsibilities” means in practice that developed countries (often referred to as Annex 1 countries) are to “take the lead in combating climate change and the adverse effects thereof.” Accordingly, the Kyoto Protocol required Annex 1 countries (including those of the EU) to reduce their greenhouse gas (GHG) emissions by 2012, while recognizing that it will take considerably long for developing countries to meet similar objectives. The 1997 Kyoto Protocol highlighted three approaches to promoting GHG reductions: (1) joint implementations, (2) clean development mechanisms (CDMs), and (3) emissions trading.

Historically, the EU was predisposed to a carbon tax and resisted implementing a cap-and-trade system. However, in June 1998 the then 15 members of the Common Market adopted a GHG burden sharing agreement, in effect an emissions allocation system, under which each state agreed to specific emission reduction targets. The aggregate of these targets constituted part of the EU’s overall Kyoto Protocol contribution towards reducing GHG emissions.

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124 UNFCCC, art. 3(1).
125 Id.
126 See, e.g., Kyoto Protocol, arts. 2.3, 3.14, 10 & 11.
127 Id. at art. 6.
129 Kyoto Protocol, art. 17.
emissions. It was followed in 2000 by the European Commission’s (“Commission”) Green Paper on Greenhouse Gas Emissions Trading within the European Union that concluded, in part:

The Commission believes that a coherent and coordinated framework for implementing emissions trading covering all Member States would provide the best guarantee for a smooth functioning internal emissions market as compared to a set of uncoordinated national emissions trading schemes. A Community emissions trading scheme would lead to one single price for allowances traded by companies within the scheme, while different unconnected national schemes would result in different prices within each national scheme. The development of the internal market has been one of the driving forces behind the EU’s recent development, and this should be taken into consideration when creating new markets. Climate change is the clearest case of transboundary effects requiring concerted action. Moreover, scale effects at the level of the EU will allow for significant cost-savings, while similar regulatory arrangements will allow to keep administrative costs as low as possible. The EU’s creation of an ETS was something of a watershed moment; a policy shift away from an exclusive preference for carbon taxes as a mean to reduce emissions to a market-based system (or a combination of the two) that enabled the EU to employ its considerable market clout to implement a GHG reduction agenda.

The EU established the current ETS in 2003 to promote “reductions in GHG emissions in a cost-effective and economically efficient manner.” It was to be implemented in three

133 See Lisbon Treaty, supra note 24 at art. I(2)(b).  
137 See ETS Directive, supra note 1, art. 1.
phases, with the final phase beginning January 1, 2013. The ETS is the first large-scale international carbon trading market of its kind, covering approximately 50% of the EU’s GHG emissions from listed industries. It is built around a Market Based Measures (MBM) framework centered on a “cap-and-trade system” as distinguished from a “command and control system”, that is, emission limits were established and emitters are given relative flexibility in meeting the limits through the buying, selling, and trading of European Union emission allowances (EUAs) as opposed to implementing specific mandated emission control methodologies and technologies. As originally constructed, the ETS was a decentralized system with each Member State developing a National Allocation Plan (NAP) according to certain EU criteria. The NAPs established “the total quantity of allowances that [a Member State] intends to allocate for that period and how it proposed to allocate them.” Key decisions concerning the quantity and methodology of allocating EUAs were left to Member States with

138 The ETS was to be implemented in three phases: (1) January 1, 2005 to Dec. 31, 2007 marked a pilot phase; (2) January 1, 2008 to Dec. 31, 2012 was the first commitment period under which Member States were to meet their emission reduction obligations; and (3) January 1, 2013 to Dec. 31, 2020, to provide a longer trading period to encourage long-term investment in emission reduction.


141 See Skjærseth & Wettestad, supra note 139 at 67 (noting that the EU was initially of the market-based approach because of its flexibility but that such mechanisms are now part of Kyoto Protocol).


143 ETS Directive, supra note 1, art. 9(1).

144 Id.

the broad exception that: (1) the NAP had to be based on objective and transparent criteria;\textsuperscript{146} and (2) the amount of free EUAs would be reduced over time.\textsuperscript{147} In 2009, the EU centralized the authority for determining the quantity of EUAs in the Commission beginning in 2013.\textsuperscript{148} This move was initiated to combat the tendency of some states to liberally issue free EUAs, which had the effect of depressing allowance values, producing windfall profits for some industries, and doing little to actually reduce GHG emissions generated by the Community.\textsuperscript{149}

Under Directive 2003/87/EC, Member States were required to ensure that as of 1 January 2005, “no installation undertakes any activity listed in Annex I resulting in emissions specified in relation to that activity unless its operator holds a permit.”\textsuperscript{150} Annex I activities include: (1) energy; (2) production and processing of ferrous metals; (3) the mineral industry, including the production of cement, glass, and ceramic products; and (4) other activities including pulp and paper product.\textsuperscript{151} Consequently, only certain GHG generating activities fell within the ambit of the Directive and even then only within the EU.\textsuperscript{152} Operators of these activities are required to obtain EUAs with each “unit” representing the “right” to emit one ton of carbon dioxide equivalent during a specified period.\textsuperscript{153} Article 6 requires installation operators “to surrender EUAs equal to the total emissions of the installation in each calendar year.”\textsuperscript{154}

\textsuperscript{146} ETS Directive, supra note 1, art. 9.
\textsuperscript{147} Id. art. 10. See also, Id. Annex II.
\textsuperscript{150} ETS Directive, supra note 1, art. 4.
\textsuperscript{151} Id. Annex I.
\textsuperscript{152} See Id., art. 27 (providing temporary exemptions from the directive). See also, Id. Annex I(1) (exempting installations used for research, development and testing of new products and processes).
\textsuperscript{153} Id., art. 3(a).
\textsuperscript{154} Id., art. 6(2)(e).
Operators could acquire EUAs either directly from EU Member States or from other persons holding EUAs. A key feature of the system was that EUAs had to be transferable within the EU and with those in third countries where they would be recognized.

Additionally, Article 2 of Directive 2004/101/EC amended the ETS to enable operators to exchange “certified emissions reductions” and “emissions reduction units” for EUAs up to a certain percentage of the allotted allowances to that installation. These provisions then contributed to the market mechanism by establishing channels that could eventually provide for global carbon trading. By “capping” the total number of EUAs and establishing an exchange mechanism for trading, the ETS seeks to reward low emitters by allowing them to sell surplus EUAs while penalizing excessive emitters by requiring them to purchase additional EUAs. The fact that so many EUAs are issued free along with “grandfathering” has led some to question the efficacy of this approach since even typically large emitters can nevertheless reap windfall profits by selling surplus EUAs. But at least in theory the ETS incentivizes industries and operators to lower their emissions within the Common Market (and now globally) by using market forces rather than explicit reduction directives.

