Unilateral extraterritorial action or 'minilateralism' within territorial jurisdiction? The EU Emissions Trading Scheme for aviation emissions and international law

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1. *Introduction*

For the battle against dangerous anthropogenic climate change, the rapid growth of global aviation emissions is a considerable challenge. While the share of aviation emissions of global total emission is modest, the growth projections for greenhouse gas emissions in this sector are remarkable. These scenarios are at odds with the recent report by the Intergovernmental Panel on Climate Change (IPCC) showing that global greenhouse gas emissions should be reduced to close to zero by the end of this century to avoid dangerous climate change. [1]

The question of where and how to regulate global aviation emissions has been a difficult one internationally. Over the past two decades, the issue has been subject to slow-moving negotiations in two distinct multilateral fora, under the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol, and at the International Civil Aviation Organization (ICAO). To date, neither of the two bodies has been able to agree on meaningful and effective measures to control greenhouse gas emissions from international aviation.

Frustrated by the lack of multilateral progress to address an urgent global problem, the European Union (EU) took a decision in 2008 to include emissions from all flights departing from, or landing to EU air-

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[1] Intergovernmental Panel on Climate Change, 'Summary for Policymakers,' in O Edenhofer et al (eds), *Climate Change 2014: Mitigation of Climate Change - Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2014)12.

ports into its Emissions Trading Scheme (ETS). This initiative generated considerable international controversy and has surfaced questions concerning the compatibility with international law of unilateral action to address global environmental problems through extraterritorial measures. One of the key questions to which this piece has been asked to answer is the following: '*When and how can a State (or regional organization) legitimately take unilateral measures to protect the environment?*'

2. *Unilateralism, 'minilateralism' and multilateralism in global climate policy*

The first issue that arises from the question above concerns the definition of 'unilateralism.' I have argued elsewhere that the EU measure could also be classified as 'minilateralism."[2] The notion of minilateralism has been used, for example, in the context of regional or otherwise selective economic cooperation between countries, of which the EU is the most important example.[3] In his famous article, Naím argued that minilateralism essentially means getting together the 'smallest possible number of countries needed to have the largest possible impact on solving a particular problem."[4] According to him, 'agreements reached by the small number of countries whose actions are needed to generate real solutions can provide the foundation on which more-inclusive deals can be subsequently built."[5] A similar vision can be detected underlying the EU aviation scheme. Directive 2008/101/EC indicates that the 'scheme may serve as a model for the use of emissions trading worldwide' while stressing that the EU and its Member States 'should continue to seek an agreement on global measures to reduce greenhouse gas emissions from

[2] K Kulovesi, 'Addressing Sectoral Emissions outside the United Nations Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism?' (2012) Rev Eur Comparative Intl Environmental L 193.

[3] ibid. See also C Brummer, *Minilateralism: How Trade Alliances, Soft Law and Financial Engineering Are Redefining Economic Statecraft* (CUP 2014).

[4] M Naím, 'Minilateralism: The Magic Number to Get Real' *Foreign Policy* (22 June 2009) <http://foreignpolicy.com/2009/06/21/minilateralism/>.

[5] ibid.

aviation.'[6] Against this background, it is clear that the EU approach to international aviation emissions corresponds with at least some definitions of minilateralism. To my mind, it is also relevant here that the aviation scheme is implemented in more than 30 countries, some of which are not members of the EU.[7] These countries do not hold uniform views on climate policy, environmental protection or EU external relations. The EU climate policy is therefore based on compromises within a relatively divergent group of countries. Against this background, in my view, the EU action on aviation emissions could well also be characterized as minilateralism.

