



## California's Cap-and-Trade Agreement with Quebec: Surviving Constitutional Scrutiny

by Sharmila L. Murthy, Associate Professor, Suffolk University Law School

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The Trump Administration has sued California over a key aspect of its climate change agenda: its Cap-and-Trade Agreement with Quebec.<sup>1</sup> California and Quebec each have independent laws that place a "cap" on the amount of greenhouse gases that regulated entities can emit; through a linked cross-border market, regulated actors in the two jurisdictions are able to "trade" their allocated emission allowances. At first glance, the complaint seems to make a valid point: how can California engage in this international emissions trading program given that President Trump has rejected the Paris Agreement on climate change and that the Supreme Court has often said that the nation should speak with "one voice" on foreign affairs?<sup>2</sup>

The short answer is that because the Constitution does not expressly prohibit states from engaging in activities that could impact foreign affairs,<sup>3</sup> states like California have long engaged in cross-border activity. Over the last half-century, states and cities have concluded hundreds to the thousands of agreements with foreign national and subnational governments on a wide range of topics, including trade, tourism, transportation, family issues, sister-sister relations, security, traffic regulation, the environment, and agriculture.<sup>4</sup> The Constitution assigns the national government exclusive power over certain aspects of foreign affairs<sup>5</sup> and theoretically empowers it with plenary power in this area.<sup>6</sup> However, neither Congress nor the President have exercised their authority to the fullest potential.<sup>7</sup> This has created the "grey zone" of foreign affairs federalism into which states like California have stepped.

So now that President Trump has sought to assert his constitutional authority over cross-border climate change agreements, can he strike down California's Cap-and-Trade Agreement with Quebec? Probably not. Three factors make it likely that California's cap-and-trade program will survive constitutional scrutiny:

(1) The California-Quebec Cap-and-Trade Agreement is largely consistent with prior acts of Congress. As a result, President Trump must primarily rely on his own independent constitutional powers, which do not plausibly include emissions trading. To overcome this problem, the complaint engages in a sleight of hand. It re-casts the Cap-and-Trade Agreement as a national security issue because, in that context, the Supreme Court tends to be more deferential to broad assertions of executive power over foreign affairs.<sup>8</sup>

(2) If the Supreme Court strikes down the California-Quebec Cap-and-Trade Agreement as an unconstitutional treaty or compact, a domino effect could occur: hundreds of existing cross-border agreements between U.S. states and cities and foreign governments could become constitutionally suspect. Most experts believe that the functional test developed for interstate compacts applies to



cross-border agreements. If the Supreme Court adopts this approach, then it will likely uphold the California emissions program with Quebec because the cross-border agreement does not have the “classic indicia”<sup>9</sup> of an unconstitutional compact.

(3) The emissions trading program does not present a risk of multiple taxation, nor is it inconsistent with existing treaty obligations of the United States. These key factors distinguish the California-Quebec Cap-and-Trade Agreement from situations where the Supreme Court has struck down state laws for discriminating against foreign commerce.<sup>10</sup>

Each of these arguments is briefly discussed below.

### **Foreign Affairs Doctrine Argument Relies on Sleight of Hand and Overlooks Precedent**

The Trump administration argues that the California-Quebec Cap-and-Trade Agreement is preempted because it “interfere[s] with the United States’ foreign policy on greenhouse gas regulation, including but not limited to the United States’ announcement of its intention to withdraw” from the Paris Agreement on climate change.<sup>11</sup>

As an initial matter, President Trump’s professed reasons for withdrawing from the Paris Agreement do not make sense in light of the agreement’s “bottom-up” structure, where parties submit their own voluntary targets (i.e. Nationally Determined Contributions). When the Trump administration complained that the Paris Agreement “undermined the nation’s economic competitiveness and would cost jobs,” and “set unrealistic targets for reducing GHG emissions while allowing China to increase such emissions until 2030,”<sup>12</sup> it was contesting the voluntary targets set by the Obama administration. The Trump administration could in fact remain a party to the Paris Agreement but submit a weaker target that is more in line with China’s goals.<sup>13</sup>

