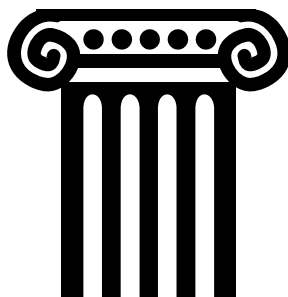


University of Minnesota Law School

Legal Studies Research Paper Series
Research Paper No. 11-34



Transnational, Unilateralism and International Law

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Transnationalism, Unilateralism and International Law

by Gregory Shaffer and Daniel Bodansky¹

We have long lived in an age of transnationalism but transnational processes have intensified with economic and cultural globalization following the fall of the Berlin Wall. Those processes often involve unilateral action and thus an uneasy relationship with international law.² This essay for the launching of the journal *Transnational Environmental Law* first sets forth a concept of transnational environmental law that encompasses but is broader than international environmental law. It then discusses the importance of assessing transnational environmental law in light of the constraints facing consent-based international environmental law, examines the tradeoffs between transnational and international environmental law from the perspective of legitimacy, and concludes by discussing the important but delicate relation of international law to transnational environmental law as both a check and a consolidator. International law should guard against the self-serving unilateral use of transnational environmental law, but it should do so in a way that preserves (and does not shut off) the dynamic, responsive character of the transnational environmental law process. Otherwise international law itself will be delegitimized.

When we speak of transnational law and legal process, we are concerned with the migration and impact of legal norms, rules and models across borders. Such migration can occur through the mediation of international law and institutions, or through the impact of unilateral legal developments in one jurisdiction that affect behavior in others. International environmental law, formally speaking, primarily involves treaties among states and secondarily customary international law and general principles of international law. Our concept of transnational environmental law thus subsumes international environmental law, since international environmental law necessarily involves the application of legal norms across national jurisdictions.

The concept of transnational environmental law, however, is much broader than that of international environmental law. Transnational environmental law encompasses all environmental law norms that apply to transboundary activities or that have effects in more than one jurisdiction. By legal norms, we refer broadly to those that lay out behavioral prescriptions issued by an authoritative source in a written form, whether or not mandatory or backed by a dispute settlement or other enforcement system.³ The concept of transnational environmental law

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² For a more general discussion of unilateralism in international environmental law, see D. Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?' (2000) 11 *European Journal of International Law*, pp. 339-48.

³ Cf. G. Shaffer, 'Transnational Legal Process and State Change, Law and Social Inquiry' (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612401 (from which this definition is taken); T. C. Halliday, 'Recursivity of Global Lawmaking: A Sociolegal Agenda' (2009) 5 *Annual Review of Law and Social Science* pp. 263-90 ('norms in this article refer to formalized codifications of behavioral prescriptions that are accepted by subjects as legitimate and authoritative'); D. Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2010), at ch. 5 (categorizing environmental norms in terms of five dimensions—purposiveness; consent; mandatory quality; precision; and implementation and compliance mechanism).

thus includes national environmental regulation that has horizontal effects across jurisdictions — for example, by providing regulatory models to other countries or by applying to or affecting the behavior of producers and consumers within them. It also includes the development of standards by private actors that have effects across borders, such as through product certification and labeling regimes. In practice, the transnational environmental law process sometimes includes international law as part of a single diachronic lawmaking process, but oftentimes does not.

Given the increasing importance of transnational environmental law, it is very timely to create a journal dedicated to assessing its operation from both a substantive and a procedural perspective. Substantively, transnational environmental law has major effects across borders. Procedurally, it often affects constituencies having little or no input in its formation, raising questions of its legitimacy.

Transnational environmental law is substantively needed, among other reasons, because the processes of international treaty negotiation and custom formation can be slow and ponderous. Even when concluded, they often result in weak standards, which commit states to do little if anything more than they intended to do anyway.⁴ The effectiveness of international environmental law, moreover, depends on implementation, which is far from guaranteed. Even when a treaty's provisions are formally enacted into national law, their effectiveness may remain in question since different actors hold sway at the stage of actual implementation — the law-in-action— than at the international negotiation and national enactment stages. For environmental advocates, the processes of international environmental law can thus be quite frustrating, especially in a world in which fisheries deplete, potable water diminishes, species vanish, the air fouls, the ozone layer thins, and the atmosphere warms. Transnational environmental law and legal processes become of interest because they require neither formal adoption of a treaty with meaningfully restrictive rules and broad adherence, nor formal recognition and enforcement by courts of customary international law.