155 Id., art. 12.
156 Id., art. 12(1).
It is important to note that the ETS as developed and implemented by the EU is not mandated by the UNFCCC or the Kyoto Protocol.\textsuperscript{161} The Kyoto Protocol only obligated a party to “[i]mplement and/or further elaborate policies and measures in accordance with its national circumstances” to achieve “its quantified emission limitation and reduction commitments[.]” (Emphasis added)\textsuperscript{162} It is also important to note that while the Kyoto Protocol called for reductions in emissions from aviation and marine bunker fuels, this was to be done “working through the International Civil Aviation Organization and the International Maritime Organization, respectively.”\textsuperscript{163} Thus, the ETS is a unilateral response to climate change; it is not a legal mandate of the Kyoto Protocol nor has it been endorsed by either the International Civil Aviation Organization (ICAO) or the International Maritime Organization (IMO). In point of fact, the ICAO has objected to the extension of the ETS to the global aviation sector and has called upon the EU to reverse its unilateral action.\textsuperscript{164} Consequently, the extension of the ETS to much of the global aviation sector was an act unsupported by the consent of states outside the EU.

2.4 The ETS and the aviation sector

The Aviation Directive pulls a significant portion of the global aviation sector into the ETS by giving the system broad extraterritorial effect. As previously noted, effective 1 January 2012 operators of non-exempt aircraft arriving at or departing from the EU must hold or acquire

\textsuperscript{161} ETS Directive, supra note 1, Preamble at ¶ 5. See also, European Commission, Final report of the Aviation working group bringing together experts from Member States and industry, consumer and environmental organisations, Annex I at 5, April 2006, \textit{available at} http://ec.europa.eu/clima/policies/transport/aviation/docs/final_report_en.pdf (outlining options for extending the ETS to aviation: (1) intra-EU only; (2) all flights departing from the EU; (3) all flights arriving or departing from the EU). Other options discussed but rejected included: (1) intra-EU + 50\% of routes to and from the EU; (2) emissions in EU airspace; (3) all flights departing from the EU and EU airspace; and (4) intra-EU and routes to and from countries that have ratified the Kyoto Protocol. \textit{Id.}

\textsuperscript{162} Kyoto Protocol, art. 2.1 & 2.1(a).

\textsuperscript{163} See \textit{Id.}, art. 2.2.

a sufficient number of EUAs or interchangeable credits to cover their carbon emissions.\(^\text{165}\) Additionally, aircraft operators must “prepare a monitoring plan and to monitor and report emissions in accordance with that plan.”\(^\text{166}\) For purposes of administration, the Commission has assigned various air carriers (both EU and non-EU carriers) to “administrating Member States” for purposes of overseeing compliance with the Aviation Directive.\(^\text{167}\) For example, Aeroflot is assigned to Germany while Qatar Airways is assigned to the United Kingdom (UK).\(^\text{168}\) This means, in practice, that Member States with vast international and regional air transport services will receive a bulk of the income generated by auctioning of the allowances,\(^\text{169}\) an issue that could become a point of some controversy as Member States face significant budget challenges.

Like much of the EU’s environmental policy, the ETS reflects both a strong ecological rationale, \textit{e.g.}, combating climate change, and a strong economic rationale, \textit{e.g.}, reducing energy consumption, incentivizing innovation, establishing global standards, promoting favorable market mechanisms, and protecting local industries. The Aviation Direction is no different in having a dual purpose. The ecological rational is rather obvious: the EU has “made a firm independent commitment . . . to reduce its GHG emissions to at least 20\% below 1990 levels by 2020.”\(^\text{170}\) Thus, “[i]f the climate change impact of the aviation sector continues to grow at the

\(^{165}\) Aviation Directive, \textit{supra} note 2, Preamble at ¶ 16.

\(^{166}\) Id., ¶ 15.


\(^{169}\) Directive 2008/101/EC foresees that in 2012, 85\% of the allowances will be given for free to aircraft operators and 15\% of the allowances will be allocated by auctioning. In trading period 2013-2020, 82\% of the allowances will be granted for free, 15\% of the allowances will be auctioned, and the remaining 3\% will remain in reserve for later distribution to fast growing airlines and new entrants into the market. For a full discussion on how EU-wide aviation allowances are to be calculated and allocated, \textit{see}, European Commission website on Climate action at http://ec.europa.eu/clima/policies/transport/aviation/allowances/index_en.htm

current rate, it would significantly undermine reductions made by other sectors to combat climate change. But the economic rationale, while more subtle, is equally important. If the Aviation Directive applied only to the EU aviation sector it would have a market-distorting effect by placing European airlines at a competitive disadvantage to their international counterparts. European airlines would likely incur higher operating costs as a function of complying with the ETS, costs that would include those associated with administrative compliance, e.g., measuring and reporting on emissions, and the costs of emission compliance, e.g., buying EUAs. There are wildly varying estimates on the costs of compliance. But this is clearly not a cost-free exercise. The EU aviation sector would presumably pass these costs on to customers through higher fees who might then decide to fly non-EU long-haul carriers not subject to the ETS. Likewise, investors in the EU’s aviation sector would see lower returns given the costs of the programs. Consequently, absent broad application the EU aviation sector would suffer a “carbon leakage” problem as the cost from pricing carbon leads businesses and consumers to relocate to or obtain services from countries with a lower carbon price. The result would be no net reduction in carbon emissions and yet higher costs to European consumers. The universal application of the Aviation Directive to the global aviation sector, in theory, addresses the

171 Id. ¶ 11. But see, Tate Hemingson, Why Airlines Should be Afraid: The Potential Impact of Cap-and-trade and Other Carbon Emissions Reduction Proposals on the Airline Industry, 75 J. AIR L. & COM. 742 (2010) (noting that the aviation sector accounts for only 2% of GHG emissions but is lumped in with the overall transportation sector, which accounts for 1/3 of emissions).
172 See Aviation Directive, supra note 2, at ¶ 16.
174 See generally, Meltzer, supra note 123.
175 See Id.
economic challenges created by the ETS by leveling the field between EU and non-EU carriers. It also promotes EU environmental and economic standards given the increasing ties between the two systems, the size of the Community’s internal market, and the breath of the EU’s carbon trading market.

There are several features of Directive 2008/101/EC that are significant. First, perhaps the most important feature of the directive and that which has generated the greatest objection is the extent of its application. Under the 1944 Convention on International Civil Aviation (“Chicago Convention”), “Aircraft have the nationality of the State in which they are registered.” However, the Chicago Convention also recognizes that “the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality[.]” Therefore, no clear rules exist “that the law of that state applies on board the aircraft in the same way as the law of the flag state applies aboard ships, and the extent to which a state’s laws apply to events occurring on board an aircraft registered in its territory has been largely left to states to determine for themselves.”