Even though President Trump has indicated that he seeks to re-negotiate the terms of the treaty, the bargaining chip theory—a key rationale of foreign affairs preemption cases<sup>14</sup>—does not make sense in light of the Paris Agreement’s “bottom-up” structure for pledges. Moreover, one of the reasons that the Environmental Protection Agency under the administration of the second President Bush gave for not regulating greenhouse gases from motor vehicles was that “unilateral EPA regulation of motor-vehicle greenhouse gas emissions might also hamper the President’s ability to persuade key developing countries to reduce greenhouse gas emissions.”<sup>15</sup> The Supreme Court rejected this argument.<sup>16</sup>

President Trump’s preemption argument is weak because he is not acting “pursuant to an express or implied authorization of Congress.”<sup>17</sup> Congress has not passed legislation preempting cross-border emissions trading programs. In addition, California’s cap-and-trade program is arguably consistent with the Clean Air Act, which covers the regulation of greenhouse gases<sup>18</sup> and which expressly preserves the authority of states to implement stricter air pollution standards, with certain exceptions.<sup>19</sup> The U.S. Senate also provided the necessary consent for the United States to ratify the United Nations Framework Convention on Climate Change (UNFCCC).<sup>20</sup> In fact, in rejecting a foreign affairs challenge to state-based regulation of greenhouse gases from motor vehicles, a U.S. District Court held that “state and local efforts in concert with federal programs contribute to the UNFCCC’s ultimate objective.”<sup>21</sup>

The real problem President Trump faces in making his preemption argument is that he must rely primarily on his independent powers—but environmental matters do not traditionally fall within the powers of the executive branch.<sup>22</sup> As a result, the complaint engages in a sleight of hand by re-



casting emission trading as an issue “interwoven” with economic growth and national security matters.<sup>23</sup> This is a clever strategic move because the Supreme Court is more deferential to executive assertions of power over national security.<sup>24</sup> Climate change does present national security threats; for example, increased droughts and floods contribute to civil instability in regions of the world where the U.S. has strategic interests. However, exactly what aspects of California’s market-based approach to greenhouse gas reductions make it a national security matter?

President Trump’s argument about national security suffers from a slippery slope problem. If the President is correct that his power over the California-Quebec Cap-and-Trade Agreement stems from his authority to “reconcil[e] protection of the environment, promotion of economic growth, and maintenance of national security,”<sup>25</sup> then even a state-based emissions trading program would seem to be national security matter.<sup>26</sup>

In fact, if a Cap-and-Trade Agreement falls within the executive’s national security powers, then, by extension, so would every single state or local action to address climate change, from zoning decisions to investments in public transportation to changes in building codes. Surely, our system of government, which is grounded in federalism and separation of powers, could not countenance such a broad assertion of executive power in the name of national security.

The California-Quebec Cap-and-Trade Agreement is also clearly distinguishable on several grounds from the key case upon which the Trump administration relies, *American Ins. Ass’n v. Garamendi*.<sup>27</sup> In that case, the Supreme Court struck down a California law designed to help Holocaust victims recover from insurance companies because the state law threatened the national government’s efforts to resolve such claims. Unlike *Garamendi*, where the Court determined the real purpose of the law was the vindication of Holocaust survivor claims, the real goal of the California-Quebec Cap-and-Trade Agreement is to address climate change through a market-based solution. Also, the California emissions trading regime does not present a situation where an executive agreement expressly preempts state claims, or derives support from implicit congressional authorization or from history and practice.<sup>28</sup> In addition, *Garamendi*’s expansive interpretation of executive power and its highly criticized resurrection of the dormant foreign affairs power has arguably been cabined by more recent case law.<sup>29</sup>

In short, unless Congress takes affirmative steps to preempt California’s Cap-and-Trade Agreement with Quebec, it is hard to see how President Trump has the inherent dormant foreign affairs power to preempt the cross-border emissions trading program. To overcome this hurdle, the Trump administration’s complaint engages in a game of smoke and mirrors and tries to shoehorn the Cap-and-Trade Agreement into the category of national security.

