AVOIDING ANOTHER KYOTO: U.S. LEGAL PATHWAYS FOR IMPLEMENTING THE IMO'S GREENHOUSE GAS PRICING PLAN

by Thomas Murray

Thomas Murray is a Fox Fellow at the Universidad de San Andrés in Buenos Aires, a Master's candidate at the Yale School of the Environment, and a U.S.-Nominated Technical Expert to the United Nations Framework Convention on Climate Change.

SUMMARY

In the next few years, the International Maritime Organization will create the world's first greenhouse gas (GHG) pricing mechanism to reduce emissions from shipping. The United States may be unable to adopt it legislatively, repeating the events of the Kyoto Protocol. To ease passage, nations agreed to create the mechanism as an amendment to the existing Convention for the Prevention of Pollution From Ships (MARPOL), which a U.S. Secretary of State should be able to unilaterally accept or reject under the expedited amendment procedure of MARPOL's implementing legislation. This Article demonstrates the insufficiency of this strategy, as the procedure is unbounded and the pricing scheme too extraordinary, such that its usage may easily run afoul of the nondelegation doctrine and the new "major questions doctrine." If the amendment instead were implemented by the U.S. Environmental Protection Agency through a Clean Air Act §115 finding, the executive may still be able to accept and implement the scheme, avoiding congressional gridlock.

In 2023, the International Maritime Organization (IMO) adopted its 2023 Greenhouse Gas (GHG) Strategy, which set the ambitious target of reaching net-zero emissions from shipping by 2050,[1] with checkpoints at 2030 of at least 20% less emissions, and 2040 of at least 70% less emissions.[2] The ambition of this plan is enabled by the ambition of its proposed method, an "economic element, on the basis of a maritime GHG emissions pricing mechanism,"[3] to be created as an amendment to the International Convention for the Prevention of Pollution From Ships (MARPOL) Annex VI.[4] To succeed, IMO negotiators are aiming to craft an agreement to come into force by 2027, yet as of mid-2025 an agreement has not been finalized.

In early April, the IMO's Marine Environment Protection Committee agreed to the drafted text of an agreement, to be formally tendered for adoption in October 2025. This text attempts to establish the IMO's "Net-Zero Framework" by creating a new fuel standard and a two-tiered pricing mechanism that will allow ships to either buy remedial units or sell surplus units, depending on their emissions outputs.[5] Yet, rare for the IMO, the draft text was not agreed to unanimously; key states, including Rus-

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1. IMO, Res. MEPC.377(80), at 6, IMO Doc. MEPC 80/17/Add.1 (July 7, 2023) [hereinafter IMO Res. MEPC.377(80)].
2. *Id.*
3. *Id.* at 8.
4. *See* Simone Vitzthum, *Greenhouse Gas Regulations: What Are IMO's Next Steps?*, Skuld (Aug. 22, 2024), https://www.skuld.com/topics/environment/air-pollution/marpol-annex-vi/greenhouse-gas-regulations-what-are-imos-next-steps/ (explaining that while the amendment need not necessarily be an amendment to Annex VI, that seems to be the most likely option, based on the existing proposals).
5. Press Release, IMO, IMO Approves Net-Zero Regulations for Global Shipping (Apr. 11, 2025), https://www.imo.org/en/mediacentre/pressbriefings/pages/imo-approves-netzero-regulations.aspx.

sia, Venezuela, and the Gulf States, voted against it, and the United States and 23 others abstained.[6]

While the United States under Donald Trump's Administration is unlikely to join immediately, some form of the agreement will likely pass globally, raising the question of whether the next administration will join and what form the agreement will take then. If the United States does join, the monumentality of such a decision would not only be due to it being the world's first global, substantive GHG pricing scheme,[7] but also to it setting an important precedent for creation of regulatory schemes in international waters. However, even if the next administration were interested, there is no guarantee the U.S. Congress would approve, bringing the nation down the same path as the Kyoto Protocol, where an international economic scheme to curb GHGs was concluded internationally and signed by the U.S. president but failed to be ratified by Congress, ultimately leading other States to leave it and damning the whole scheme into obscurity.[8]

The fiasco of the Kyoto Protocol loomed large over the Barack Obama Administration during its negotiation of the Paris Climate Agreement, eventually leading the president to skip congressional authorization and accept the agreement through sole executive action, with the expected parties taking various sides on the legality of this action.[9] The main, highly contested argument for its legality was that the president already had sufficient, existing congressional authority to do so, under the Senate's ratification of the United Nations Framework Convention on Climate Change (UNFCCC) and the Global Climate Protection Act.[10]

If the IMO GHG pricing scheme is in a similar position, a future president could try to use the same strategy of relying on existing congressional authorization. Similar to the acceptance of the Paris Agreement being grounded in the UNFCCC's founding treaty,[11] the IMO's GHG pricing mechanism could rest on the Senate's ratification of MARPOL Annex VI.[12] Moreover, Congress has already passed implementing legislation to Annex VI with a section allowing for a simplified amendment process: the Act to Prevent Pollution From Ships (APPS), specifically §1909(b).[13]

However, an important aspect of why the Paris Agreement ended up not needing congressional authorization was its lack of binding, substantive obligations, particularly that it placed no emissions reductions or controls on any nation that joined.[14] While nations were required to create emissions-reduction plans ("nationally determined contributions") and routinely increase their ambitions (the "ratchet up" mechanism), there was no requirement that these plans be followed.[15] As a consequence, the Obama Administration was able to rest its authority to conclude such an agreement on the Global Climate Protection Act, given that this law largely only allows the executive to formulate and coordinate international climate agreements, but does not give any specific power to implement requirements of those agreements.[16]

Therefore, the IMO's GHG pricing scheme, as a substantive mechanism that would require some actions, would still need to rest on previously delegated congressional authority to avoid the Kyoto Protocol's fate, but is too substantive to use the same legislation as the Paris Agreement. The APPS amendment route would be the most natural fit, but it may be easily questioned whether this amendment procedure, simply a few paragraphs seemingly intended for technical revisions,[17] could actually support the creation of a new regulatory scheme.