Transnational environmental law can take many forms. Often, it involves cooperative action among states — for example, to mutually recognize each others' licenses and permits,⁵ or to develop jurisdictional rules allocating disputes to one state or another. The growing recognition in the 1970s of transboundary environmental effects led to attempts in both Europe and North America to remove barriers to the adjudication of transboundary environmental disputes in national courts, and to ensure that transboundary environmental effects were considered as part of a country's regulatory and administrative decision-making.⁶

Transnational environmental law can also be the product of mimicry. Other countries frequently model their laws on those in the U.S. or the E.U.⁷ They may do so to ensure access to U.S. and E.U. markets; but they also may do so simply because it is easier to adopt a rule already developed through relatively sophisticated technical administrative processes than to try to reinvent environmental regulation without the benefit of the expertise and experience present in the U.S. and Europe. In the 1970s, for example, many countries adopted environmental impact assessment requirements modeled on those in U.S. law.⁸ Some scholars argue that the growing convergence of environmental laws around the world resulting from common functional

⁴ G. Downs, D. M. Roche, & P. N. Barsboom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50 *International Organization*, pp. 379-406

⁵ P. H. Sand, 'Lessons Learned in Global Environmental Governance' (1991) 18 *Boston College Environmental Affairs Law Review*, pp. 213-77, at pp. 251-54.

⁶ *Legal Aspects of Transfrontier Pollution*, (Organisation for Economic Co-operation and Development, 1977).

⁷ J. Braithwaite & P. Drahos, *Global Business Regulation* (Cambridge University Press, 2000), at pp. 285-292.

⁸ Sand, 'Lessons Learned,' n. 5 above, at p. 256.

demands, expert networks and the spread of "world culture"⁹ is creating a "global environmental law"¹⁰ — another variety of transnational environmental law.

Although these types of transnational environmental law do not involve domination by one state of another, other types have a more unilateral character. In some cases, states have little choice but to adopt the environmental standards of dominant market actors such as the United States and the European Union. In other cases, powerful states apply their national environmental standards extraterritorially, effectively imposing their standards on others. In both types of cases, transnational legal processes are catalyzed by unilateral action.

Because of their economic weight, unilateral action by the E.U. and the U.S. often leads to the creation of transnational environmental law. Take, for example, the regulation of chemicals by the European Union. The E.U. passed a regulation in 2006 known as REACH, which created new and more stringent requirements for chemicals to be sold in the E.U. market — requirements that significantly exceed those in the United States and anywhere else in the world.¹¹ The result has been pressure to leverage up regulation and production practices for chemicals beyond the E.U., without any international agreement.¹² Similarly, countries and companies around the world have been pressed to tailor their approval and marketing of genetically modified grain varieties to E.U. approvals because of the importance of the European market in a world in which grains cannot be easily segregated.¹³

Powerful states can also exercise clout through unilateral environmental regulations that have extraterritorial implications. For example, the U.S. has unilaterally restricted, albeit indirectly, the use of purse seine nets in the Eastern Tropical Pacific tuna fishery, which inadvertently kill dolphins, and shrimp trawler nets that inadvertently drown endangered sea turtles.¹⁴ In each case, the United States barred the import into its market of tuna and shrimp unless the sea food in question was effectively caught using U.S.-prescribed methods. These restrictions continue to exert pressure on tuna-fishing and shrimp-catching processes abroad to make them more protective of marine mammal species. In each case, the U.S. unilateral action

⁹ D. J. Frank, A. Hironka & E. Schofer, 'The Nation-State and the Natural Environment over the Twentieth Century' (2000) 65 *American Sociological Review*, pp. 96-116, at pp. 101-5. See generally L. M. Friedman, 'Erewhon: The Coming Global Legal Order' (2001) 37 *Stanford Journal of International Law*, pp. 347-64, at pp. 348-9 (describing the effect of global culture on international business and human capital).