### **Labeling California-Quebec Agreement a Treaty Could Have Far-Reaching Effects, and the Agreement Does Not Have “Classic Indicia” of a Compact**

The Trump administration further alleges that the Cap-and-Trade Agreement violates the Treaty Clause’s prohibition against states entering into a “Treaty” or “Alliance,”<sup>30</sup> and the Compact Clause’s requirement of Congressional consent for “any Agreement or Compact” that a state enters into “with a foreign power.”<sup>31</sup> In deciding these issues, the Supreme Court would have to be mindful of the enormous potential ripple effect of its holding, which could apply to the hundreds or thousands of cross-border agreements that states and cities have entered into on a range of topics. Because Congress has not even created a reporting mechanism for keeping track of subnational cross-border agreements, the exact scope of this impact is unknown.



An admittedly open question is how the Court would handle claims about agreements with a sub-national foreign government. The Supreme Court has not assessed the validity of an agreement between a U.S. state and a foreign country since 1840.<sup>32</sup> In *Holmes v. Jennison*, the Court struck down an informal extradition arrangement between Vermont's governor and the British colony of "Lower Canada," which is present-day Quebec.<sup>33</sup> Yet, the Court as a whole did not agree whether the arrangement at issue even triggered clause 1 (the Treaty Clause) or clause 3 (the Compact Clause) of Article 1, §10.<sup>34</sup> The Supreme Court has since held that the distinctions between the terms "treaty," "agreement" and "compact" have been lost to history.<sup>35</sup> Given the scant jurisprudence on the topic, the Court may be inclined to follow precedent and skirt the issue of what exactly is the difference between these terms.

In simply asserting the California-Quebec Agreement is a treaty or a compact requiring congressional consent, the Trump administration ignores the functional test that the Court has created in the interstate context, which most experts believe applies to cross-border agreements.<sup>36</sup> The Court's test focuses on whether the compact or agreement tends to "increase of political power" of states in a manner that "may encroach upon or interfere with the just supremacy of the United States."<sup>37</sup> In applying this functional test, the Court has focused on factors, such as whether "each State retains complete freedom to adopt or reject the rules and regulations" and that each state is "free to withdraw at any time" from the agreement.<sup>38</sup> The Court has never invalidated an interstate compact<sup>39</sup> and it has been willing to find implied congressional consent.<sup>40</sup>

The California-Quebec Cap-and-Trade Agreement does not have the "classic indicia" <sup>41</sup> of an unconstitutional compact under the Court's test.<sup>42</sup> Both parties have the right to withdraw after "endeavour[ing] to give 12 months notice."<sup>43</sup> Although the Agreement contains a number of "shall" clauses that facilitate cooperation, California retains the "sovereign right and authority" to adopt, change or repeal any of its regulations or enabling legislation.<sup>44</sup> The kind of reciprocal legislation that exists between California and Quebec does not seem so dissimilar from other interstate agreements that have been upheld by the Supreme Court.<sup>45</sup>

The Cap-and-Trade Agreement also shares similarities with other cross-border agreements, such as one the Great Lakes. In 2005, eight U.S. states and two Canadian provinces entered into the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement. This cross-border agreement does not have the consent of Congress; rather, Congress only formally approved a related compact that the eight U.S. states entered into on the same day. Like the Cap-and-Trade Agreement, the Great Lakes Agreement is designed to harmonize regulatory systems across an international border, provides the ability to reject the rules, and requires require twelve months' notice to withdraw. <sup>46</sup>

The existence of the Great Lakes Agreement underscores a larger point. If the Supreme Court departs from existing jurisprudence and strikes down the California-Quebec Cap-and-Trade Agreement as an unconstitutional treaty or compact, it will call into question a whole host of other cross-border agreements on a range of topics, including trade, tourism, investment, agriculture, family support, transboundary pollution and traffic regulation.<sup>47</sup>

### **The Agreement Does Not Involve Taxation so the Foreign Commerce Clause Does Not Apply**

The Supreme Court has only considered the dormant Foreign Commerce Clause in cases involving taxation. The Court inquires whether there is an "enhanced risk of multiple taxation,"<sup>48</sup> and whether the tax prevents the Federal Government from "speak[ing] with one voice when regulating



commercial relations with foreign governments.”<sup>49</sup> As the Court has noted, “a state tax at variance with federal policy will violate the ‘one voice’ standard if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive.”<sup>50</sup>