At the same time, the EU is a *sui generis* international actor and its Member States are legally required to speak with one voice on environmental policy internationally.[8] Hence, in the lively international debate on the EU regulation of aviation emissions, the scheme has often been characterized as 'unilateralism.' Scott and Rajamani have argued that the unilateralism in which the EU is engaging here is 'of a peculiar and interesting kind.'[9] They have characterized it as 'contingent unilateralism' in the sense that 'the global extension of EU climate change law depends upon there being no adequate international agreement or third country climate action in place.'[10] According to them, 'the EU should be viewed as a reluctant unilateralist and as deploying contingent unilateralism as a means of incentivizing urgently needed climate action elsewhere.'[11] The reference to 'reluctant unilateralism' reflects the fact that in international legal discourse, unilateralism tends to have a negative connotation: 'to characterize an action unilateral is to condemn it.'[12]

[6] Directive 2008/101/EC, Preamble, para 17.

[7] The three non-EU countries in which the aviation scheme is implemented are Norway, Liechtenstein and Iceland. These countries are members of the European Economic Area.

[8] K Kulovesi, M Cremona, 'The Evolution of EU Competences in the Field of External Relations and Its Impact on Environmental Governance Policies' in C Bakker, F Francioni (eds), *The EU, the US and Global Climate Governance* (Ashgate 2014) 81 at 86-87.

[9] J Scott, L Rajamani, 'Contingent Unilateralism: International Aviation in the European Emissions Trading Scheme'<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446425>.

[10] ibid.

[11] ibid.

[12] D Bodansky, 'What's so Bad about Unilateral Action to Protect the Environment,' (2000) Eur J Intl L 339.

Bodansky has rightly stressed, however, that a unilateral act is not the same as an act violating international law, but 'in most instances States are entitled to act unilaterally. That is the essence of sovereignty.'[13] He further indicates that 'the issue to define is when a State's right to act as sovereign – that is, to act unilaterally – is appropriate and when it should yield to an international decision-making process.'[14]

This brings me to my second point concerning unilateralism: it is important to note that the international legal criticism against the EU aviation scheme arose not only from its allegedly unilateral nature but also from *the territorial scope* of the measure. To stress the point, it is well established under international law that the EU and its Member States are free to address global environmental problems unilaterally within their territorial jurisdiction. Thus, since 2005, the EU has subjected its energy-intensive economic sectors to a carbon price under the EU ETS with no international objections. In contrast, the key source of criticism against the EU aviation scheme has been the fact that in its original form, Directive 2008/101/EC applied to greenhouse gas emissions from all flights landing in or taking off from EU airports (with certain limited exceptions). The obligation to surrender emission allowances to the EU authorities applied to greenhouse gas emissions calculated from the duration of *the entire flight*, including segments taking place outside European airspace. This also applied to emissions by *non-European airlines* operating flights within or to the EU.

In response to international developments, the EU modified the territorial scope of the aviation scheme.[15] Accordingly, during the period from 2013 to 2016 the scheme applies only to flights within the 30 countries participating in the scheme. Exemptions were also introduced for flight operators with low emissions. The official reason for this modification relates to negotiations launched under the ICAO to develop by 2016 a global market-based mechanism addressing international aviation emissions, which should be operational by 2020. In practice, political pressure from various powerful countries opposing the scheme is

[13] ibid 340.
[14] ibid.
[15] Decision no 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ L 113, 25.4.2013, 1-14.

likely to have played a role as well.[16] The current modification is temporary and further measures will be considered in light of international developments. Thus, the Commission must report in 2017 to the European Parliament and Council on the outcome of the next ICAO Assembly in 2016 and propose appropriate measures regarding the EU aviation scheme.

3. *International law and extraterritorial measures to protect the environment*

In light of the above discussion, one of the key questions arising from the EU aviation scheme concerns the compatibility with international law of measures taken by States to protect the environment outside their territory. Territorial jurisdiction is the classical starting point under public international law.[17] Accordingly, States exercise sovereignty and supreme authority over activities and actors within their territorial boundaries. One of the leading textbooks of public international law emphasizes 'the presumption that jurisdiction (in all its forms) is territorial, and may not be exercised extra-territorially without some specific basis in international law.'[18] The book notes, however, that 'what amounts to extraterritorial jurisdiction is to some extent a matter of appreciation.'[19] Principles of extraterritorial jurisdiction were originally developed in the field of criminal law.[20] In accordance with the nationality principle, States often exercise jurisdiction over their own nationals with respect to serious crimes they may have committed in foreign countries. Less accepted jurisdictional principles include the protective principle[21] and passive personality principle[22] A considerable

[16] A Vihma, H Van Asselt, 'The Conflict over Aviation Emissions. A Case of Retreating EU Leadership?' (2014) <www.fiia.fi/en/publication/404/the_conflict_over_aviation_emissions/>.