¹⁰ T. Yang & R. V. Percival, 'The Emergence of Global Environmental Law' (2009) 36 *Ecology Law Quarterly*, pp. 615-64, at p. 626. See also K. Holzinger, C. Knill & T. Sommerer, 'Environmental Policy Convergence: The Impact of International Harmonization, Transnational Communication and Regulatory Competition' (2008) 62 *International Organization*, pp. 553-87, at pp. 556-60.

¹¹ See J. Scott, 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction' (2009) 57 *American Journal of Comparative Law*, pp. 897-942, at pp. 898-9.

¹² Cf. V. Heyvaert, 'Globalizing Regulation: Reaching Beyond the Borders of Chemical Safety' (2009) 36 *Journal of Law and Society*, pp. 110-28, at p. 112 (noting EU promotion of the global adoption of REACH); and Y. Naiki, 'Assessing Policy Reach: Japan's Chemical Policy Reform in Response to the EU's REACH Regulation' (2010) 22 *Journal of Environmental Law*, pp. 171-95, at pp. 172-3.

¹³ M. Pollack & G. Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press 2009), at pp. 262-6, 296.

¹⁴ See J. H. Knox, 'The Judicial Resolution of Conflicts Between Trade and the Environment' (2005) 28 *Harvard Environmental Law Review*, pp. 1-78, at p. 33-4; R. W. Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict' (1999) 12 *Georgetown International Environmental Law Review*, pp. 1-122, at p. 6 (describing the United States' unilateral action to reduce dolphin mortality from tuna fishing); and G. Shaffer, 'Power, Governance and the WTO: A Comparative Institutional Approach', in M. Barnett & Bud Duvall (eds.) *Power in Global Governance* (Cambridge University Press 2004), pp. 130-60, at pp. 130, 152

spurred some international treaty negotiations. However, in the shrimp trawler case, the U.S. entered an Inter-American Convention for the Protection and Conservation of Sea Turtles, but not one for other countries affected by the U.S. regulatory restrictions, in particular Asian countries.¹⁵ In the case of the regulation of purse seine nets in the Eastern Tropical Pacific (ETP), the U.S. negotiated and signed a multilateral treaty, but has continued to disadvantage imports of tuna from the ETP, regardless of compliance with the agreement, by prohibiting the tuna from using the “dolphin safe” label.¹⁶

Private groups can effectively take advantage of the huge U.S. and E.U. markets to transnationally leverage up regulation, as David Vogel showed in his classic work, *Trading Up*.¹⁷ Vogel looked particularly at the regulation of food safety, chemical safety, waste disposal and automobile emissions. He demonstrated how more stringent regulation in a large market led large companies to adapt to that regulation, providing them with a competitive advantage and shaping their lobbying interests in other jurisdictions considering such regulatory changes. The result was to promote the dissemination of stricter environmental regulation across borders. He and others call this process “the California effect” in light of California’s frequently leading role as a regulatory vanguard within the United States. Transnational environmental law, he shows, is spurred by unilateral action within a regulatory jurisdiction exercising market power.

Environmental activists may similarly operate as transnational norm entrepreneurs,¹⁸ sometimes creating their own private regimes in the absence of relevant international or national law. Groups such as the World Wildlife Fund (WWF) have been central to the development of labeling, certification and monitoring regimes. For example, the WWF took the lead in developing forest stewardship principles, following the failure of states to reach an agreement at the Rio Conference “Earth Summit” in 1992 and the weak International Tropical Timber Agreement of 1994.¹⁹ These private initiatives sometimes compete with each other and can be bolstered by state action that references them, funds them or otherwise provides support.²⁰

¹⁵ An Indian Ocean - South-East Asian Marine Turtle Memorandum of Understanding was signed, but it has yet to lead to a treaty with legal commitments. See Shaffer, ‘Power, Governance and the WTO’, n. 14 above; and B. H. Oxman & L. de La Fayette, ‘United States-Import Prohibition of Certain Shrimp and Shrimp Products-Recourse to Article 21.5 of the DSU by Malaysia’ (2002) 96 *American Journal of International Law*, pp. 685-92, at p. 688 at n.25.