Unlike a tax, California’s Cap-and-Trade Agreement links two independent market-based programs for regulating greenhouse gases. Given this, it is perhaps no surprise that the Trump administration’s complaint does not address the two-pronged test of the dormant Foreign Commerce Clause. Instead, the complaint merely alleges, without any support, that the Cap-and-Trade Agreement and related laws “discriminate among categories of foreign commerce on their face or as applied.”<sup>51</sup>

Even if the Cap-and-Trade Agreement could be conceived of as a tax, it is difficult to understand how it could create the kind of “enhanced risk of multiple taxation”<sup>52</sup> that was experienced by the cargo ships in the seminal case, *Japan Line v. County of Los Angeles*.<sup>53</sup> Moreover, in *Japan Line*, the Supreme Court’s finding that the United States must speak with one voice was influenced by U.S. participation in a treaty whose terms conflicted with the state law at issue. In contrast, the Paris Agreement supports the use emissions trading.<sup>54</sup> In turn, the Paris Agreement is consistent with the United Nations Framework Convention on Climate Change and the U.S. Senate’s Byrd-Hagel Resolution<sup>55</sup>—a fact that even Senator Chuck Hagel has acknowledged.<sup>56</sup>

## Conclusion

The lawsuit challenging California’s Cap-and-Trade Agreement with Quebec is just the latest chapter in a long line of actions that the Trump administration has taken to weaken our environmental protections. In the name of national security, President Trump engages in a power grab. However, unless the President is able to convince Congress to pass a law preempting California’s cross-border emissions trading program, he does not have the constitutional authority to end the Cap-and-Trade Agreement with Quebec. Moreover, the Supreme Court would have to depart from existing jurisprudence in order to strike down the emissions trading program as unconstitutional. If it did, the Court would potentially open the floodgates to litigation over the hundreds to thousands of cross-border agreements that states and cities have entered into on a myriad of issues.

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<sup>1</sup> United States of America v. State of California et al., Case 2:19-cv-02142-WBS-EFB (E.D. CA. 10/23/2019). California and Quebec originally entered into the Cap-and-Trade Agreement in 2013. In 2017, Ontario briefly joined emissions trading program and the terms were re-negotiated. Due to a change in provincial leadership, Ontario subsequently withdrew, but the 2017 Agreement still governs the relationship between Quebec and California. *See* Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Quebec and Ontario (2017); Agreement Between the California Air Resources Board and the Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and- Trade Programs for Reducing Greenhouse Gas Emissions (2013).

<sup>2</sup> *See, e.g.*, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000).

<sup>3</sup> For example, Congress has the power to declare war, art. I, §8, but states are not completely prohibited from engaging in war. Rather, the Constitution states that “[n]o state shall, without the Consent of Congress, . . . engage in war, unless actually invaded, or in such imminent Danger as will not admit of delay.” U.S. CONST. art I, §10. *See also* MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* 87 (2016).

<sup>4</sup> *Compare* EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* 5 (1998) (stating that “state and local governments have entered into thousands of accords, compacts, and agreements” in the past quarter of a century) *and* Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. LAW REV. 741, 744,



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754 (2010) (determining from an empirical analysis of public records between 1955 to 2008 that forty-one U.S. states concluded over 340 agreements with foreign powers).

<sup>5</sup> See, e.g., U.S. CONST. art II, §2 (stating that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States. . . .”).

<sup>6</sup> Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA REV 1617, 1619 (1997).

<sup>7</sup> GLENNON AND SLOANE, *supra* note 3 at 89, n.10.

<sup>8</sup> See, e.g., *Trump v. Hawaii*, 138 S.Ct. 2392 (2018) (upholding the President’s broad authority to restrict entry into the U.S. by foreign nationals on national security grounds).

<sup>9</sup> *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve*, 472 U.S. 159, 175 (1985).

<sup>10</sup> See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

<sup>11</sup> Complaint, para. 103.

<sup>12</sup> Complaint, para 42.

<sup>13</sup> Sharmila L. Murthy, *States and Cities as Norm Sustainers: A Role for Subnational Actors in the Paris Agreement on Climate Change*, VA. ENVIRON. LAW J. 1, 15 (2019).

<sup>14</sup> See, e.g., *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 377, 381 (2000).

<sup>15</sup> *Massachusetts v. EPA*, 549 U.S. 497, 513–514 (2007).