As a result, the Aviation Directive does not limit itself to the EU aviation sector or intra-EU air travel, both of which are clearly under the EU’s jurisdiction. Rather, the Aviation Directive extends the ETS to all segments of all flights of non-exempt operators without regards to the principles of nationality or territoriality, in effect forcing a significant part of the global aviation sector into the EU’s carbon trading market. With few exceptions, all flights to or from

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178 Chicago Convention, supra note 18, art. 17.
179 Id. art. 11.
the EU must account for their carbon emissions and surrender a sufficient number of EUAs regardless of nationality of the air carrier or territorial location of the emission generating activity. Therefore, emissions from EU-bound or departing aircraft include generating activity: (1) over EU’s territory; (2) over the territory of non-EU states; (3) in international airspace, and (4) while on the ground in a third country. This broad application results from the Aviation Directive’s fuel consumption formula, which is based on the “Amount of the fuel contained in aircraft tanks once fuel uplift for the flight is complete – amount of fuel contained in aircraft tanks once fuel uplift for subsequent flight is complete + fuel uplift for that subsequent flight.”

Thus, a flight from Hong Kong to Frankfort must hold EUAs for its total fuel consumption (and therefore total carbon emissions) from point of departure to the point of landing, including the running of an auxiliary power unit while parked at the gate. A non-exempt aircraft operator that has exhausted its free EUAs must then purchase additional EUAs from other holders. As free EUAs are reduced over time, the global aviation sector will be forced to purchase additional EUAs in the carbon market where hopefully a raise in carbon prices will spur behavioral changes and innovation.

Second, under the Aviation Directive the Commission may exclude from the ETS airlines from a third country if it has adopted “measures for reducing the climate change impact of flights departing from that country which land in the Community.” This vaguely worded provision, when read in conjunction with the Directive’s Preamble language of “equivalent measures,” appears to give the Commission significant authority to assess the sufficiency of a third country’s

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181 See generally, Aviation Directive, supra note 2, Annex at 18. See also, Meltzer, supra note 123.
182 Id.
183 Cf., Id.
184 Id. at L 8/8, art. 3(d).
185 Id. at L8/14, ¶ 18.
186 Id. at L8/5, ¶ 17.
carbon reduction programs. Although the EU has stated that it intends to seek “optimal interaction” between trading systems to avoid double regulation, the fact remains that third country measures must in the view of the Commission “have an environmental effect at least equivalent to that of this Directive”\footnote{Id.} before an exemption is granted. This provision encourages two unstated objectives: (1) promoting the EU’s emission trading system as the globe’s aspirational standard; and (2) protecting the growing tie between environmental regulations and economic activity with the EU as a precursor to further technological and industrial innovation. Whether provisions within the Directive authorizing recognition of third party measures will incentivize the development of a global ETS system that aligns with the EU’s ETS remains an open question.\footnote{See, Hua Lan, Comments on EU Aviation ETS Directive and EU—China Aviation Emission Dispute, 45 REVUE JURIDIQUE THEMIS 589 (2011).} However, absent objective standards for assessing whether third country’s measures have an “environmental effect at least equivalent to” it is difficult to see how the question of equivalency can be assessed in a transparent, objective and apolitical manner given the interdependencies of the global economy.\footnote{Cf., Airbus Supports China’s Opposition to EU Emissions Tax, CHINA DAILY, June 13, 2012, available at http://www.chinadaily.com.cn/business/2012-06/13/content_15497338.htm.} The lack of objective standards may in practice lead to a reduction in the effectiveness of the Aviation Directive by: (1) granting accommodations to third countries that amounts to a race to the bottom; or (2) creating complete paralysis in efforts to obtain a global GHG emissions reduction agreement given vast difference over what constitutes “equivalent” measures now that the EU’s ETS is in place and operational.

Finally, funds derived from the ETS are intended to “tackle climate change in the EU and third countries.”\footnote{Aviation Directive, supra note 2 at 9, ¶ 4.} However, the Aviation Directive also states that, “It shall be for Member
States to determine the use to be made of revenues generated from the auctioning of EUAs."  
This language raises two important issues. First, although there is a political agreement that a significant portion of the revenues generated by the auctioning EUAs will be dedicated to reducing GHG emissions, to fund research and development, and to cover the costs of administering the ETS, the revenues are paid directly to Member States and therefore can be diverted to other purposes. While the aviation directive strongly suggests that the revenue should be dedicated to addressing climate change nothing prevents a Member State from using the revenues to cover, for example, the costs of state pensions. Second, because the global aviation sector must acquire EUAs issued by Member States even for emissions that occur outside the EU, the ETS’s revenue generating provisions effectively forces the global aviation industry into the EU’s carbon market by attaching to economic activity occurring outside the territory of the EU. Whether this constitutes an extraterritorial tax is debatable. What is less debatable is that the Aviation Directive establishes an extraterritorial revenue generating mechanism that for the most part ignores issues of nationality and territoriality with respect to global aviation activity.

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191 Id.
193 Aviation Directive, supra note 2 at 6, ¶ 22. See also, infra note 217.
194 Cf., Minister Says Suspend EU ETS for Two Years, GLOBAL TRAVEL INDUSTRY NEWS (Mar. 21, 2012), available at http://www.eturbonews.com/28426/minister-says-suspend-eu-ets-two-years (noting that UK’s Air Passenger Duty (APD) started off as a "green tax" but is now a pure revenue-raising mechanism).
195 See, Meltzer, supra note 123.
2.5 Legal validity of the ETS – the ECJ’s Opinion

In addition to the diplomat row caused by the EU’s extension of the ETS to third country airlines, (e.g., threats to remove landing rights for European airlines, introduction of legislation prohibiting airlines from complying, formal objections), the aviation directive was almost immediately challenged in the courts. The Air Transport Association (ATA) of America along with a number of U.S. and Canadian airlines initiated suit in the High Court of England and Wales (Queens Bench) seeking a preliminary ruling on the validity of the UK’s regulations implementing the Aviation Directive. Because the case implicated the validity of EU legislation and was thus beyond the competence of a national court, the case was referred to the ECJ under Article 267 of the Treaty on the Functioning of the European Union (TFEU).

On December 21 2011, the ECJ issued it ruling rejecting the ATA’s challenge holding generally that neither customary international law nor existing treaties barred the EU from applying its directive to third country aircraft operators or outside of its territory. It is not necessary to conduct an extensive examination of the ECJ ruling with respect to the technical validity of the ETS. However, three particular issues are noteworthy: (1) the status of the EU as a supranational lawmaking entity with separate legal personality; (2) the conditions under which international law forms a benchmark against which EU law is measured; and (3) the ETS’s extraterritorial revenue generating mechanism.