[17] J Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 456.

[18] ibid.

[19] ibid 457.

[20] E Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law and Legal Theory* (OUP 2009), 99-100.

[21] Jurisdiction over alien over acts done abroad which affect the internal or external security or other key interests of the state. See Crawford (n 17) 461.

number of States also claim universal jurisdiction in the interest of public policy concerning certain serious crimes regardless of where they were committed and nationalities of the people involved.[23]

State sovereignty, along with the principle of non-intervention enshrined in the Charter of the United Nations, has been used as the basis for drawing limits to the exercise of extraterritorial jurisdiction.[24] It has been argued that 'a State has a right to extraterritorial jurisdiction where its legitimate interests are concerned, but the right may be abused and it is abused when it becomes essentially an interference with the exercise of local jurisdiction.'[25] However, as Vranes has pointed out, the principles of State sovereignty and non-intervention are ultimately incapable of answering whether extraterritorial regulation is compatible with international law.[26] This is because 'by exercising extraterritorial jurisdiction, the regulating State risks interfering with the sovereignty (or right to self-determination) of another State and thereby with its territorial competence; yet, the regulating State, as well, *prima facie* makes use of its right to self-determination.'[27] Vranes therefore proceeds to explore the usefulness of proportionality and other means of balancing situations where the sovereign interests of two States are juxtaposed.[28] As discussed in Sections 3 and 4 below, also other, perhaps more nuanced, tests can be drawn from both case law and literature for distinguishing between territorial and extraterritorial jurisdiction.

3.1. *Extraterritorial environmental measures under international trade law*

In recent years, questions concerning the exercise of extraterritorial jurisdiction to protect the environment and shared natural resources have been particularly hotly debated in context of international trade

[22] This means punishing aliens for acts abroad harmful to national of the forum. See Vranes (n 20).
[23] ibid 467.
[24] See ibid for detailed discussion111 ff.
[25] RY Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Law' (1957) BYIL 146 at 153. The quote is from Vranes (n 20) 127.
[26] ibid 129.
[27] ibid.
[28] ibid.

law. In the famous *Tuna-Dolphin* dispute of 1991, the US prohibited the imports of tuna caught by certain fishing methods with the objective of protecting dolphins and Mexico challenged this under the General Agreement on Tariffs and Trade (GATT). Mexico argued that 'permitting one contracting party to impose trade restrictions to conserve the resources of others would introduce the concept of extraterritoriality into the GATT.' [29] This, then, 'would threaten all contracting parties, especially when restrictions were established unilaterally and arbitrarily.'[30] The US responded by claiming that there was nothing in its measure that was extraterritorial; it 'simply specified the products that could be marketed in the territory of the United States.'[31] The US also stressed that the measures were aimed at protecting a shared natural resources:

> 'Without conservation measures, dolphins, a common natural resource, would be exhausted. Without these measures on imports, the restrictions on domestic production would be ineffective at conserving dolphins. Dolphins were highly migratory species that roamed the high seas. The interpretation urged by Mexico would mean that a country must allow access to its market to serve as an incentive to deplete the populations of species that are vital components of the ecosystem.'[32]

Thus, both Mexico and the US implicitly invoked sovereignty as a justification for their argument. According to Mexico, the US initiative to restrict fishing methods used by Mexican fisherman to catch tuna destined for export to the US was illegal extraterritoriality and interfered with Mexican sovereignty. The US, in turn, emphasized its sovereign rights to determine what products could access its market and close its borders to products that are environmentally harmful. In this case, balancing between the two conflicting claims of sovereignty took place within the legal framework provided by the General Agreement on Tariffs and Trade (GATT). One of its key provisions was Article XX(g), containing a general exception to countries' international trade obligations to protect exhaustible natural resources. In interpreting this provision, the *Tuna-Dolphin* panel sided with Mexico:

[29] GATT Panel Report, *Tuna-Dolphin* (September 1991) para 3.48.
[30] ibid.
[31] ibid para 3.49.
[32] ibid.