<sup>16</sup> *Id.* at 523–524.

<sup>17</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J. concurring).

<sup>18</sup> *Massachusetts v. EPA*, 549 U.S. at 528–529.

<sup>19</sup> *Id.* §116, 42 U.S.C §7416. Even the preemption of certain state regulation, however, has exceptions. For example, Section 209 of the Clean Air Act, 42 U.S.C. §7543, specifically allows California to be granted a waiver by the EPA to set its own standards for the control of emissions from new motor vehicles provided that certain requirements are met. *Id.* at §7543(b). Although the Trump administration has sought to revoke California’s existing waiver, this effort has been challenged in court.

<sup>20</sup> UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, (1992),

[http://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf). Article 4(2) requires that parties “adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.” *Id.*

<sup>21</sup> *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295, 394–395 (D. Vt. 2007).

<sup>22</sup> Congress has the authority to enact environmental laws, and most environmental statutes are premised on a model of “cooperative federalism,” which preserves a role for states. In addition, many features of climate policy, such as zoning, land use, and public transportation decisions, fall within the ambit of traditional state and local authority.

<sup>23</sup> Complaint, paras. 32 and 72.

<sup>24</sup> See, e.g., *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).

<sup>25</sup> *Id.*

<sup>26</sup> Such an argument would also seem to cast doubt on the Regional Greenhouse Gas Initiative.

<sup>27</sup> 539 U.S. 396, 418-20 (2003).

<sup>28</sup> Cf. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (upholding an executive agreement made after the Iran hostage crisis, which had the effect of extinguishing claims pending in state and federal courts on the basis of longstanding custom and congressional acquiescence).

<sup>29</sup> See, e.g., *Medellin v. Texas*, 552 U.S. 491 (2008) (holding in part that the President did not have the power to issue a directive overturning a state court decision denying a habeas corpus petition). See also Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case against the State Department*, VA. J. INT. LAW 915, 929–930, 936–938 (2010) (arguing that *Garamendi* should be read more narrowly after *Medellin*); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. REV 1897, 1930 (2015) (noting that the “outcome and reasoning in *Medellin* represented a major step in normalizing foreign relations law”). But see *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S.Ct. 2076 (2015) (holding that recognition of foreign governments is a “topic on which the Nation “must ‘speak ... with one voice’” and “[t]hat voice must be President’s”); Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, HARV. LAW REV. 112–146, 114 (2015) (arguing that executive branch attorneys will interpret the decision very broadly to expand presidential power in foreign affairs).

<sup>30</sup> U.S. CONST., art. I, §10, cl. 1 (“No State shall enter into any Treaty, Alliance or Confederation”).



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31 U.S. CONST., art I., §10, cl. 3 (“No State shall, without the consent of Congress. . . enter into any Agreement or Compact with another State, or with a foreign Power.”).

32 *Holmes v. Jennison*, 39 U.S. 540 (1840).

33 *Id.*

34 *Id.*

35 *U. S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 460–464 (1978). ; *Virginia v. Tennessee*, 148 U.S. 503, 519–520(1893). *See also* *Hollis*, *supra* note 4 at 760–762; GLENNON AND SLOANE, *supra* note 3 at 281.

36 GLENNON AND SLOANE, *supra* note 3 at 282; David Sloss, *California’s Climate Diplomacy and Dormant Preemption Articles and Essays*, 56 WASHBURN LAW J. 507, 522–524 (2017). Although Duncan Hollis has acknowledged that “the U.S. Department of State, at least one state court, the Restatement (Third) of Foreign Relations Law, and most scholars have all assumed that the Court’s interstate compact doctrine does apply” to agreements between states and foreign governments,” *Hollis*, *supra* note 4 at 766–767. he also argues that the Court should return to literal reading of the compact clause and require congressional consent for all agreements that states and cities enter into with foreign governments. *Id.* at 779–783.

37 *Virginia*, 148 U.S. at 519; *U.S. Steel Corp.*, 434 U.S. at 467–468 (1978).