196 See, e.g., James Fontanella-Khan, et al., "India Warns EU on Airline Carbon Tax," FINANCIAL TIMES 1, May 25, 2012 (noting that India has threatened to bar European airlines from its airspace should sanctions be imposed against its airlines for non-compliance).
198 See, e.g., Statement by the China Air Transport Association (CATA) on the EU ETS on 10 March 2011.
199 See generally, Air Transport Case, supra note 44.
200 Id., at ¶ 47.
201 Consolidated Version of the Treaty on the Functioning of the European Union, art. 267, Mar. 30, 2010, 2010 O.J. C 83/164 (national court may apply to the ECJ for preliminary ruling on the interpretation of the Treaties or the validity or interpretation of acts of the EU) [Hereinafter “TFEU”].
202 See Air Transport Case, supra note 44.
First, as an entity with legal personality, the EU is unique.\(^{203}\) One observer has noted:

The misunderstandings [of the power of the European Union] have multiple sources, not the least of which has been the failure of political scientists to reach an agreement on the character of the EU. It is more than a conventional international organization, but it is less than a state. Establishing its character has been made more difficult by the rearguard actions fought by European governments in the name of national sovereignty, which have combined with the pioneering nature of the EU experiment to produce a system of policy-making that is segmented, complex, often unpredictable and constantly changing. Unlike the founders of the United States or the French Fifth Republic, the founders of the European Union did not draw up a constitution to serve as a blueprint for a new system of government, but instead reached some general agreements about some policy goals, and have spent the last 50 years editing those agreements in order to redefine the nature of integration.\(^{204}\)

The status and authority of the EU as a regulator is a point of contention across the globe and within the EU itself. Unlike a federated union with a clear hierarchy of authority, the EU is something of a limited confederation in which its principal actors – the Member States – have ceded some authority to a supranational body but have not ceded their status as sovereign states. In reverse, the EU has assumed powers as a supranational governing institution that, in theory, sits separate and apart from its Member States – at once bound to and liberated from its creator.

As a supranational body with independent legal personality, the EU has declared that it is not bound by international agreements unless it has agreed to be so, unless it has assumed from the Member States authority over a particular matter, or unless another body has exclusive jurisdiction over a subject the EU would otherwise seek to regulate.\(^{205}\) As the ECJ pointed out with regards to the Chicago Convention, the EU is not a signatory to the Convention\(^{206}\) and the ICAO has not assumed exclusive authority over aviation.\(^{207}\) While all Member States are bound

\(^{203}\) See, Consolidated Version of the Treaty on European Union (TEU), art. 47, 2010 O.J. C83/41.
\(^{204}\) McCormick, \textit{supra} note 9 at 69.
\(^{205}\) Air Transport Case, \textit{supra} note 44 at ¶¶ 61-63.
\(^{206}\) \textit{Id.} at ¶ 60.
\(^{207}\) \textit{Id.} at ¶ 69
by the Chicago Convention, the EU itself is not.\textsuperscript{208} Consequently, the ECJ declared that the EU can neither be bound by the Convention nor can the Convention be relied upon to defeat an act of an EU institution.\textsuperscript{209} The ECJ’s opinion essentially recognizes the institution of the EU as possessing the qualities of a quasi-state for certain purposes, leading to the larger unresolved question of what now constitutes a “state” for purposes of international law.

Second, the ECJ has often acknowledged that EU institutions are bound by international law, including customary international law.\textsuperscript{210} However, being bound by international law and subjecting acts of EU institutions to scrutiny under international law are two different considerations. According to the ECJ, for an international agreement to limit EU authority two conditions beyond membership must be met: (1) the “nature and the broad logic of the agreement concerned must not preclude such a review of validity”;\textsuperscript{211} and (2) the agreement must be unconditional and sufficiently precise as to confer some right upon the individual.\textsuperscript{212} For example, in contrast to its conclusions relative to the applicability of Chicago Convention, the ECJ found with regard to the Kyoto Protocol that notwithstanding the EU’s membership: (1) it conferred no rights upon individuals;\textsuperscript{213} and (2) in any event, the was not sufficiently precise as to grant exclusive authority over aviation to another institution preempting EU authority.\textsuperscript{214} Stated differently, the Kyoto Protocol may have imposed binding obligations on EU institutions leading to the promulgation of binding regulations to effectuate its purposes, but it could not be read as conferring any individual standing to challenge regulations promulgated in pursuit

\begin{itemize}
  \item \textsuperscript{208} Id. at ¶ 72.
  \item \textsuperscript{209} Id. at ¶ 71.
  \item \textsuperscript{210} Id. at ¶ 49, 101.
  \item \textsuperscript{211} Id. at ¶ 53.
  \item \textsuperscript{212} Id. at ¶ 54.
  \item \textsuperscript{213} Id. at ¶ 77.
  \item \textsuperscript{214} Id.
\end{itemize}
thereof. Moreover, with regard to the Open Skies Agreement, the ECJ found that it could be read to confirm rights upon individuals was sufficiently precise, but nevertheless the ETS was completely compatible with the agreement. Consequently, according to ECJ none of the cited agreements could defeat the broad regulatory application of the Aviation Directive.

The ECJ also held that the same interpretative principles generally applied within the context of customary international law: (1) the principles are capable of calling into question the subject-matter competence of the EU; and (2) the act affects “rights which the individual derives from EU law or to create obligations under EU law in his regard.” Applying this analysis, The ECJ rejected challenges to the Aviation Directive under the customary international law principles of sovereignty of airspace, freedom of international airspace, and jurisdiction of aircraft in international airspace. The ECJ concluded that: (1) in as much as flights subject to the Aviation Directive performed some activities within an EU Member State they were subject to “the unlimited jurisdiction of the European Union”; (2) since the Aviation Directive was intended to provide a high level of environmental protection the EU may permit commercial activity within its territory “on condition that operators comply with criteria that have been established by the European Union and are designed to fulfill the environmental protection objective”; and (3) using events that take place outside EU airspace for purposes of applying the Aviation Directive does not impugn the sovereignty of non-EU states.

216 Air Transport Case, supra note 44 at ¶ 84.
217 Id.
218 Id. at ¶¶ 131-157.
219 Id. at ¶ 107
220 Id. at ¶¶ 124-130.
221 Id. at ¶ 125.
222 Id. at ¶ 128.
223 See generally, Id. at ¶ 125-130.
Finally, the ECJ rejected the claimants’ contention that the Aviation Directive amounted to an unlawful tax in violation of the Open Skies Agreement. In rejecting this attack, the ECJ distinguished the allowance system from a tax, duty, or fee on fuel concluding, in part, that “it is not intended to generate revenue for public authorities[.]” The ECJ concluded that the Aviation Directive does not breach Open Skies Agreement provisions that exempt fuel from taxes and other fees as it found no direct or inseparable link exists between the cost of the Aviation Directive and fuel used. This conclusion is somewhat suspect given that Member States are free to use revenue generated by the sale of EUAs for other purposes. The ECJ gave no recognition of the fact that the directive clearly states that income generated by the sale of EUAs were under the discretion and control of Member States. 

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224 Id. at ¶ 143. The ECJ also held that the Aviation Directive did constitute a tax because it was not a rate-based system but rather the costs of compliance depended as much on market conditions as upon action of state authorities. See, id. at ¶¶ 145-147.