Worryingly, these arguments have already been raised against APPS §1909(b) amendments. In 2012, when the United States negotiated the North American Emissions Control Area (ECA) through the IMO and implemented it through the §1909(b) procedure, the state of Alaska sued on the grounds that §1909(b) was too limited for such a significant program, which thus should have been passed as an Article II treaty.[18] While the district court ruled in favor of the federal government,[19] its reasoning was based on questionable logic[20]; and now, following the U.S. Supreme

6. Hussein Al-Khalisy et al., *IMO Approves Two-Tier GHG Pricing Mechanism*, Argus Media (Apr. 11, 2025), https://www.argusmedia.com/en/news-and-insights/latest-market-news/2677729-imo-approves-two-tier-ghg-pricing-mechanism.
7. The closest example would be the Paris Agreement, but as it did not require substantive actions to reduce emissions, this Article considers that the passage of the IMO's GHG pricing mechanism would be the first substantive, global GHG reduction instrument. *See generally* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L. 9/Rev/1, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].
8. *See* Amanda M. Rosen, *The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change*, 43 Pol. & Pol'y 31 (2015) (discussing the history of the Kyoto Protocol).
9. *Compare* Steven Groves, *The Paris Agreement Is a Treaty and Should Be Submitted to the Senate*, Heritage Found. (Mar. 15, 2016), https://www.heritage.org/environment/report/the-paris-agreement-treaty-and-should-be-submitted-the-senate, *with* Center for Biological Diversity, *Yes, He Can: President Obama's Power to Enter a Legally Binding Agreement Without Waiting for Congress*, https://www.biologicaldiversity.org/programs/climate_law_institute/to_paris_and_beyond/pdfs/YesHeCanFactsheet.pdf. Both organizations analyze the same agreement, the Paris Climate Agreement, with the case criteria, the C-175 State Department Circular, but come to opposite conclusions, which tend to align with their respective anti- and pro-environmental positions.
10. Harvard Dataverse, *Statement Regarding the Paris Agreement*, https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/M6E3ER (last visited June 13, 2025) [hereinafter Paris Cover Memo].
11. *Id.*
12. Protocol of 1997 Amending MARPOL Convention, S. Treaty Doc. No. 108-7, 108th Cong. (2006).
13. APPS, 33 U.S.C. §1909(b) (2008).
14. Paris Agreement, *supra* note 7, art. 3; *see generally* Miranda A. Schreurs, *The Paris Climate Agreement and the Three Largest Emitters: China, the United States, and the European Union*, 4 Pol. & Governance 219 (2016) ("The Obama administration moreover worked to shape the Paris Agreement in such a way that it would not require ratification by the Senate. . . . The INDCs [intended nationally determined contributions] are non-binding, aspirational targets, and thus, as interpreted by the Obama administration, do not need Congressional approval.").
15. Paris Agreement, *supra* note 7.
16. Paris Cover Memo, *supra* note 10.
17. *See infra* Section I.A.
18. Alaska v. Kerry, 972 F. Supp. 2d 1111 (D. Alaska 2013).
19. *Id.* at 1150.
20. *See* John Micheal Allen, *The Dangerous Expansion of Executive Treaty Power in* Alaska v. Kerry *and the MARPOL Convention*, 27 Geo. Int'l Env't L. Rev. 497, 504-05 (2014/2015) (describing the key inconsistency—the judge finds that there are sufficient limitations on the Secretary of State's

Court's ending of *Chevron* deference[21] and creation of the major questions doctrine (MQD), a similar challenge to the GHG pricing amendment would likely be successful.[22]

Luckily, nothing restricts the number of sources of authority the executive may cite to prove that it already has necessary congressional authorization. For instance, passage of the Minamata Convention on Mercury did not need further congressional approval despite having substantive provisions, and this was accomplished by citing a wide range of mercury-control laws already on the books.[23] Thus, we may look elsewhere for the necessary congressional authorization and conclude that §115 of the Clean Air Act (CAA), which expressly allows the U.S. Environmental Protection Agency (EPA) to regulate emissions pursuant to international agreements,[24] presents the strongest option. With the exact details of the economic scheme still undetermined, there is room to tailor the international agreement to be more applicable for passage through a simultaneous §115 finding and the APPS §1909(b) procedure.

This Article argues that if the United States joins the IMO GHG pricing scheme without further congressional authorization and new implementing legislation, the prior congressional authority granted through the APPS §1909(b) amendment procedure would be insufficient, inviting either nondelegation doctrine (NDD) or MQD issues. Yet, the executive still likely could proceed if there were a supportive finding from §115 of the CAA and if the mechanism were structured correctly to reduce the extraordinariness of the scheme.

Part I examines the possibility that the United States attempts to pass the GHG pricing mechanism solely through APPS §1909(b), first examining the text of the section and legislative history. It then analyzes the lack of statutory limits to the amendment procedure in light of the relevant case law, and finds this may raise issues of the separation of powers if used too expansively. Under the State Department's internal criteria for distinguishing between international agreements that should be passed as Article II treaties and congressional-executive agreements, there is a disconnect between the amount of congressional authorization one can rightfully claim from APPS and the amount needed for the GHG pricing mechanism. This gap is then analyzed under the NDD and the MQD to conclude that both may pose an issue for the pricing mechanism, as the NDD may take issue principally with the weakness of the §1909(b) construction, and the MQD with the "majorness" of the pricing scheme itself.

Part II argues that a finding under CAA §115 may be enough to claim, alongside APPS §1909(b), that the executive already has sufficient congressional authorization. The distinct advantages of §115, beyond being a substantive delegation of power to the executive, are that it specifically addresses the subject matter in question, is based on a technical procedure, and incorporates state action through the state implementation plan (SIP) process. The practical steps of how international passage of the IMO's pricing scheme would trigger the §115 process are discussed, before turning to the potential issues and opportunities of such a strategy, namely in regard to how the section could provide an effective defense against a potential use of the NDD to claim that the scheme could not be accepted without new congressional approval.

Part III addresses the MQD, arguing that certain design features of the agreement can be internationally negotiated to reduce the majorness of the scheme in the context of the U.S. economy and legal system. It focuses on three design choices yet to be negotiated—the type of mechanism, the equity considerations, and the disbursement model—in light of the options put forth by the main parties so far. These options are whittled down through application of the previously mentioned, potentially problematic, legal principles to propose a mechanism that would retain its effectiveness while avoiding many of the potential legal snags.

The Article concludes with the idea that the gap between delegated and needed congressional authority for the executive to accept and implement the pricing mechanism can be successfully closed by simultaneously raising the level of delegated authority, through §115, and lowering the needed authority, by designing the mechanism sufficiently to avoid any separation-of-powers issues.

I. Can the APPS Amendment Procedure Incorporate a Carbon Pricing Scheme?

Congress accepted MARPOL Annex VI in 2008 and implemented it through amendments to the APPS.[25] This Act added Annex VI to the list of annexes subject to a specific amendment procedure by the Secretary of State.[26] Yet, it is unclear whether the Secretary of State is allowed to unilaterally accept an amendment, what breadth of proposals may constitute an "amendment," and whether Congress could even constitutionally allow the executive to accept amendments without its consent.

power to accept an amendment to MARPOL through APPS as to render it constitutional, while simultaneously finding there was a lack of "judicially manageable or discoverable standards" onto which one may judge the Secretary of State's acceptance of any given amendment, to find the whole question nonjusticiable under the political question doctrine).