> 'The Panel considered that if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which the other party could not deviate without jeopardizing their rights under the General Agreement."[33]

Many drew from this ruling the conclusion that extraterritorial trade measures to protect the environment are prohibited under international law. This conception has taken a surprisingly strong hold even if this *Tuna-Dolphin* panel report was never formally adopted and subsequent case law points towards a different direction.[34] In the words of Pauwelyn, some of the legal findings by the *Tuna-Dolphin* panel gave rise to what he has characterized as environmental 'myths' that years later kept 'haunting' the World Trade Organization (WTO).[35]

Indeed, an environmental trade measure of a very similar design has subsequently been found to be compatible with WTO law in the *Shrimp-Turtle* case. This dispute also arose under the GATT when the US restricted imports of shrimp caught by fishing methods harmful to sea turtles. One of the key differences between the *Shrimp-Turtle* and *Tuna-Dolphin* cases is that sea turtles are recognized as endangered under international environmental law, while dolphins are not.[36] Also relevant for the outcome was probably the fact that the *Shrimp-Turtle* case was decided by the WTO Appellate Body, credited for recognizing that WTO law does not exist 'in clinical isolation' of other rules of international law.[37] Thus, in the *Shrimp-Turtle* case, the Appellate Body emphasized the reference to sustainable development in the preamble of the WTO Agreement and cited various instruments of international environmental law to support its interpretation of GATT Article XX.[38]

The Appellate Body did not take a direct stance on the question of

[33] ibid para 5.32.

[34] J Pauwelyn, 'Recent Books on Trade and Environment: *GATT* Phantoms Still Haunt the WTO' (2004) Eur J Intl L 575 at 585.

[35] ibid.

[36] K Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Kluwer Law International 2011).

[37] WTO, *The United States: Standards for Reformulated and Conventional Gasoline–Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R 17.

[38] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products–Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R para 133.

extraterritorial measures in the *Shrimp-Turtle* dispute, it simply identified 'a sufficient nexus' between the US and migratory species of sea turtles. It ruled that:

> 'We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).'[39]

Two possible interpretations of the Appellate Body's ruling are that the 'sufficient nexus' brought the endangered species of sea turtles under US territorial jurisdiction, or that it justified the exercise of extraterritorial jurisdiction.[40] In any case, from the Appellate Body two *Shrimp-Turtle* decisions it is possible to identify certain factors that were relevant for the finding that the unilateral trade measure designed to protect migratory species of sea turtles outside US territorial waters was compatible with WTO law. In other words:

– sea turtles are recognized as endangered under international environmental law;

– the US modified its measure so that its application was not a mere rigid extension of the US territorial jurisdiction to third countries through the requirement of uniform measures to protect sea turtles.[41] Instead, the modified US measure left room for countries to design such sea turtle protection policies that are suitable to their national circumstances, an approach that is more appropriate for the conservation of global environmental resources;[42] and

– the US engaged in good faith efforts to negotiate an agreement with all

[39] ibid.

[40] Vranes (n 20) 161. I have discussed these questions also in K Kulovesi, 'Make Your Own Special Song Even If Nobody Else Sings Along: International Aviation Emissions and the EU Emissions Trading Scheme' (2012) Climate Law 535 at 545 ff.

[41] R Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) Colombia J Intl Environmental L 489 at 510.

[42] ibid.

countries affected by its trade measure on the conservation of sea turtles.[43]

In the continuing lively scholarly discussion on environmental trade measures, some scholars have argued that trade measures restricting, for instance, imports based on the way a product has been produced abroad are territorial rather than extraterritorial measures since they are applied within or at the border.[44] Another line of argument on extraterritorial measures emphasizes the 'coercive' effect of trade measures. In other words, the relevant tests for the legality of extraterritorial measures include whether the regulation commands or compels results beyond national borders, or merely induces or influences results.[45] Both views are reflected in the debate about the EU ETS for aviation emissions.