225 Id. at ¶¶ 142, 143.


227 The issue of how ETS revenues generated by aircraft operations are to be used presents the EU with two rather thorny problems. First, as originally presented, the revenue generated by aircraft operations was to be used principally for climate change activity. See, Aviation Directive, supra note 2 ¶ 22 (revenues generated from auctioning allowances should be used to reduce GHG emissions, adapt to climate change, fund research and development, cover the cost of administration, fund contributions to the Global Energy Efficiency and Renewable Energy Fund, and undertake measures to avoid deforestation and facilitate adaptation in developing countries). If dedicated to these purposes, the revenues arguably would not amount to a general tax per se but rather a fee dedicated to a specific cause not unlike security fees imposed on air transport passengers. However, the lack of any authority within the EU to demand that Member States dedicate revenue to this purpose leaves states with discretion to use the funds as they see fit. See e.g., id. (“Decisions on national public expenditure are a matter for Member States, in line with the principle of subsidiarity.”) Arguably, this seriously jeopardizes the legitimacy of both the EU’s and the ECJ’s position with regards to whether the ETS is a tax under Open Skies. See e.g., Open Skies Agreement, supra note 215 at art. 1. Given the current fiscal crisis now gripping states such as Greece, Italy and Spain, policymakers will be hard pressed not to divert Aviation Directive revenues to general government purposes, e.g., funding schools, pensions, defense, healthcare. The current practice of Member States, except Germany, is to plough revenues raised from carbon permit auctions into general expenditures. This calls into question the entire integrity of the ETS as a climate change initiative, leading to the possible conclusion that the Aviation Directive is nothing more than a revenue generating exercise in practice if not in theory. Second, and possibly more divisive within the EU, is that Member States to whom a large number of airlines have been assigned will potentially reap windfall revenues over time that, as noted, could be applied to general government operations. States with smaller assignment will receive far less revenue for either climate change initiatives or general government operations.
What is perhaps most fascinating in the ECJ’s decision is: (1) the degree to which the ECJ sustained the EU’s climate change efforts by promoting the concept of “unlimited jurisdiction”; and (2) the degree to which the Court relied on EU treaties alone to justify extending the EU’s authority beyond its borders to encompass aviation activities occurring in third states. An aircraft operator is now subject to very specific EU jurisdiction, i.e., the Aviation Directive, no matter where on the planet it is headquartered so long as its aircraft arrive at or depart from an aerodrome in an EU Member State. The Aviation Directive does not simply require an aircraft operator in a third country to hold sufficient EUAs for a particular flight. It requires that operator to develop and maintain sophisticated emission calculation and reporting systems even if only a relatively small percentage of its flights are connected to Europe and even if only a small percentage of its emissions actually occur over EU airspace. Moreover, in its final discussion on the applicability of customary international law, the ECJ noted that, “EU policy on the environment seeks to ensure a high level of protection in accordance with art. 191(2) TFEU[.]”

The EU, therefore, claims broad authority to regulate transnational economic activity based not only on its international obligations (which cannot be challenged) but also on the transnational extension of aspirational guarantees contained in the TFEU. Stated different, because the TFEU seeks a high level of environmental protection within the EU, EU institutions by extension must have broad authority to regulate activity occurring outside the EU that jeopardize the guaranteed protection. This is not only an extraordinary example of the assertion of municipal jurisdiction beyond the physical boundaries of a state; it is an example of

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228 Id. at ¶ 128. It should be noted that in the French version of the decision the term “unlimited jurisdiction” is expressed as the “pleine juridiction”.
229 Id. at ¶ 128.
230 Id.
the capacity of influential states to use the notion of substantial connections to capture the virtual space between what is domestic and what is international for regulatory purposes.

III. The Aviation Directive as Indicator

3.1 An indicator?

This article began with the assertion that the Aviation Directive provides a platform upon which to see an emerging trend in international law: the use of municipal law to regulate global relationships and behaviors. Alone, the Aviation Directive does not represent a momentous shift in “international” lawmaker so much as it serves as an indicator of the how the most influential states can assert and protect their self-interests in a global arena. Other states have acted likewise to project their political values, economic interests, and legal norms unilaterally using municipal law.231 But the Aviation Directive is an important example of how states and institutions such as the EU use a combination of economic power, political power, and municipal lawmaking to protect their interests.232 As transnational problems explode and the world becomes more integrated in terms of economics, energy, culture,233 security, and the environment, the actions of one state can clearly have parochial and global consequences for

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231 See generally, supra note 10.
233 See, e.g., Brand of Dreams: America is wooing foreign tourists for the first time, ECONOMIST, June 30, 2012, at 30 (noting that one Brazilian’s explanation for not visiting the U.S. is “The United States did such a good job of turning Brazilians into Americans it’s not all that different.”)
others.\textsuperscript{234} The embedded liberalism pushed by Western states and so embraced by the world\textsuperscript{235} may in the end have encouraged so much integration, in both the economic and non-economic spheres, that distinctions between the limits of state legal authority and the limits of international legal authority blur incentivizing the greater extraterritorial application of municipal law as a tantalizing alternative to multilateralism. The importance of the Aviation Directive lies in what it says about changing attitudes concerning the nature of the “state” and the agility of the most influential states to alter global behavior through their municipal lawmaking and regulatory apparatuses.

3.2 Managing interstate relations

For some 300 years the theoretical legal management of the international relations system was premised on the notion of sovereign equality and non-interference in the affairs of other states. These were not merely geographically-based concepts. Rather, their importance rested in the assumed quality of the nation-state as an autonomous, self-regulating, and sovereign political constituent equal to all other like constituents. As the U.S. Supreme Court noted over 100 years ago, “Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”\textsuperscript{236} Sovereignty did not merely mean physical control of geographical territory; it meant the exclusive control of all of the means available to a state to

\textsuperscript{234} See, e.g., Steven Wheatley, \textit{A Democratic Rule of International Law}, 22(2) EUR. J. INT’L L. 525, 528, 529 (2011) ("The consequences of industrialization, globalization, and modernization have resulted in policy issues that states acting alone cannot regulate effectively (global warming, the international financial markets, and international terrorism, etc.), and states accept the need for highly focused cooperation and coordination efforts in the various sectors of global society (trade, environment, human rights, etc.).").

\textsuperscript{235} See JONATHAN GRAUBART, LEGALIZING TRANSNATIONAL ACTIVISM: THE STRUGGLE TO GAIN SOCIAL CHANGE FROM NAFTA’S CITIZEN PETITIONS 9 (2012).

\textsuperscript{236} Underhill v. Hernandez, 168 U.S. 250, 252 (1897).
regulate relationships and behavior within its territory. Whether this assumed quality of the nature of the state reflected the actual equality of the state are two separate considerations. While states may enjoy legal equality in theory under international law, it is self-evident that not all states enjoy equivalent influence and, therefore, are not created equal when measured on the broader plains of economic, political, legal and cultural power. The world of statehood is a place of evolving and relative parities, not static and absolute equalities. The globalization of economic activity and its attendant impacts on states means that developments in one part of the world can rapidly have dire consequences in another part of the world demanding domestic regulation of extraterritorial activities as a means of self-preservation. The relative parity of states is the very reason that some are far more capable of defining global rules and global behavior than are others.