21. Loper Bright Enters. v. Raimondo, No. 22-451, slip op. at 1 (U.S. June 28, 2024).
22. *See* Kristen E. Eichensehr & Oona A. Hathaway, *Major Questions About International Agreements*, 172 U. Pa. L. Rev. 1845, 1854-58 (2024) (describing the challenges that may be faced specifically by congressional-executive agreements in regard to the MQD).
23. *See* U.S. Department of State, Measures to Implement the Minamata Convention on Mercury (Minamata Convention Notifications), https://minamataconvention.org/sites/default/files/documents/notification/USA%2520declaration_Art%252030%2520para%25204.pdf (in which the State Department uses at least seven separate laws to argue that each responsibility required by the Minamata Convention is already under the purview of the executive's powers).
24. An Act to Improve, Strengthen, and Accelerate Programs for the Prevention and Abatement of Air Pollution, as Amended, 42 U.S.C. §7415 (2012).
25. APPS, Pub. L. No. 96-478, 94 Stat. 2297 (1980), *amended by* Maritime Pollution Prevention Act of 2008, Pub. L. No. 11-280, 122 Stat. 2611.
26. 94 Stat. at 2615.

A. *The Secretary of State's Ability to Accept MARPOL Annex VI Amendments*

Whether the Secretary of State can, without the advice and consent of the Senate, approve any amendment to MARPOL Annex VI largely hinges on the interpretation of APPS §1909. This section dictates the procedure of how amendments are handled:

> (a) Acceptance of certain amendments by the President
> A proposed amendment to the MARPOL . . . may be accepted on behalf of the United States by the President following the advice and consent of the Senate, except as provided for in subsection (b) of this section.
>
> (b) Action on certain amendments by the Secretary of State
> A proposed amendment to Annex I, II, V, or VI to the Convention . . . may be the subject of appropriate action on behalf of the United States by the Secretary of State following consultation with the Secretary, or the Administrator as provided for in this chapter, who shall inform the Secretary of State as to what action he considers appropriate at least 30 days prior to the expiration of the period specified in Article VI of the MARPOL Protocol during which objection may be made to any amendment received.
>
> (c) Declaration of nonacceptance by the Secretary of State
> Following consultation with the Secretary, the Secretary of State may make a declaration that the United States does not accept an amendment proposed pursuant to Article VI of the MARPOL Protocol.[27]

In *Alaska v. Kerry*,[28] the state of Alaska took issue with creation of the North American ECA, restricting how much sulfur ships could emit, as an amendment to MARPOL Annex VI through §1909(b), given that it could hamper the state's cruise industry and ability to import goods.[29] The court addressed the issue by asking whether the Senate intended for advice and consent to be necessary each time an amendment was accepted by the Secretary, or whether there was ex ante congressional consent.[30] Here, the state used a U.S. House of Representatives committee report to claim that the legislature only intended the streamlined, §1909(b) procedure to be applicable in cases of technical matters necessary to keep abreast with technological changes.[31]

The federal government countered on three grounds: first, arguing that such legislative history is irrelevant, since it was not reflected in the statutory text itself[32]; second, based on other pieces of legislative history; and third, arguing that the existence of a specific carve-out for these few annexes means they must be rightfully viewed as entitled to acceptance without the advice and consent of the Senate.[33] The judge concurred with the federal government, agreeing with its reading of the legislative history and stating that the ordinary meaning of the text proved dispositively in favor of the view that amendments to these annexes did not require congressional action.[34]

However, the judge's reasoning may have been in error, as the analysis rested on the idea that the "plain language of the text is unambiguous."[35] As will become apparent, the text actually is very ambiguous, hence the controversy surrounding its meaning. Principally, the textual issue is why, if Congress intended to allow the Secretary of State to accept amendments to these annexes, did it not outright say that as it did with the president's ability, but instead simply state that the Secretary of State may take "appropriate action"[36] on the amendments?

The strongest textual argument in agreement would point out that §1909(a) does refer to subsection (b) as a clear exception to itself, specifically to the rule that amendments "may be accepted on behalf of the United States by the President following the advice and consent of the Senate, except as provided for in subsection (b) of this section."[37] One may argue, through the canon of the rule of the last antecedent,[38] that the exception only and specifically refers to the clause concerning the advice and consent of the Senate. Yet, this would also necessarily mean that §1909(b) would still require the amendment to be accepted by the president, which nothing in the text of §1909(b) would suggest, making it a suspect interpretation. Therefore, instead, it simply seems to be an alternative pathway to accepting these amendments, which may or may not need the advice and consent of the Senate.[39]

The clear statement rule presents the strongest textual argument to the contrary, as the drafters seem to have avoided plainly delegating this power to the Secretary of State. Looking at the full statutory context emphasizes this, as "appropriate action"[40] is clearly contrasted with the much more directly delegated powers of "acceptance" (to the president)[41] and "declaration of nonacceptance" (also to the Secretary of State).[42] Given the presumption of consistent usage,[43] "appropriate action" must be distinct from the pure acceptance or nonacceptance of the amendment, either allowing much broader powers (possibly including acceptance and nonacceptance as a fraction

27. 33 U.S.C. §1909.
28. 972 F. Supp. 2d 1111 (D. Alaska 2013).
29. *Alaska Sues Over Unconstitutional North American ECA*, Ship & Bunker (July 16, 2012), https://shipandbunker.com/news/am/443951-alaska-sues-over-unconstitutional-north-american-eca.
30. *Alaska*, 972 F. Supp. 2d at 1138-43.
31. *Id.* at 1139.
32. *Id.*
33. *Id.* at 1138-43.
34. *Id.* at 1141-43.
35. *Id.* at 1138-40.
36. 33 U.S.C. §1909(b).
37. *Id.* §1909(a).
38. *See generally* Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in* Barnhart, *and Why Both Are Weak*, 99 Judicature 22 (2015).
39. This would be the equivalent of saying "One may take I-95 and hit a roadblock, or take I-99." Hitting a roadblock is guaranteed for I-95, but nothing specifically says you will or will not hit one on I-99 either.
40. 33 U.S.C. §1909(b).
41. *Id.* §1909(a).
42. *Id.* §1909(c).
43. *See generally* Bryan A. Garner & Antonin Scalia, *A Dozen Canons of Statutory and Constitutional Text Construction*, 99 Judicature 87, 87 (2015).

of that) or much narrower powers (not including acceptance and nonacceptance).