3.2. *The EU aviation scheme and the question concerning its extraterritorial nature*

The compatibility of the EU ETS for aviation emissions with international law has been explored in depth in the *ATA Case* before the Court of Justice of the EU (CJEU) in Luxembourg. In 2009, American Airlines, Continental Airlines, United Airlines, and the Airport Transport Association of America (ATA) launched a legal challenge against the UK Minister of Energy and Climate Change concerning the EU's trading scheme for aviation emissions. They argued that the EU aviation scheme violated, *inter alia*, the following principles of customary international law:

(a) The principle of customary international law that each State has complete and exclusive sovereignty over its air space;

(b) The principle of customary international law that no State may validly purport to subject any part of the high seas to its sovereignty;

(c) The principle of customary international law of freedom to fly over the high seas; and

(d) The principle of customary international law (the existence of which was not accepted by the EU) that aircraft overflying the high seas

[43] I have discussed the *Shrimp-Turtle* case in detail in Kulovesi, *The WTO Dispute Settlement System* (n 36).

[44] Vranes (n 20).

[45] ibid.

are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty.

In its decision in December 2011, the CJEU affirmed the validity of Directive 2008/101/EC. Concerning the scheme's compatibility with international law the Court ruled:

> 'The fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of being relied upon in the main proceedings, the full applicability of European Union law in that territory.'[46]

The Court also ruled that:

> '… as European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU, the European Union legislature *may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union* and are designed to fulfill the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol.'[47]

The Advocate General's opinion preceding the decision by the CJEU also included some interesting perspectives on questions concerning extraterritoriality and exercise of EU jurisdiction. The opinion highlighted that Directive 2008/101/EC is concerned solely with arrivals at, and departures from, EU airports, and any exercise of sovereignty occurs only with respect to such flights.[48] It also emphasized that activities of airlines within the airspace of third countries 'are not made

[46] Case C-366/10, *Air Transport of America & Others v Secretary of State for Energy and Climate Change* [2011] ERC-I-13755.
[47] ibid (emphasis added).
[48] ibid Opinion of AG Kokott (6 October 2011).

subject to any mandatory provisions of EU law.'[49] The Advocate General argued that:

> 'The fact that the calculation of emission allowances to be surrendered is based on the whole flight in each case does not bestow upon Directive 2008/101 any extraterritorial effect. 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 [in] the territory of third countries, in particular to consume as little fuel as possible and expel as few greenhouse gases as possible. However, there is no concrete *rule* regarding their conduct within the airspace outside the European Union.'[50]

The Advocate General's latter argument reflects the scholarly view discussed above that places the emphasis on the 'coercive effect' of the trade measure. In other words, she argues that since the EU ETS for aviation emissions merely influences or induces results outside the EU without compelling them, it is seen as compatible with international law. Otherwise, the CJEU and the Advocate General's Opinion reflect the view that the exercise of EU jurisdiction in regulating aviation emissions is based on *territorial connection between* the aircrafts being regulated and the EU; only aircraft that enter the EU territory and markets are included in the ETS for aviation emissions. Thus, the 'trigger' for the EU to exercise its jurisdiction is the fact that an aircraft lands at, or takes off from an EU airport. [51] Following such a logic, the measure can be seen as respecting territorial jurisdiction as an established principle of international law.