The Aviation Directive demonstrates that globalization combined with the openness and plasticity of the international law system leaves ample space for the most influential states to influence (1) the internal legal regimes of other states, or (2) how individuals behave in other parts of the world. Global phenomena such as climate change, economic integration, resource management, and transnational security concerns now serve to entice states to act extraterritorially in an effort to favorably shape their global interdependencies, protect local

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markets, and address problems whose origins may rest elsewhere but nevertheless have a clear domestic impact. The world is not a collection of legally isolated states. It is a world of asymmetrical paradoxes marked by a greater need for multilateralism offset by tempting opportunities for state unilateralism.

The Aviation Directive evidences this paradox in three ways. First, at a policy level the Aviation Directive demonstrates that the most influential states retain significant influence over the international legal order even as their formal authority has been constrained by the diffusion of global political power. States such as the US, the EU and now China exercise this influence by combining their distinctive lawmaking capabilities with their economic strengths leveraging both to achieve particular objectives. As EU Climate Commissioner Hedegaard stated, “This is very much proof that we in the Commission do not think we should sit idly waiting for the big international agreement.” Moving forward in Europe means unilaterally globalizing Europe’s climate change framework using its considerable collective regulatory and economic power, an approach used by other the most influential states as well. The EU is clearly prepared to

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243 See e.g., Hedegaard supra at note 11.
244 Cf., Christopher L. Eisgruber, Birthright Citizenship and the Constitution, 72 N.Y.U. L. Rev. 54 (1997) (noting that U.S. law is applied transnationally creating entities able to operate across borders).
245 Cf., See Sungjoon Cho, A Bridge too far: The Fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution, 7 J. Int’l Econ. L. 219, 239 (2004) (“The inherent discriminatory nature of bilateralism/regionalism is often blended with an internal power disparity and ultimately begets unilateralism. Unilateralism, which is often clad with extraterritoriality, tends to eclipse international trade law, thereby placing the global trading system at the mercy of bare politics by a handful of influential states.”).
246 Hedegaard, supra note 11.
248 See e.g., supra note 10. Other supranational bodies are seeking to broaden their global influence as well. See Richard Frimpong Oppong, The African Union, the African Economic Community and Africa’s Regional Economic
play to its strengths and push its climate change agenda even in the absence of a multilateral consensus on the specific approaches to be used to address atmospheric carbon levels.\textsuperscript{249} The combination of power, impatience and transnational problems provide fertile ground for aggressive unilateralism on the part of some contrary to the so-called embedded liberal framework that was supposed to promote greater integration while containing national adventurism.\textsuperscript{250}

Second, in the absence of a binding multilateral framework, the implementation of the Aviation Directive indicates that the EU is positioning itself to create and regulate carbon markets by defining and setting the standards of equivalency.\textsuperscript{251} As noted earlier, while all states have an incentive to seek common policy on transnational issues, the state that leads the effort can often force other states to adapt to its standards. Within the context of the ETS and the Aviation Directive, the EU can achieve its objectives in three ways by: (1) tightly regulating its carbon market, which is the largest in the world;\textsuperscript{252} (2) defining what constitutes equivalency between its carbon markets and emerging third-country carbon reduction policies thereby driving


\textsuperscript{251} Similarly, the American Clean Energy and Security Act of 2009, § 401, H.R. 2454, 111\textsuperscript{th} Cong. (2008) sought to include imports in the U.S. cap-and-trade system starting from 2020 through “international reserve allowances” to offset lower energy and carbon costs of manufacturing covered goods. This would not have applied to countries with acceptable carbon reduction regimes in place.

the later to largely comport with the former; and (3) broadening the definition of what constitutes economic activity within the Common Market thus expanding its transnational regulatory reach into activities that occur in third states. The Aviation Directive, to the extent it is successfully implemented, drives a significant segment of a global industry into a regional carbon trading system and extends the EU’s regulatory powers into spaces previously assumed to be reserved to other states. The mere act of landing at or departing from an aerodrome in the EU effectively constitutes economic activity within the Common Market, notwithstanding the fact that a bulk of that economic activity may occur outside the EU.

Finally, as noted, under the Aviation Directive the EU retains authority to pass on the efficacy of aviation-based climate change policies initiated in third states. The Aviation Directive accomplishes this by: (1) empowering the Commission to grant waivers to third-country air carriers based upon the quality of a country’s aviation carbon reduction efforts; and

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253 Cf., Ikenberry, supra note 101. See also, Scott & Rajamani, supra note 7 at 483 (discussing that “equivalent” may have multiple meaning but that “third country measures are required to achieve an environmental effect at least equivalent to that of the directive” and that “the emphasis upon equivalence would seem to suggest that equal treatment, not differentiation, will be the guiding principle in this respect.”).


255 With odd sort of reasoning, Advocate General Kokott opined that the Aviation Directive did not pose a threat to the sovereignty of non-EU member states by regulating aviation emissions over their territories because it did not preclude third countries from bringing into effect or applying their own emissions trading schemes for aviation activities. See, Opinion of Advocate General, supra note 37 at ¶ 156.

256 Some might argue that the EU’s aviation direction is no different from other aviation regulatory schemes imposed by other states such as, for example, the U.S. requirement of 100% cargo screening for inbound flights regardless of origin. See, The Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat. 380 (U.S., Aug. 3, 2007). Does that requirement not constitute extraterritorial regulation of economic activity that occurs elsewhere? To some extent the answer is “yes”. However, the Aviation Directive is distinguishable in one important sense. The formula that was developed to calculate the amount of fees to be paid through the purchase of carbon credits clearly enables both generators and non-EU states to distinguish between locations of economic activity, e.g., in a non-EU state and over international airspace. Thus, unlike the 100% cargo screening requirement or many airport landing fees, the Aviation Directive imposes a financial charge on carbon generating economic activity attributable to a particular flight even when much of that economic activity occurs outside the EU. As discussed earlier, supra at p. 31, the reason for this approach was to: (1) mitigate a potential carbon leakage problem; and (2) protect EU-based airlines from economic distortions associated with compliance. This does not alter the fact, however, that a non-EU registered airline landing or departing from a Member State is subject to the regulator effects of the ETS and must pay a fee calculated by the length of flight (that is, total fuel consumed) to the assigned Member State for its total carbon generating economic activity regardless of where it occurs.
(2) deploying certain economic tools to support the waiver system, *e.g.*, granting or withdrawing landing rights. This waiver system is in effect an approval system; that is, the granting of a waiver is the equivalent of the EU placing its imprimatur on a third country’s aviation emission reduction efforts. Conversely, the Commission’s refusal to grant a waiver is a *de facto* judgment that a third country’s aviation carbon reduction efforts do not pass EU muster. Not only does the Aviation Directive project out a regulatory system, it pulls into the Brussels’ bureaucracy the assessment of third-country efforts in this area. Whether the Commission ultimately uses this power is an open question. The fact that the EU uses its own treaties and regulations to confer upon itself certain comprehensive powers,257 in this case effectively globalizing one aspect of its environmental regulatory authority, provides important insight into states’ response to the impact of transnational problems.