38 *Id.*

39 GLENNON AND SLOANE, *supra* note 3 at 281.

40 *Virginia*, 148 U.S. at 525 (finding Congress gave implicit consent to the running of a boundary between the two States); *New Hampshire v. Maine*, 426 U.S. 363 (1976) (upholding an interstate agreement locating an ancient boundary line that did not have explicit congressional consent); *Cuyler v. Adams*, 449 U.S. 433, 440–42 (1981) (finding that a federal crime act constituted advance consent to an agreement between Pennsylvania and New Jersey on detainees).

41 *Northeast Bancorp*, 472 U.S. at 175.

42 In its recent legal challenge to the Cap-and-Trade Agreement, the Trump Administration has alleged that the Western Climate Initiative “is a state actor and an instrumentality of the governments of California, Quebec, and Nova Scotia.” Complaint at para. 15. However, WCI is an independent non-profit group that was created to provide administrative and technical support for the harmonization of cap-and-trade programs in different states and provinces. Moreover, it is not not a joint commission tasked with coordinating joint regulation. These factors also support the legal conclusion that the arrangement is not an unconstitutional compact.

43 Agreement (2017), *supra* note 1 at Art. 17. In fact, the 2017 agreement is even more likely to withstand constitutional scrutiny than the earlier 2013 agreement, which stated that “[a] Party may withdraw from this Agreement by giving 12 months prior written notice to the other Party.” Agreement (2013), *supra* note 1 at Art. 16.

44 Agreement (2017), *supra* note 1, Preamble.

45 *Northeast Bancorp*, 472 U.S. at 175. In *Northeast Bancorp*, several states passed “regionally restrictive statutes . . . to allow the growth of regional multistate bank holding companies which can compete with the established banking giants in New York, California, Illinois, and Texas.” *Id.* at 165. For example, Massachusetts passed a law that “specifically provides that an out-of-state bank holding company with its principal place of business in one of the other New England States . . . , which is not directly or indirectly controlled by another corporation with its principal place of business located outside of New England, may establish or acquire a Massachusetts-based bank or bank holding company, provided that the other New England State accords equivalent reciprocal privileges to Massachusetts banking organizations.” *Id.* at 164. The Supreme Court upheld the Massachusetts statute and a similar one in Connecticut, finding that the arrangement lacked the “classic indicia of a compact.” *Id.* at 175.

46 Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (December 13, 2005), Art 707.

47 For example, if the Supreme Court strikes down the Cap-and-Trade Agreement, then U.S. states and Canadian provinces might not be able to coordinate effectively about other cross-border issues, like drivers’ licenses and traffic offenses. *See, e.g.*, Reciprocal Agreement Between the State of New York and Quebec Concerning Drivers’ Licenses & Traffic Offenses, (1988), <http://legisquebec.gouv.qc.ca/en/pdf/cr/C-24.2,%20R.%2016.pdf>.

48 *Japan Line*, 441 U.S. at 446.

49 *Id.* at 449. *See also* *Barclays Bank v. Franchise Tax Board of California*, 512 U.S. 298, 311 (1994) (“In ‘the unique context of foreign commerce,’ a State’s power is further constrained because of ‘the special need for federal uniformity.’”).

50 *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 194 (1983).

51 Complaint, para. 110.

52 *Japan Line*, 441 U.S. at 446.



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<sup>53</sup> *Id.* (striking down a California ad valorem property tax on foreign-owned cargo ships under the dormant Foreign Commerce Clause).

<sup>54</sup> Article 6.2 of the Paris Agreement states in part, “Parties shall, where engaging on a voluntary basis in cooperative approaches that involve the use of internationally transferred mitigation outcomes towards nationally determined contributions . . . .” The term “internationally transferred mitigation outcomes” is part of the new climate jargon for emissions trading.

<sup>55</sup> Byrd-Hagel Resolution, S. Res. 98, 105th Cong. (1997).

<sup>56</sup> Statement of Hon. Chuck Hagel, Former Secretary of Defense and Senator, The Need for Leadership to Combat Climate Change and Protect National Security, Hearing before the Committee on Oversight and Reform, House of Representatives, 116th Congress (April 9, 2019) at 11-12 (“I supported the 2015 Paris Peace Climate Agreement that Secretary Kerry negotiated because it met the requirements of the Byrd-Hagel resolution, ensuring that all nations—all nations—take measurable, reportable, and verifiable steps to reduce emissions.”).