Assuming the broader interpretation, this would clearly necessitate congressional authorization, as even the less expansive power of accepting an amendment does, and so the more expansive power implicitly must. This is further suspect in light of the full statute, which makes clear that the timeline of the Secretary of State's actions is centered around the ability to object to the amendment and, in the next section, reject it.[44] As pointed out in *Alaska*, a delegated power to reject something does not automatically imply the power to accept it.[45]

This overall textual indeterminacy is likely why both sides turned to the Act's legislative history. Yet, the mutual citation of this legislative history led the state to accuse the federal government of aiming to "selectively quote"[46] it, not a far cry from the quip that the use of legislative history is like "looking over a crowd and picking out your friends."[47]

In the failing of theory, practice becomes our compass.[48] The strongest indication toward resolving this question is the history of usage and amendment this provision has seen. In 1987, the APPS was amended such that §1909(b)'s "Annex I or II" was amended to "Annex I, II or V,"[49] and in 2008, "Annex I, II or V" was amended to "Annex I, II, V or VI."[50] Further, numerous amendments to these annexes were approved by the Secretary of State before 1987,[51] between 1987 and 2008,[52] and after 2008.[53] Thus, as new annexes were added to MARPOL, Congress was aware that their inclusion into §1909(b) would allow the Secretary of State to unilaterally accept amendments to them, and still chose to add them to the procedure. If Congress had objected to the interpretation that it had delegated the power to the Secretary of State to accept MARPOL annex amendments without its consent, it would not have affirmed and expanded this power twice over.

B. *The Breadth of an "Amendment" and How the GHG Pricing Mechanism Fits*

While the legislative history of APPS §1909(b) suggests the Secretary of State can, without the advice and consent of Congress, accept *an* amendment to MARPOL Annex VI, this opens the question of *which* amendments, before falling outside the scope of an "amendment" and thus necessitating the use of the Article II procedure. As APPS suggests no substantive requirements on what amendments may allow,[54] only dictating the procedure, one is forced to turn to extra-statutory sources for interpretation.

This section will examine the history of legal reasoning surrounding ambiguous and open-ended delegations of authority in congressional-executive agreements and their implementing legislation, explore the extra-textual considerations that dictate how those delegations affect whether to seek senatorial advice and consent for a given agreement, and apply those extra-textual considerations to the GHG pricing mechanism. As will become clear, the necessary delegated powers for the Secretary of State to accept, and for EPA to implement via regulation, the GHG pricing mechanism may be outside the bounds of what APPS can provide through its prior delegation of authority, potentially opening up judiciable claims under the MQD and the NDD that will then be explored in the following section.

1. The Lack of Statutory Limits to the MARPOL Annex VI Amendment Procedure

In *Alaska*, the state argued that the particular action of the Secretary to accept the amendment creating the North American ECA was outside the scope of "appropriate action."[55] Particularly, this was because the Secretary failed to follow the procedure laid out in a separate appendix in finding that the technical requirements necessary to trigger the ECA were present.[56] The federal government argued, and the judge concurred, that this was ultimately a political question, owing to three of the six factors in *Baker v. Carr*, including the lack of "judicially manageable or discoverable standards."[57]

44. 33 U.S.C. §1909(b).
45. Alaska v. Kerry, 972 F. Supp. 2d 1111, 1144 (D. Alaska 2013) (citing Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332 (9th Cir. 1990)).
46. *Id.* at 1138-39.
47. Kim Lane Scheppele, "Looking Over the Crowd and Picking Your Friends": The Social World of Legal Cases, Presentation at the Maryland Law School 2012 Constitutional Law Schmooze (Feb. 2012), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1144&context=schmooze_papers.
48. *See* Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretation*, 62 N.Y.U. Ann. Surv. Am. L. 497 (2006) ("Most significantly for present purposes, U.S. courts also look to postratification practice under the treaty as proof of original intentions, a practice sanctioned under the VCLT [Vienna Convention on the Law of Treaties] as well.").
49. *See* 33 U.S.C. §1909, *amended by* United States-Japan Fishery Agreement Approval Act of 1987, Pub. L. No. 100-220, 101 Stat. 1458.
50. *See* 33 U.S.C. §1909, *amended by* Maritime Pollution Prevention Act of 2008, Pub. L. No. 110-280, 122 Stat. 2611.
51. IMO, Res. MEPC.14(20), *Adoption of Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution From Ships, 1973* (Sept. 7, 1984); IMO, Res. MEPC.16(22), *Adoption of Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution From Ships, 1973 (Relating to Annex II of the International Convention for the Prevention of Pollution From Ships, 1973 as Modified by the Protocol of 1978 Relating Thereto)* (Sept. 7, 1984).
52. IMO, Res. MEPC.34(27), *Adoption of Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution From Ships, 1973 (Relating to Appendices II and III of Annex II of MARPOL 73/78)* (Mar. 17, 1989); IMO, Res. MEPC.36(28), *Amendments to Annex V of MARPOL 73/78* (Oct. 17, 1989).
53. IMO, Res. MEPC.176(58), *Comparative Analysis of Candidate Mid-Term Measures*, IMO Doc. MEPC 58/23/Add.1 (Oct. 10, 2008) [hereinafter IMO Res. MEPC.176(58)]; IMO, Res. MEPC.190(60) (Mar. 26 2010).
54. 33 U.S.C. §1909. The section simply refers to amendments as either "certain amendments," "proposed amendments," or "pursuant to Article VI of the MARPOL Protocol," none of which present any nonobvious description of what an amendment should entail.
55. Alaska v. Kerry, 972 F. Supp. 2d 1111, 1124-25 (D. Alaska 2013).
56. *Id.* at 1122-23.
57. *Id.* at 1124-29.

This is curious since, later, the judge is forced to justify why the Secretary's empowerment to unilaterally accept amendments should not be considered a violation of the MQD.[58] To do so, the judge necessarily must say that, following *Mistretta v. United States*,[59] the Secretary's actions are guided by an intelligible principle.[60] The distinction the judge attempts to make is that

> Sections 1909(b) and (c) do not limit *how* or *why* the Secretary of State determines to accept or reject an amendment, it does limit *what* the Secretary of State can accept or reject: the Secretary of State may act only on an amendment that has gone through the process outlined in Appendix III.[61]

The reasoning errs by ignoring that, as both sides acknowledged, Appendix III was not followed, leading to only two interpretations. Either Appendix III does function as a boundary, but if so, was a boundary that has been crossed, thus providing the evidence necessary to allow one to say there is sufficient law to judge whether the action was appropriate; or it does not function as a boundary, confirming there is no law on which to judge the appropriateness of the North American ECA designation, thus failing to function as an intelligible principle. Therefore, for the designation of ECAs, there is, at best, a disregarded appendix that functions to constrain the breadth of what an amendment may be. Yet, this only applies to one narrow case of ECA designation; any other amendment lacks the equivalent to Appendix III to guide what is considered, content-wise, to be appropriate.