### 3.3 Managing state and global conduct by reshaping individual behavior

Traditionally the authority of a state to regulate the behaviors of persons (legal and natural) within its borders free from outside interference has been considered sacrosanct in international relations.258 Although the so-called “American Doctrine”259 has at times recognized extraterritorial application of municipal laws, most states have resisted its broad adoption in the absence of treaty or customary obligations.260 Even U.S. courts have been

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258 *But see,* Jaye Ellis, *Shades of Grey: Soft Law and the Validity of Public International Law,* 25 (2) LEIDEN J. INT’L L. 313, 324 n. 74 (2012) (“it once appeared self-evident that state sovereignty implied a right of the sovereign to define and pursue domestic policy goals without interference from other states. This interpretation of sovereignty remains highly persuasive and pervasive, but has lost its self-evidence.”).

259 Brownlie, *supra* note 46 at 309

260 P.M. Roth, *Reasonable Extraterritoriality: Correcting the “Balance of Interests”*, 41(2) INT’L COMP. L. Q. 245 (1992);
hesitant to grant wide transnational application to domestic laws and regulations. The extent to which one state may extend its domestic authority into the affairs of another state is, however, a question with liquid results. Ian Brownlie notes that, “The present position is probably this: a state has enforcement jurisdiction abroad only to the extent necessary to enforce its legislative jurisdiction” (emphasis added) based primarily on the principle of “substantial connection”.

Under assumed principles of public international law an extraterritorial act can only be legal if: (1) there is a substantial and bona fide connection between the regulated act, the subject matter, and the jurisdiction; (2) the principle of non-intervention is observed; and (3) accommodation, mutuality and proportionality are followed.

But this is only “probably” the law and as Halpin and Roeben note, globalization gives broad artistic legal license to states and lawmakers. Limitations on the extraterritorial extension of municipal law are fluid because international law is the creation of actors (state and now non-state) imbued with wide discretion juxtaposed by narrow accountability for their actual regulatory choices. By defining the notion of “substantial and bona fide connection” narrowly or broadly, the most influential states can restrict or expand the application of their municipal law to individuals and activities in other states. The expanding list of transnational problems in

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262 Brownlie, supra note 46 at 311.

263 Id. at 311, 312.

264 See, e.g., Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 12 (advisory opinion) [hereinafter cited as Genocide Advisory Opinion] (“It is well established that in its treaty relations a State cannot be bound with its consent, and that consequently no reservation can be effective against any State without its agreement thereto.”).

such areas as climate change, security, and finance actually serve to incentivize states to see substantial connections where none existed before or even undertake the unilateral enforcement of the “collective will”, whatever that may mean. In short, for regulatory purposes it is increasingly difficult to tease apart purely domestic behavior from the purely transnational behavior given their interconnectedness.

But the Aviation Directive illustrates more than the expanding notion of substantial connection between external behavior and domestic state interests. It also illustrates the emerging tendency of the most influential states to achieve certain policy objectives by circumventing frozen multilateral apparatuses and going directly after the extraterritorial conduct of individuals. Globalization has arguably created the “virtual citizen” living in multiple legal spheres and subject directly and indirectly to a virtual system of legal regimes, some of which operate completely beyond the borders of a particular state. Such regimes seek to alter global

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266 See Air Transport Case, supra note 44, ¶¶ 124-129 & 133-135.
268 In addition to issues concerning the environment and climate change, the 2008 financial crisis encouraged further extraterritorial regulation of the global financial industry given the transnational effects of that crisis. For example, the U.S. Commodities Futures Trading Commission (CTFC) has proposed that as part of its implementation of the Dodd-Frank Act’s swap rules the term “U.S. person” be interpreted by reference to the extent to which swap activities or transactions involving one or more such person has relevant effect on U.S. commerce. See, Press Release, CFTC Approves Proposed Interpretative Guidance on Cross-Border Application of the Swaps Provisions of the Dodd-Frank Act (June 29, 2012), http://www.cftc.gov/PressRoom/PressReleases/pr6293-12. This results from provisions within the Dodd-Frank Act that apply to activities that “have a direct and significant connection with activities in, or effect on, commerce of the United States[.]” Commodities Exchange Act, § 2(i), 7 U.S.C. § 2(i), as amended by Dodd-Frank Act, §722(d)(1)(1) (2010). Although the CTFC does not require foreign governments, central banks or international financial institutions to register, see, Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, 77 Fed. Reg. 30596, 30693, it is clear that Dodd-Frank and the CTFC’s interpretation of its powers are meant to cast a wider transnational net over certain financial transactions that have effects on the U.S. economy.
271 See e.g., Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Reducing the Climate Change Impact of Aviation, at 4, COM (2005) 459 final (Sept. 27, 2005) (stating that “international aviation should be included in any post-2012 climate change regime to give States stronger incentives to take action[].”
behavior by attaching directly to individual conduct regardless of where it occurs on the planet and with decreasing respect for the notion of total state sovereignty. The extraterritorial application of municipal law becomes a convenient and largely unchecked method for shaping global behaviors ranging everywhere from how tuna are caught on the high seas,\textsuperscript{272} to how the internet is used,\textsuperscript{273} to how the world reducing its carbon footprint,\textsuperscript{274} to overseeing corporate activity,\textsuperscript{275} to provincial concerns over national security.\textsuperscript{276} The Aviation Directive is not simply an attempt to highlight a growing global problem or regulate a specific market activity. It is rather an attempt at behavior modification par excellence;\textsuperscript{277} a behavior modification exercise in which the EU extends its municipal authority beyond the notion of the state to a virtual world of substantially connected behavior in an attempt to alter global conduct by individuals and companies.\textsuperscript{278} Transnational certification regimes serve a similar purpose.\textsuperscript{279} The Aviation Directive seeks to achieve the due goals of attacking climate change and protecting domestic economic interests by incentivizing alternative behavior making existing behavior more

\textsuperscript{272}See e.g., Marine Mammals Protection Act, \textit{supra} at note 10.
\textsuperscript{273}See \textit{e.g.}, \textit{Re the MARITIM Trade Mark} [2003] I.L. Pr. 17 (Germany, Hamburg Dist. Ct. 2003) (holding that under German law a tort occurs any place where the internet domain can be called up regardless of the physical location of the domain).
\textsuperscript{274}See \textit{e.g.}, \textit{Aviation Directive, \textit{supra} note 2}
\textsuperscript{275}See \textit{e.g.}, Anti-monopoly Law of the People’s Republic of China (promulgated by the Standing Committee of the 10th National People’s Cong., Aug 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT’L PEOPLE’S CONGRESS (declaring law shall apply extraterritorially based on effects); The Bribery Act 2010, 2010 c.23 (UK, Apr. 8, 2010) (extending UK bribery law to third counties).
\textsuperscript{277}According to the ICAO, “The airlines of . . . 191 Member States carried approximately 2.7 billion passengers in 2011, showing an increase of about 5.6 per cent over 2010. The number of departures on scheduled services reached 30.1 million globally in 2011 compared to 29 million in 2010.” \textit{INTERNATIONAL CIVIL AVIATION ORGANIZATION, ANNUAL REPORT OF THE COUNCIL, Doc. 9975 1,(2011), http://www.icao.int/publications/Documents/9975_en.pdf .}
\textsuperscript{278}See also, Aviation Directive, \textit{supra} note 2 \S 15 (“Aircraft operators have the most direct control over the type of aircraft in operation and the way in which they are flown[.]”).
\textsuperscript{279}Opinion of Advocate General, \textit{supra} note 36 at \S 147.
expensive to continue while capitalizing on the effort. If airlines must buy carbon credits and the cost of carbon increases, passengers are more likely to demand greater efficiency and innovation in the delivery of aviation services if for no other reason than to curtail expenses. And, if the EU is a head of the pack in altering its behavior and transforming its economy, better for its citizens and its future prospects.