¹⁶ In 1998, the U.S. and a number of Latin American states adopted the Agreement on the International Dolphin Conservation Program (IDCP), which made binding the previously voluntary arrangements to limit dolphin mortality in the tuna purse seine fishery in the Eastern Tropical Pacific. The U.S., however, still applies a “dolphin safe” labeling regime that prohibits tuna fished with purse seine nets in the Eastern Tropic Pacific from being sold with the label “dolphin safe,” even if the tuna was caught in compliance with the IDCP Agreement, despite a U.S. undertaking to revise its labeling regulations. Mexico brought a claim against the United States before the WTO on account of the impact on Mexican-caught tuna, which it won at the panel stage. D. Pruzin, ‘WTO Panel Issues Final Ruling on U.S. Rules for Tuna Labeling’ (2011) 28 *International Trade Reporter*, p 1182.

¹⁷ D. Vogel, *Trading Up: Consumer and Environmental Regulation In a Global Economy* (Harvard University Press, 1995), at pp. 5-8.

¹⁸ See M. E. Keck & K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, (Cornell University Press 1998), at pp. 2-3.

¹⁹ B. Cashore, E. Egan, G. Auld, & D. Newsom, ‘Revising Theories of Nonstate Market-Driven (NMSD) Governance: Lessons from the Finnish Forest Certification Experience’ (2007) 7 *Global Environmental Politics*, pp. 1-44, at pp. 3-4; and, A. Long, ‘Global Climate Governance to Enhance Biodiversity and Well-Being: Integrating Non-State Networks and Public International Law in Tropical Forests’ (2011) 41 *Environmental Law*, pp. 95-164, at pp. 113-14.

²⁰ See e.g., E. Meidinger, ‘The Administrative Law of Global Private-Public Regulation: The Case of Forestry’ (2006) 17 *European Journal of International Law*, pp. 47-87, at pp. 59-60. See generally B. Cashore, F. Gale, E. Meidinger, & D. Newsom (eds.), *Confronting Sustainability: Forest Certification in Developing and Transitioning*

Examples of other transnational private environmental law regimes restricting industry operations include the Marine Stewardship Council's rules on sustainable fisheries, which Walmart has pledged to follow in its purchasing,²¹ and the World Commission on Dams, which has issued guidelines and recommendations for dam construction.²²

Non-governmental environmental advocacy groups can leverage the market power of consumers in large countries to pressure companies to accept these "voluntary" standard-setting regimes. In the tuna-dolphin case, the major U.S. brand companies for canned tuna initially adopted strict labeling requirements because of the threat of consumer boycotts organized by environmental groups, and these environmental groups then successfully pushed for new U.S. legislation (without the companies' opposition), which Congress passed under the Dolphin Protection Consumer Information Act of 1990.²³ Likewise, Home Depot agreed to buy wood that is certified as meeting the Forest Stewardship Council standards after it was threatened with a consumer boycott.²⁴ The various boycotts advocated by environmental groups against purchases of Icelandic fish products have had a different target – not the fishing industry itself, but rather the Icelandic government's whaling policy.²⁵

Often, transnational environmental action may depend on the interests of large industry in a powerful jurisdiction, a secret of transnational environmental law's success. The Montreal Protocol on the Ozone Layer is a prime example in international environmental law, where DuPont developed a comparative advantage in developing chemical alternatives to ozone-depleting chlorofluorocarbons, facilitating international legal action because of corporate support.²⁶ Similarly, to be effective, forest stewardship and mining principles must be supported by industry. These processes are not always fully transparent; northern-based NGOs may use the

Countries (Yale School of Forestry & Environmental Studies, 2006), at pp. 203, 235, 303, 363 (providing case studies of governmental adoption of private certification requirements in Latvia, Poland, Bolivia and Guatemala, respectively).

²¹ See M. P. Vandenbergh, 'The New Wal-Mart Effect: The Role of Private Contracting in Global Governance' (2007) 54 *UCLA Law Review*, pp. 913-70, at pp. 927-28 (describing Wal-Mart's pledge to source fish from MSC-certified suppliers).

²² K. Dingwerth, 'The Democratic Legitimacy of Public-Private Rule Making: What Can We Learn from the World Commission on Dams?' (2005) 11 *Global Governance*, pp. 65-83, at p. 66 (describing the formation of the World Commission on Dams as a case study "for learning about the legitimacy of global rule making").

²³ See K. L. Stewart, 'Dolphin-Safe Tuna: The Tide is Changing' (1998), 4 *Animal Law*, pp. 111-36, at pp. 117-8; and Parker, 'The Use and Abuse of Trade Leverage,' n. 14 above, at 32-33.