As previously mentioned, the argument that an amendment must be technical in nature[62] was dismissed for being entirely extra-textual. Similarly, the only other argument present is from the federal government, which asserts that amendments to MARPOL annexes that the Secretary may accept are necessarily bound to "the type and content of amendments that would be proposed to those annexes,"[63] and must be "related to the substance of the annex and consistent with the MARPOL Convention framework."[64] This statement provides no clarity in a situation in which the key question is whether a given amendment is *sufficiently* related to the intentions of MARPOL.

More broadly, what counts as an "amendment" to a treaty is a notoriously difficult question,[65] and is subsidiary to the greater, more controversial, question of how to determine the proper form of an international agreement when it comes to domestic ratification.[66] Typically, international agreements are divided into three types: the Article II treaty, which passes through the acceptance of two-thirds of the Senate; the congressional-executive agreement, which passes through a simple majority in both houses as justified by Article 1, §10[67]; and the sole executive agreement, which is concluded by the executive on the basis of preexisting granted authority.[68] In the case of an amendment to MARPOL Annex VI for the GHG pricing mechanism, the fact that the amendment would be passed through APPS means the amendment itself would be an ex ante[69] congressional-executive agreement. Thus, the question shifts to whether the amendment can function as an ex ante congressional-executive agreement or instead must go through the Article II treaty process.

This question becomes controversial when a president attempts to interpret treaties and the powers granted through their implementing legislation in a politically expedient manner. In *Field v. Clark*, the Tariff Act of 1890 was challenged by disgruntled businesses, who claimed the Act's authorization for the president to set tariffs in a discretionary manner was an unconstitutional delegation of legislative power.[70] The Supreme Court rejected the notion, arguing that the Act gave an "intelligible principle" upon which the president must act, specifically when to set tariffs, and that he was not exercising legislative power but rather the executive power of enforcing the law.[71]

However, *Clark* and the cascade of precedents following it may be only partially relevant to our case, as there is a distinction between "those follow-on agreements that merely 'fill gaps' that have been deliberately or inadvertently left in the underlying treaty, and those other agreements that depart from the express terms of the original accord."[72] The GHG pricing amendment fits into an awkward middle ground, as it neither needs a total reimagining of the text, which would likely be unconstitutional, nor simply fills in the details, which would likely be constitutional.

58. *Id*. at 1146.
59. 488 U.S. 361 (1989).
60. *Alaska*, 972 F. Supp. 2d at 1146.
61. *Id*. at 1147.
62. *Id*. at 1138-40.
63. *Id*. at 1146.
64. *Id*.
65. *Cf*. David A. Koplow, *When Is an Amendment Not an Amendment?: Modification of Arms Control Agreements Without the Senate*, 59 U. Chi. L. Rev. 981 (1992) (describing the same issue of what constitutes an "amendment," yet in the context of arms control agreements, in the midst of the "reinterpretation debate" of the Anti-Ballistic Missile Treaty).
66. *See* John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 Mich. L. Rev. 757, 771 (2001) (noting that the choice of form the U.S. government may use to conclude an international agreement has never been "successfully challenged in court on constitutional grounds").
67. *Id*. at 769 (noting this textual support is questionable, as Article 1, §10 only precludes states from entering into "agreement or compact" with other nations, from which it must be assumed that the federal government can).
68. *See generally* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1239 (2008) (describing sole executive agreements generally).
69. *See generally* Ryan Harrington, *Understanding the "Other" International Agreements*, 108 Law Libr. J. 343, 347-49 (2016) (explaining the difference between ex ante and ex post congressional-executive agreements as largely one of receiving congressional consent).
70. 143 U.S. 649, 650 (1892).
71. *Id*. at 700.
72. Koplow, *supra* note 65, at 1036.

Political controversies along these lines, such as the reinterpretation dispute[73] and non-amendment debate,[74] demonstrate that ex ante congressional-executive agreements tend to have a fundamentally weaker claim to the legitimacy of their delegated authority, in contrast to Article II treaties.[75] By virtue of being ex ante, these agreements cannot claim they have the same level of congressional approval, and thus delegated authority, as ex post agreements or treaties, given that Congress usually does not know the particulars until the agreement has been concluded.[76] Further, by virtue of being congressional-executive agreements, they lack the authority that a supermajority in the Senate naturally confers, as "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[77]

Admittedly, the weakness of congressional-executive agreements in comparison to Article II has been disputed, principally by those arguing that having to pass a majority in both houses should be considered equal to passing a supermajority in Congress,[78] yet such reasoning is immediately objectionable. Such an allegation could be plausible if both houses of Congress represented separate and distinct voter bases, as that would mean that passage in both would require, in plain terms, the passage of two separate tests. Then, one could conclude, with some very rough logic, that the passage of two separate, smaller tests is equally significant as the passage of one larger barrier (that of a Senate supermajority). Yet, this is not the case; the legislators in both the House and Senate run in elections that allow the exact same set of voters to vote for each chamber.[79] Thus, a congressional-executive agreement passing both chambers is not passing two independent tests any more than a new driver passing a driving test twice in a row, albeit in a different car.

Further, not only is the Senate supermajority a numerically higher bar to pass for an international agreement, but in a nation roughly split between two parties, it will nearly always require some party members to vote with the opposition. This is in contrast to the simple majority in both chambers, from which a congressional-executive agreement could pass with parties voting down the line if one party has even a slim majority in both houses.[80] The ability of Congress to delegate away its power is fundamentally checked by the fact that its own powers are solely and exclusively derived from the people. The fact that Article II treaties require two-thirds of the representatives of the American voter base, as opposed to half,[81] and that some of those representatives are crossing party lines, suggests a significantly more meaningful delegation of power. Evidence for this perspective is seen in the inverse, in which a president, lacking the popular mandate to get an agreement passed as an Article II treaty, passes it instead as a congressional-executive agreement, such as with the annexation of Texas and Hawaii.[82]

If it is true that ex ante congressional-executive agreements have a weaker claim to delegation than Article II treaties, then it follows that some agreements should only be ratified as Article II treaties. This is one side of the "interchangeability" debate, which asks whether these two agreement forms are equally applicable to all cases.[83]

As will be discussed later, this creates conflicts with the NDD and the MQD. Regarding the former, it principally takes issue with Congress delegating too much power to

73. *Compare* Joseph R. Biden & John B. Ritch, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U. Pa. L. Rev. 1529 (1989) (describing the events surrounding the "reinterpretation" controversy), *and* Abraham D. Sofaer, *Treaty Interpretation: A Comment*, 137 U. Pa. L. Rev. 1437, 1442 (1989).

74. The "non-amendment debate" being shorthand for the practice of the executive modifying arms treaties without referring to these modifications as "amendments" to avoid scrutiny. *See* Koplow, *supra* note 65, at 1142.