The unilateral application of Aviation Directive, therefore, targets a broad swath of persons by penalizing existing behavior and incentivizing alternative behavior. By extending the ETS to global aviation the EU effectively seeks to: (1) drive-up the financial costs of current global carbon generating behavior (not by aircraft but by people); (2) encourage other state to take climate change more seriously; (3) establish its carbon trading market as a central tool in global emissions reduction efforts; (4) meet its international climate change obligations by globalizing those obligations; and (5) protect its own internal markets from the potentially distorting effects of its climate change policies while simultaneously encouraging innovation. Aircraft are not merely static objects of metal, plastic and rubber. They exist for a functional purpose and that is to transport people. The Aviation Directive’s individual behavior-focused approached to addressing global climate change, as distinguished from a formal state-to-state focused approach typically associated with multilateralism, has two advantages: (1) it bypasses external barriers such as the inconvenience of multilateral agreements or intransigence of other states; and (2) enables the EU to protect its own domestic policies and objectives. It also has the potential of sparking a significant trade war in response to a perception of EU overreach thus

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280 See, e.g., Air Transport Case, supra note 44 at ¶ 140 (“In particular, by allowing the allowances . . . to be sold, the scheme is intended to encourage every participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated to him[.]”).
281 Danielle Goodwin, Aviation, Climate Change and the European Union’s Emissions Trading Scheme, 6 J. PLANNING & ENVRT. L. 742 (2008); Mark Stallworthy, New Forms of Carbon Accounting: The Significance of a Climate Change Act for Economic Activity in the United Kingdom, 18(10) INT’L CO. & COMM. L. REV. 331 (2007). See also, Aviation Directive, supra note 2, at 5 ¶ 15 (noting air carriers “have the most direct control over the type of aircraft in operation and the way in which they are flown[.]”).
encouraging other states to take equally broad unilateral actions in other areas of transnational concern.

IV. Conclusion

Throughout history influential states have sought to shape global relations and global behavior beyond their immediate borders often through conquest and colonization. In more recent years, law has become an important tool in achieving political and economic objectives, and protecting domestic interests from global forces. The Aviation Directive evidences that while many global problems need multilateral solutions, those same problems can actually serve to incentivize states to act unilaterally by extending their municipal laws into the virtual spaces of transnational conduct created by globalization. Yet the EU’s unilateral effort at addressing climate change and other environment concerns does more than demonstrate developments and paradoxes within to the field of international law. It demonstrates three important points about the globe’s legal order. First, the extension of the ETS to global aviation demonstrates that notwithstanding efforts by Western states over the last 60 years to promote multilateralism as the favored tool for solving global problems, these same states can still be driven by domestic concerns to act unilaterally when it suits them. And given their vast array of political, economic and cultural power, they are quite capable of dominating the world’s legal landscape. And as non-economic matters such as climate change, national security, and transnational crime, to name a few, emerge on the same plain as economics they become powerful incentives for unilateralism and extraterritoriality. In short, when multilateralism fails the world’s most powerful states are not rendered powerless in shaping global behavior.

282 See e.g., Aviation Directive, supra note 2 at ¶ 16 (“In order to avoid distortions of competition and improve environmental effectiveness, emissions from all flights arriving at and departing from Community aerodromes should be included from 2012.”). See also, supra note 10.
Second, the Aviation Directive demonstrates that in a world defined by substantial connectedness, influential states now have the power to shape global behavior by regulating individual conduct regardless of where a person or entity may be physically located on the planet. As noted, the Aviation Directive is not simply about regulating commercial or economic activity; indeed the non-economic concerns it seeks to address are as important as the economic concerns. Thus, the Aviation Directive is fundamentally about reshaping global behavior by using municipal laws to incentivize certain behavior and discourage other behavior across the world. “Aircraft operators have the most direct control over the type of aircraft in operation and the way in which they are flown and should therefore be responsible for complying with the obligations imposed by this Directive, including the obligation to prepare a monitoring plan and to monitor and report emissions in accordance with that plan.”

Global interdependencies will demand greater multilateral cooperation and yet encourage states to use extraterritorial legal powers to regulate individual behavior elsewhere largely regardless of the limitations imposed by notion of the state thus calling into question the types of legal relationships individuals now have to states. The notion that an individual is tied to a time and place that defines the limit of state authority is being replaced by the virtual individual and the virtual regulatory power of states.

Finally, the Aviation Directive points to the fact that notwithstanding a desire to define the normative parameters of public international law – always a questionably successful enterprise – globalization is not only contributing to subject matter fragmentation but more importantly source fragmentation. What is to be made of the Aviation Directive, the Dodd-

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283 Aviation Directive, supra note 2 at ¶ 15.
284 But see, Wheatley, supra note 234.
Frank Act, or India’s Competition Law on the spectrum of law? Are they examples of purely municipal law? Are they examples of a new form of international law? Are they both? While these examples are arguably not “international law” in the strictest, most formal sense of that term, each is nevertheless designed to shape international behavior, to redefine the relationship of the individual to the state, and to project a municipal regulatory system across the globe.

Thus, in spite of efforts over the last 60 years to transform international law from a coordinating exercise into a cooperation exercise, it is still the product of a segmentary society. It is defined by the will of each segment to cooperate and capability of its more influential segments to “go it alone” when cooperation fails. To ignore this fact is to ignore one of the most important and understudied developments in international law: the power of some states to rebuff multilateralism when unilateralism provides a more effective and expedient solution. As transnational problems grow in terms of breadth, number and speed, the incentive for some states to shape global behavior and therefore international law through the unilateral use of municipal law will be an attractive alternative to multilateralism, claims to the contrary notwithstanding.

bank regulators and international bureaucrats in the Basel Accord as lacking accountability and legitimacy, but arguing that Basel II is subject to a subtle structure of international administrative law). See also, Meredith Crowley & Robert Howse, US-Stainless Steel (Mexico), 9(1) WORLD TRADE REV. 117 (2010); Dieter Kerwer, Rules that Many Use: Standards and Global Regulation, 18 GOVERNANCE 611 (2005); Andrea Hamann, Transnational Networks and Constitutionalism, 6(3/4) INT’L J. CONST. L. 481 (2008).