²⁴ T. Büthe and W. Mattli, *The New Global Rules: The Privatization of Regulation in the World Economy* (Princeton University Press, 2011), at p. 28.

²⁵ See, e.g., 'Protest over Iceland's Whaling Plans' (BBC News, 15 August 2003), available at <http://news.bbc.co.uk/2/hi/science/nature/3152489.stm>; Campaign Whale, 'Stop Iceland's Whale Killers' (last visited 25 August 2011), available at <http://www.campaign-whale.org/campaigns/stop-iceland-whale-killers>. Greenpeace also organized consumer boycotts against Norway. See G. McIvor, 'Boycott of Norwegian Fish Products Starts in Australia' (Agence France Presse, 16 August 1993); 'Economic Sanctions Needed to Halt Norwegian Whaling, Environmentalists Say' *International Environmental Reporter* (BNA 19 November 1992). For other examples of transnational product boycotts (or threatened ones) that spurred industry to tighten environmental self-regulation, see Keck, *Activists Beyond Border*, n. 18 above, at p. 133; H. M. Osofsky & J. K. Levin, 'The Scale of Networks?: Local Climate Change Coalitions' (2008) 8 *Chicago Journal of International Law*, pp. 409-36, at pp. 412-13; J. Mertus, 'From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Society' (1999) 14 *American University International Law Review*, pp. 1335-89, at pp. 1353-54; and G. Shaffer, 'The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters' (2001) 25 *Harvard Environmental Law Review*, pp. 1-93, at p. 57.

²⁶ C. R. Sunstein, 'Of Montreal and Kyoto: A Tale of Two Protocols' (2007) 31 *Harvard Environmental Law Review*, pp. 1-65, at pp. 14-15.

leverage of U.S. and E.U. market access to find allies in northern industry to advance transnational environmental aims without heeding the interests and priorities of developing country constituencies.²⁷

Because transnational environmental law often involves the imposition of rules by one actor on another — whether by the state itself or by industry or private NGOs leveraging a state's market power — it can raise questions of legitimacy. Both of us have written on this issue, whether in terms of the legitimacy of international environmental law-making,²⁸ or on the challenges confronting developing countries regarding the intersection of trade and environment issues.²⁹

All legitimacy problems are not created equal. The different variants of transnational environmental law raise different levels of concerns. Transnational environmental law based on mimesis is relatively unproblematic. Diffusion of E.U. or U.S. environmental standards due to their market dominance raises greater concerns, even though liberalism has traditionally been more troubled by the imposition of political than economic power. Projection by a state of its norms to production activities outside its borders raises still greater legitimacy concerns, since in such cases a state is purporting to govern actors that do not have a voice in its political processes — although, even here, these concerns may be mitigated, at least partially, to the extent that a state is acting to promote community rather than national interests.

At first glance, traditional consent-based international environmental law may appear superior, from a legitimacy standpoint, to transnational environmental law processes that are not grounded in consent. However, all environmental governance tools with transnational implications are highly imperfect. They thus must be compared in terms of their tradeoffs, substantively and procedurally. When comparing transnational environmental law (often stemming from unilateral action) with international environmental law (based on state consent), one is not comparing a defective process against an ideal, but rather two imperfect institutional alternatives.

Action over climate change — arguably the most significant environmental issue facing the world today — provides a useful example. International environmental law — from the Kyoto Protocol to the Copenhagen Accord — has largely failed to spur transnational action based on agreed norms to mitigate climate change. Transnational environmental law based on unilateral E.U. or U.S. action is thus an important option. The alternative of relying on formal treaty negotiations may be too little too late to prevent dangerous climate change, and thus may be illegitimate in terms of outcomes, whether for current or future generations.

Multilateral and unilateral institutional alternatives also involve legitimacy tradeoffs from a procedural perspective. Choices over voting rules raise legitimacy issues since they can give too much (or too little) power to veto players. On the one hand, there is a powerful argument that multilateral decision-making not based on consensus would be illegitimate as it would impose obligations and restrictions on states without their consent, violating the *grundnorm* of sovereignty, and the collective right of decision-making of a people (or demos).³⁰ Issues over

²⁷ See e.g., Vogel, *Trading Up*, n. 17 above, at p. 112; Shaffer, 'The World Trade Organization Under Challenge,' n. 25 above, at pp. 83-4.