75. This is not to claim that either Article II treaties or congressional-executive amendments are more or less valid as instruments of international agreements, as the Supremacy Clause dictates each are equally the law of the land. *See* U.S. Const. art. VI, cl. 2. Rather, it is to make the distinction that they may differ in what they contain, given the difference in delegated powers that come from their approval processes. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799, 826-827 (1995). Here, Bruce Ackerman and David Golove emphasize then-Solicitor General William Howard Taft's interpretation of the Postmaster General's ability to conclude arrangements with foreign nations concerning postage, through congressional ex-ante authorization. Taft considered such a power to be entirely exceptional, and only justified through its historical practice, suggesting that the general rule was that simple congressional majorities cannot create international agreements, and thus agreements approved through simple congressional majorities could not be considered equal to treaties.

76. This may be why some argued that ex ante authorization should only be permissible when Congress makes the political decision of what the agreement will entail, and only authorizes the president to make fact-based findings concerning when the necessary circumstances have arisen to trigger the acceptance of the agreement Congress has agreed to. If this were the case, then ex ante and ex post authorization would be of equal weight, as in both cases Congress would have full knowledge of what the agreement dictated, yet this is not the case in practice, as ex ante authorization goes beyond fact-finding, so there exists a greater question of the legitimacy of ex ante authorizations.

77. Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001).

78. Hathaway, *supra* note 68, at 1251:

> For example, the first factor—how extensive the commitment or risks affecting the nation—was likely intended to discourage the use of sole executive agreements in situations with extensive commitments or risks. But it is far from clear how this factor would affect the choice between an Article II treaty and a congressional executive agreement.

79. That is in the chamber, writ large. This ignores the role that gerrymandering may play in causing a given voter base, divided differently between House and Senate election districts, to elect different proportions of the two major parties to each chamber, owing to their election district boundaries. It also ignores the different weighting proportions that cause voters in less populated states to have a marginally larger impact, on a per capita basis, on representatives in the Senate.

80. The same party has controlled both the House and Senate for 48 out of 84 Congresses since 1857. *See* U.S. House of Representatives History, Art, and Archives, *Party Government Since 1857*, https://history.house.gov/Institution/Presidents-Coinciding/Party-Government/ (last visited June 13, 2025).

81. The statement that half of the voter base is represented by a simple majority vote in each house does admittedly assume that nearly all people vote along party lines and that most congresspeople vote along party lines. If this is assumed, then most people simply vote for the same party when voting for the Senate and the House, and then the two elected Republicans or Democrats vote in the same direction on a given treaty.

82. Louis Klarevas, *"The Law": The Constitutionality of Congressional-Executive Agreements*, 33 Presidential Stud. Q. 394, 402 (2003).

83. *See generally* Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L.J. 181 (1945) (describing the overall interchangeability debate).

the president to create rules.[84] *Field* phrases this as "discretionary" versus "legislative" power,[85] while *Yakus v. United States* describes the distinction between a delegation of legislative power—to make new laws—and a delegation of executive power—to create rules to enforce existing laws and their principles.[86] The underlying theme is that Congress cannot give away its legislative authority, as a manifestation of the foundational ideas of the separation of powers.[87]

The most frequent rule associated with the NDD is that a delegation is permissible if it follows an "intelligible principle," given that if power is constrained by one, then the executive is not in a lawmaking position, and is instead simply creating rules to further the specified principle.[88] The MQD is less well-defined, but largely prohibits executive agencies from making decisions of "exceptional political and economic" consequence without clear authorization from Congress.[89] To understand the MQD's and NDD's relevance to APPS and the potential amendment, we must now turn to investigate Congress' specific delegation of power through APPS and the necessary powers needed for the executive to accept the amendment only as a congressional-executive agreement.

2. Circular 175 and Other Treaty Interpretation Considerations

While no authoritative legislation dictates which form international agreements need to take domestically to avoid questions of separation of powers, the closest equivalent would be the State Department's guideline Circular No. 175 (C-175), which distinguishes the forms international agreements may take, how to decide between them, and the rights and responsibilities of various parties.[90] In particular, it establishes the C-175 procedure, which orients how executive agencies might formalize their international agreements.[91] While C-175 itself does not provide an explanation for its existence, various scholars have identified its creation as a backlash against the controversial usage of unilateral executive treaty-making power following the Second World War.[92] It was originally created in conjunction with the Case-Zablocki Act, which itself was a response to the proliferation of informal, unapproved, executive agreements.[93]

Though not a law, C-175 has been used as a frame of reference in debates around proper treaty form, such as during the ratification of the Paris Agreement.[94] The document outlines eight criteria "for Selecting Among Constitutionally Authorized Procedures":

> (1) The extent to which the agreement involves commitments or risks affecting the nation as a whole;
>
> (2) Whether the agreement is intended to affect state laws;
>
> (3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
>
> (4) Past U.S. practice as to similar agreements;
>
> (5) The preference of the Congress as to a particular type of agreement;
>
> (6) The degree of formality desired for an agreement;
>
> (7) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
>
> (8) The general international practice as to similar agreements.[95]

Each of these criteria speak to the relationship between the amount of delegated power from Congress and the needed delegation of powers for the executive to accept the GHG pricing amendment. Thus, if a gap exists between these two factors, it may indicate that further congressional approval may be needed, such as through ex post congressional authorization or through a separate Article II treaty. If neither option is utilized in facing a gap, then it may be vulnerable to MQD and NDD claims.

This understanding largely derives from the reaffirmation in *Medellín v. Texas* of Justice Robert Jackson's concurring explanation of the use of executive power in *Youngstown Sheet & Tube*. As the Supreme Court cites:

> First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." . . .

84. *See generally* Constitution Annotated, *ArtI.S1.5.1 Overview of Nondelegation Doctrine*, https://constitution.congress.gov/browse/essay/artI-S1-5-1/ALDE_00000014/ (last visited June 13, 2025).
85. 143 U.S. 649, 650 (1892).
86. 321 U.S. 414, 453 (1944) (the executive must make policy that "tend[s] to effectuate the policy").
87. Constitution Annotated, *supra* note 84.
88. Mistretta v. United States, 488 U.S. 361, 409-10 (1989) (citing J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).
89. Biden v. Nebraska, No. 22-506, slip op. at 1 (U.S. June 30, 2023) (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)).
90. 11 U.S. Department of State, Foreign Affairs Manual §723.3 (2006).
91. U.S. Department of State, *Circular 175 Procedure*, https://2009-2017.state.gov/s/l/treaty/c175/index.htm (last visited June 13, 2025).
92. *See generally* John F. Murphy, *Treaties and International Agreements Other Than Treaties: Constitutional Allocation of Power and Responsibility Among the President, the House of Representatives, and the Senate*, 23 U. Kan. L. Rev. 221, 229 (1974/1975) (explaining C-175 "[l]argely as a result of the controversy over the war in Vietnam"); *see* S. Rep. No. 106-71, at 87 (2001) (identifying C-175 as a response to the Korean War).
93. S. Rep. No. 106-71, at 220.
94. *Compare* Groves, *supra* note 9, *and* Center for Biological Diversity, *supra* note 9.
95. 11 U.S. Department of State, *supra* note 90, §723.3.

> Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." . . . In this circumstance, Presidential authority can derive support from "congressional inertia, indifference or quiescence." . . . Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."[96]

Therefore, the eight C-175 considerations may all be understood as either signaling or constituting the amount of necessary delegated power for a given international agreement to be constitutionally concluded in a specific form, and the amount of delegated power that a given international agreement has been granted through past executive and congressional actions. This section also suggests that ex ante congressional-executive agreements inherently have a middling amount of delegated power from Congress, generally less than an Article II treaty and more than a sole executive agreement, and thus attempts to conclude an agreement through this form raises the burden of proof one must demonstrate to argue that Congress has actually delegated sufficient power to rightfully conclude it in such a form. The next section will use these eight factors to determine whether the GHG pricing mechanism, as a planned ex ante congressional-executive agreement, can actually be concluded as such.

3. Extra-Textual Considerations Applied to the APPS Amendment Procedure

These considerations can be broken down into three categories. The first, which we call "signal considerations," includes ones that do not themselves contribute to or affect the value of how much power has been delegated by Congress or how much is needed for the executive to skip the Article II process, but may be interpreted as useful signs to what those values may be or how they relate to each other. These include general international practice, the degree of formality of the international agreement, and what comparable cases have determined.

The second category, which are considerations that affect the amount of power Congress has delegated to the executive, principally derives from the text of the agreement, but considering its silence in this case, the preference of Congress becomes the main point of analysis. The third category includes all variables that affect how much congressional authorization would be necessary to implement an agreement without the Article II procedure.[97] This includes the duration of the agreement, its effect on the nation as a whole, and its effect on state sovereignty.

Together, the first group of considerations signals that the executive has little preexisting authority to conclude environmental agreements. To do so, at least one of three factors is necessary: (1) the absence of substantive obligations in the agreement; (2) the invocation of older and more specific statutes to demonstrate that authority has already been delegated; or (3) an ex ante congressional authorization that clearly dictates the goal of the agreement and either the necessary powers or the form of the arrangement to reach the goal.

International practice is likely to be the weakest factor in responding to this question. The Vienna Convention on the Law of Treaties makes no distinction between treaty types,[98] nor do the vast majority of nations.[99] Even if comparable practices did exist, the Supreme Court rarely applies foreign case law,[100] and if it began to do so, it might introduce numerous concerns such as breaking the implicit compact between the Court and the American people,[101] eroding public support for the judiciary,[102] and introducing questions regarding the impact of foreign contexts and practices.[103]

The desired degree of formality for the agreement fares slightly better in terms of relevancy. While undefined legally, treaty formalities are often identified to mean the existence of a written as opposed to verbal agreement[104] and through a defined method of ratification. In theory, the scope and significance of a treaty is what dictates its formality as it is being negotiated internationally, so informal agreements are less likely to warrant congressional consideration.[105] Yet, the written or verbal consideration has largely been nullified since C-175's original passage, as the

96. Medellín v. Texas, 552 U.S. 491, 495 (2008) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)).

97. As will be addressed in Section I.C.1 exploring the NDD, Congress does not have an unlimited right to delegate its own power, but, logically, we must first determine how much congressional power has been delegated before asking whether that delegation was too great.

98. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention]. *See also* Keith E. Fryer & J. Michael Levengood, *Arms Control: SALT II—Executive Agreement or Treaty*, 9 Ga. J. Int'l & Compar. L. 123, 126 (1979) ("The distinctions made in United States constitutional law between the various types of international agreements do not, however, extend into the sphere of international law.").

99. *See generally* Julia Yoo, *Participation in the Making of Legislative Treaties: The United States and Other Federal Systems*, 41 Colum. J. Transnat'l L. 455 (2003) (creating a comparative table of nations' national treaty-making processes, highlighting that the United States is one of the few to implicate one house in a two-house legislature).

100. Austen L. Parrish, *Storm in a Teacup: The US Supreme Court's Use of Foreign Law*, 2007 Ill. L. Rev. 637, 649 (2007) ("Compared to other western democracies, the American practice has become increasingly isolated as an extreme version of provincialism.").

101. John Yoo, *Peeking Abroad?: The Supreme Court's Use of Foreign Precedents in Constitutional Cases*, 26 U. Haw. L. Rev. 285 (2004).

102. Brett Curry & Banks Miller, *Looking for Law in All the Wrong Places? Foreign Law and Support for the U.S. Supreme Court*, 36 Pol. & Pol'y 1094, 1109 (2008).

103. Yoo, *supra* note 99.

104. *See generally* Giorgio Amiranashvili, *Some Characteristics of Formal Requirements for a Legal Transaction in American Law*, 2 J. L. 44 (2016) (describing how the formality of legal contracts in general is often understood through whether they are written or oral); Vienna Convention, *supra* note 98, art. 2 (defining the characteristic of being "written" as necessary for something to be a "treaty").

105. *See generally* Groves, *supra* note 9 (arguing that the Paris Agreement should have been ratified as an Article II treaty partially owing to its formality).

Case-Zabolski Act requires that all binding international agreements, even those that have no interaction with or relation to Congress—such as sole executive agreements—must be in written form.[106]

The third consideration, that of comparable cases, is relevant due to the lack of a textual foundation for the concept of congressional-executive agreements, which creates difficulties when trying to distinguish between these agreements and Article II treaties. Some have argued that the line between them must come from past practice.[107] Concurrent with the logic of the *Youngstown* framework, comparable cases may be illustrative in revealing which subject areas courts are historically more willing to determine to be fully or partially within the preexisting scope of presidential authority.

The most direct comparison for the GHG pricing amendment, as an environmental agreement, is the Paris Agreement. During the debates around the constitutionality of President Obama's acceptance of the Paris Agreement without congressional approval and consent, many looked to the history of the Minamata Convention[108] and the United States-Canada Air Quality Agreement (AQA).[109] In particular, these analyses often claimed that, absent Senate advice and consent, these international, emissions-control agreements were acceptable, and thus Paris was as well.

To preface, the Minamata Convention acceptance may have avoided scrutiny for simply not being particularly high-profile.[110] Otherwise, proponents argued that it was legal under the precedent of other environmental agreements accepted without Senate consent, such as the United Nations Economic Commission for Europe (UNECE) Convention on Long-Range Transboundary Air Pollution and the North American Agreement on Environmental Cooperation.[111] Notably, neither of these agreements actually entailed any commitments other than simply meeting to talk about issues. Likely, they could pass because they required no implementing legislation, given that the capacity to negotiate treaties is firmly entrenched in the executive's portfolio.