According to Scott, what the EU does with, *inter alia*, its aviation scheme is 'pushing at the boundaries of territorial jurisdiction.'[52] Introducing a new concept of 'territorial extension,' Scott argues that, the EU 'uses the existence of a territorial connection with the EU (notably but not only market access) to shape conduct that takes place outside

[49] ibid.
[50] ibid.
[51] J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276433>.
[52] ibid 123.

the EU."[53] She also indicates that the EU 'only very rarely enacts extra-territorial legislation"[54] but regards 'territorial extension' as consistent with customary international law and the territoriality principle.[55] Scott also emphasizes that the EU's reliance on 'territorial extension' of its law entails an international orientation[56] and an obligation for the EU regulator to take into account conduct or circumstances abroad.[57] This is significant 'because it reflects a commitment on the part of the EU to respect the limits on prescriptive jurisdiction laid down by public international law."[58] Indeed, the sensitivity to international developments with respect to the EU ETS for aviation emissions is reflected in provisions of Directive 2008/101/EC concerning, for example, the possibility to exclude from the scheme aircrafts originating from countries implementing equivalent measures to cut greenhouse gas emissions from international aviation. It is also evident from the way in which the EU aviation scheme has been modified in response to recent international developments, including giving time for the ICAO to negotiate a global market-based mechanism for international aviation emissions.

4. *Conclusions*

The discussion above shows that while many countries have criticized the EU aviation scheme, it is possible to defend the scheme's compatibility with international law. Looking at the EU ETS for aviation emissions from a broader perspective, it surfaces some interesting regulatory challenges that are increasingly reflected in scholarly discussion on topics, such as global environmental law and legal pluralism. In the era of globalization, it seems that the traditional interpretation of the international legal principle of territorial jurisdiction does not capture the full range of ways in which States exercise jurisdiction in practice. The question of jurisdictional boundaries obviously remains im-

[53] J Scott, 'The New EU "Extraterritoriality"' (2014) 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2464240>.
[54] Scott, 'Extraterritoriality and Territorial Extension in EU Law' (n 51) 89.
[55] ibid 115.
[56] ibid 115.
[57] ibid 13.
[58] ibid 14.

portant, while accusations of the exercise of illegal extraterritorial jurisdiction are sometimes too hastily made.

I have argued elsewhere that 'the global legal landscape is no longer characterized by clear-cut distinctions between the 'international' and 'national' legal orders, or 'multilateral' and 'unilateral' actions."[59] Against this background, the EU scheme for aviation emissions reflects a complex trend whereby environmental law is becoming globalised and legal systems interact, complement each other and sometimes also seek to influence each other.[60] I have thus argued that it would be useful for the debate to move to the next level, turning away from the traditional focus on the permissibility of extraterritoriality and unilateralism towards international rules, principles and procedures that curtail EU-type 'minilateral' action that seeks to advance multilateral objectives in the absence of a global agreement.[61] With Morgera, we have subsequently explored the way in which the EU has sought to contribute to the development of international standards in the field of climate change, also assessing the legitimacy of such efforts.[62] Morgera has also developed a 'good faith test to assess the legitimacy of ongoing and future EU initiatives aimed at contributing to the development and implementation of international environmental law.'[63]

Thus, to come back to the questions that this piece was asked to answer, I have argued that unilateralism as such does not violate international law, but the problems normally arise if measures decided unilaterally interfere with established jurisdictional principles under international law, especially the territoriality principle. Thus, in the EU avia-

[59] K Kulovesi, 'Addressing Sectoral Emissions outside the United Nations Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism?' (2012) *Rev Eur Comparative Intl Environmental L* 193 at 201.

[60] ibid 202.

[61] ibid.

[62] E Morgera, K Kulovesi, 'The Role of the EU in Promoting International Standards in the Area of Climate Change' (2013) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2267419>.

[63] E Morgera, 'The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test' (2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2517366&download=yes>. The four-pronged test includes the following elements: Respect for the objective of multilateral environmental agreements; responsiveness to intervening multilateral developments; dialogue; and mutual supportiveness.

tion case, I would rather characterize the measure as 'minilateral' and see the key legal challenge as deriving from the way in which the territorial boundaries of the scheme were originally drawn. However, as seen above, the CJEU emphasized the territorial connection between the EU and the aircraft being regulated and accepted that the scheme did not constitute an illegal extraterritorial measure. As also seen above, the WTO Appellate Body found a 'sufficient nexus' between the US and its measure to protect endangered species of sea turtles outside its territory. It therefore seems that States can implement environmental protection measures with implications outside their territory if there is a sufficient territorial link and if international collaborative endeavours are being respected.