²⁸ D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 *American Journal of International Law*, pp. 596-624, at p. 605.

²⁹ See G. Shaffer, 'The World Trade Organization Under Challenge,' n. 25 above, at p. 24; and Shaffer, 'Power, Governance and the WTO', n. 14 above.

³⁰ Cf. J. E. Alvarez, 'Contemporary International Law: An "Empire of Law" or the "Law of Empire"?' (2009) 24 *American University International Law Review*, pp. 811-824, at pp. 825-26 (UN Security Council as 'legislating

climate change policy involve major distributive implications for states and for constituencies within them, raising procedural legitimacy concerns if obligations can be imposed on states through a multilateral process without their consent. On the other hand, global public goods (such as stabilizing the earth's climate) may demand procedural innovations so that a minority cannot procedurally block effective action. Filibuster rules in the U.S. Senate provide an example of the legitimacy issues raised by procedure, since they grant a minority of Senators from less populated U.S. states the ability to block action favored by majorities.³¹ Similarly, multilateral procedural rules requiring agreement by consensus permit a single state or sub-set of states to impinge on the ability of others to take action, especially in light of collective action and free rider concerns. If a veto not only had the effect of blocking multilateral action but also meant that states may not take non-discriminatory unilateral action, the states that wish to act are not only adversely affected substantively; they effectively lose their ability to develop policies to protect their environmental interests.³² In these circumstances, permitting some forms of unilateral action, subject to principled substantive and procedural constraints (such as non-discrimination and due process) may be superior (even if highly imperfect) from a comparative institutional perspective.³³

Given the U.S. rejection of the multilateral Kyoto Protocol and the E.U.'s key role in advancing it, the E.U. arguably has a legitimate case for taking unilateral initiatives on the climate change issue at this time. The E.U. began to take unilateral action on airline emissions, a major contributor to climate change, when it adopted a Directive to include emissions from international flights in the E.U. Emissions Trading System, effective on January 1, 2012.³⁴ Under the legislation, the E.U. will give airlines a limited number of tradable allowances for their flights into and out of the European Union. If an airline's emissions are lower than its allowances, it can sell or bank its surplus allowances; if its emissions are anticipated to be higher than its allowances, then it must either reduce its emissions or buy additional allowances through the European emissions trading system. A consortium of U.S. airlines has sued to enjoin E.U. action before an English administrative court, which referred the legal questions to the Court of Justice of the European Union. The consortium claims that the E.U. proposal (1) violates customary international law by regulating carbon dioxide emissions outside E.U. airspace; (2)

hegemony'); L. R. Helfer, 'Nonconsensual International Lawmaking' (2008) 2008 *University of Illinois Law Review*, pp. 71-125, at p. 115; J. H. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 *American Journal of International Law*, pp. 782-802, at pp. 795-96; and J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal*, pp. 2403-83, at pp. 2472-74 (on legitimacy issues in decision-making in the E.U.).

³¹ See, e.g., G. N. Magliocca, 'Reforming the Filibuster' (2011) 105 *Northwestern University Law Review*, pp. 303-28, at p. 304 ('The most troubling counter-majoritarian difficulty in modern constitutional law is Rule XXII of the United States Senate. Forty-one senators, who could represent less than forty-one percent of the population due to the malapportionment of the Senate, can veto most legislation and presidential nominations by refusing to invoke cloture. A vote against cloture by that Senate minority sustains debate indefinitely as a filibuster.').

³² Cf. Sunstein, 'Of Montreal and Kyoto,' n. 26 above, at pp. 5-9 (contending that unilateral action was in the U.S. interest in terms of ozone protection but not in terms of climate change policy); and J. Freeman & A. Guzman, 'Climate Change and U.S. Interests' (2009) 109 *Columbia Law Review*, pp. 1531-1601, at p. 1542 (contending that unilateral action by the U.S. is likely in the U.S. interest despite the multilateral stalemate).

³³ See generally N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, 1997); and G. Shaffer and J. Trachtman, 'Interpretation and Institutional Choice at the WTO' (forthcoming, 2011) 52 *Virginia Journal of International Law*, p.1-50.

³⁴ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.

violates the Kyoto Protocol, which directed that emissions from international aviation be addressed by the International Civil Aviation Organization rather than through unilateral action; and (3) violates the 1944 Convention on International Civil Aviation and the E.U.-U.S. Open Skies Agreement, which limit the charges that states can impose on flights.³⁵ If international law, however, impedes the E.U. from taking non-discriminatory steps to reduce emissions, then from the perspective of climate change mitigation, it is international law that could be viewed as the problem. The E.U.'s action may well be an important, albeit small, step in achieving the necessary level of emissions reductions to stabilize the earth's climate.

International law has a critical but delicate role to play, as part of the transnational environmental law process, in disciplining unilateral action. Unilateral action can often be tailored to benefit national economic interests over foreign ones, bestowing a competitive advantage on particular states and their constituencies, especially powerful ones. International law can press a state to justify its actions and reevaluate them in light of their impacts on others. It can induce a state to clarify and explain its environmental goals, address whether there are regulatory alternatives sufficient to meet those goals that are more amenable to third party concerns, and, if so, to modify its initiatives. The World Trade Organization (WTO), through the WTO Appellate Body's interpretation of WTO legal provisions, plays a key role in this regard.³⁶ The WTO does not forbid unilateral environmental regulatory action but it does press countries to justify their actions substantively and procedurally or face potential trade sanctions. For example, WTO rules likely permit unilateral regulation of greenhouse gas emissions (especially when a country has engaged in multilateral processes in good faith and these processes have stalemated), but such regulation must be applied in a non-discriminatory manner and meet procedural safeguards of transparency and due process.³⁷

Unilateral action is not a one-step dance. It is better viewed as part of a dynamic process of action and reaction, reassessment and response, in which international law plays an uneasy role as both a check and a potential consolidator. International law needs to discipline (or better stated, provide guidelines for) unilateral action, as part of this dynamic process. But as with all matters, the trick is to get the balance right: there should be neither too little constraint, which would permit discriminatory and opportunistic policies, nor too much constraint, which would impede needed action.

Unilateral action's impact ultimately depends on whether it is persuasive in shaping norms of behavior. Perceptions of legitimacy will often determine its effectiveness. Where a rule or norm advanced unilaterally is deemed illegitimate, it will spur greater resistance, including challenges under WTO and other international law, undermining its effectiveness. That resistance can spur re-articulations of legal norms and rules as part of a recursive process.³⁸ In

³⁵ E. Rosenthal, 'U.S. and Europe Battle over Carbon Fees for Airlines,' (New York Times, 27 July 2011), available at <http://www.nytimes.com/2011/07/28/business/energy-environment/us-air-carriers-brace-for-emissions-fees-in-europe.html?pagewanted=all>; and M. Bisset & G. Crowhurst, 'Is the EU's Application of its Emissions Trading Scheme to Aviation Illegal?' (2011) 23 *Air and Space Law*, pp. 1-18, at p. 3. In addition, legislation was introduced in the U.S. House of Representatives that would prohibit U.S. airlines from participating in the E.U. emissions trading scheme. 'European Union Emissions Trading Scheme Prohibition Act of 2011,' H.R. 2594, 112th Congress (2011).

³⁶ See Shaffer & Trachtman, 'Interpretation and Institutional Choice,' n. 33 above.

³⁷ *Trade and Climate Change*, (World Trade Organization, 2009), at pp. 109-10; J. Pauwelyn, 'U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law' (working paper, 2007) *Nicholash Institute for Environmental Policy Solutions, Duke University*, pp. 1-44, at p. 34; G. C. Hufbauer, S. Charnovitz & J. Kim, *Global Warming and the World Trading System* (Peterson Institute, 2009).

³⁸ Halliday, 'Recursivity of Global Lawmaking,' n. 3 above.

contrast, where unilateral action contributes to the forging of a new consensus that results in the adoption and application of common environmental law norms, it can create a transnational legal order, either in the form of international environmental law or more informal institutional settlement.³⁹ Unilateral action creates risks. But where there are risks, there are also opportunities.

³⁹ Shaffer, 'Transnational Legal Process,' n. 3 above ('Where the transnational legal norms are relatively clear, coherent and accepted, the transnational legal order can be viewed in systematic terms. Where they are less so, the transnational legal order is more contingent and fragile.').