Distinct from these agreements, Minamata's justification was not because it was an inherent power of the executive, but rather because of the wide swath of existing American laws regulating mercury.[112] Together, these laws demonstrated that the president had already been explicitly delegated all necessary powers, negating the need for any argument resting on an expansive view of ex ante authorization. The AQA took a similar approach, given that, while it did entail substantive obligations, it was also building off another domestic law, the CAA.[113] Particularly, it limited many of its emissions levels to what was achievable under the then-upcoming Title IV of the CAA Amendments.[114] Thus, congressional approval was in practice ex ante and, like the previous example, express in its delegated powers.

The Paris Agreement's acceptance thus emulated the UNECE convention, given that it largely made no commitments other than formulating plans and updating other nations on their progress, so the Obama Administration was able to justify its acceptance on the president's powers delegated through the U.S. Constitution, the previous senatorial acceptance of joining the UNFCCC, and the passage of the Global Climate Protection Act, which only vaguely advocated for greater U.S. involvement in global climate affairs.[115] No substantive ex ante or ex post legislation was used, likely because there were no substantive commitments to begin with.[116]

Similarly, others have identified the potential for the IMO to regulate climate matters based on the precedent of the International Civil Aviation Organization's (ICAO's) Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) program.[117] This is because the program was accepted by the executive branch, solely based on the ex ante approval theoretically derived from Congress passing the Convention on International Civil Aviation (the Chicago Convention), the ICAO's founding charter, through the Article II treaty process.[118] Yet, like the Paris Agreement, CORSIA contains no binding provisions and is fully optional for airlines to participate in for at least the near future.[119] Together, these examples illustrate that the executive has no special privilege concerning environmental matters,[120] and so, absent any authorization beyond ex ante congressional approval, powers may be justified as already delegated through initially unrelated, past pieces of legislation.

106. 1 U.S.C. §112b(c).
107. *See* Yoo, *supra* note 66, at 800.
108. *See* Daniel Bodansky, Center for Climate and Energy Solutions, Legal Options for U.S. Acceptance of a New Climate Change Agreement 14-16 (2015).
109. *See* Kayla Clark, *The Paris Agreement: Its Role in International Law and American Jurisprudence*, 8 Notre Dame J. Int'l & Compar. L. 107, 120 (2018).
110. Duncan B. Hollis, *Doesn't the U.S. Senate Care About Mercury?*, Opinio Juris (Nov. 12, 2013), https://opiniojuris.org/2013/11/12/doesnt-u-s-senate-care-mercury/.
111. *See* Tseming Yang, *The Minamata Convention on Mercury and the Future of Multilateral Environmental Agreements*, 45 ELR 10064, 10071 (Jan. 2015), https://www.elr.info/articles/elr-articles/minamata-convention-mercury-and-future-multilateral-environmental-agreements.
112. U.S. Department of State, Acceptance on Behalf of the United States of America (2013), http://archive.mercuryconvention.org/Portals/11/documents/Notifications/US%20declaration.pdf.
113. *See* Jason Buhi & Lin Feng, *The International Joint Commission's Role in the United States-Canada Transboundary Air Pollution Control Regime: A Century of Experience to Guide the Future*, 11 Vt. J. Env't L. 107, 125-26 (2009).
114. *Id.*
115. Paris Cover Memo, *supra* note 10.
116. "Substantive" in the sense of compelling any action beyond policy planning.
117. *See* Aoife O'Leary & Jennifer Brown, Columbia Law School & Environmental Defense Fund, The Legal Basis for IMO Climate Measures (2018).
118. *Id.*
119. *See* Federal Aviation Administration, U.S. Department of Transportation, Notice of Corsia Monitoring, Reporting, and Verification (MRV) Program—Rev.1 (May 25, 2023), https://www.faa.gov/media/29121. Further, CORSIA specifically excludes domestic aviation, which sidesteps awkward questions around state sovereignty, and allows the executive to rest on the greater deference afforded in international matters, which, as will soon be addressed, may be an issue for the IMO's pricing mechanism.
120. As opposed to, say, trade. *See generally* Jeanne J. Grimmett, Congressional Research Service, Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than as Treaties (2012) (describing why trade specifically as a subject matter is more able to avoid the Article II procedure); *see generally* Hathaway, *supra* note 68, at 1236 (describing the "gradual move towards concluding trade agreements primarily as congressional-executive agreements").

However, ex ante congressional authorization for environmental agreements, even absent past pieces of supporting legislation pursuant to the subject, may be itself sufficient if that authorization is detailed enough so that the executive is only filling in the gaps. In *Japan Whaling Ass'n v. Cetacean Society*, environmental groups sued the Secretary of Commerce for choosing to not designate Japan as noncompliant with the International Convention for the Regulation of Whaling zero-tolerance policy on whaling, and thus not applying the appropriate economic sanction, in exchange for coming to an agreement with the nation to slowly limit its whaling activities over the years.[121] The environmental groups argued the Pelly and Packwood-Magnuson Amendments dictated that the Secretary of Commerce was required to designate, and thus sanction, countries that participated in whaling, as the amendments required sanctioning when nations "diminish the effectiveness" of the overall treaty.[122]

The Supreme Court found that while it was true the Secretary had a non-discretionary requirement to sanction noncompliant nations, creating an arrangement with the nation to slowly phase out whaling was sufficient to conclude that it would no longer "diminish the effectiveness" of the treaty, and thus was not out of compliance and did not need to be sanctioned.[123] In particular, the Court noted that "Congress used the phrase 'diminish the effectiveness' to give the Secretary a range of certification discretion."[124] It further noted that the goal of the agreement was quite clear—to stop whaling—and there were no questions concerning whether the executive had sufficient authority to conclude the executive agreement with Japan, which depended on the executive's power to impose economic sanctions on Japan, if it fell out of compliance.[125] In sum, the goal and authority were present; it was only the exact form of the arrangement of how that authority would be used to realize the goal that was ambiguous. Therefore, it was the "gap" that was filled in, and the Court took no issue with it.

The other side of the coin was presented in *Alaska*. APPS, and MARPOL Appendix III, set out the precise arrangements and procedures that were to be used to designate the North American ECA, as well as the general regulations of what constitutes an ECA.[126] The goal was equally clear: to reduce emissions within specific jurisdictions.[127] The issue was whether the executive branch had sufficient authority to accept and implement such a plan.[128] Thus, the "gap" in this case concerned authority. Yet, the judge swiftly assumed that, if Congress had agreed to a specific procedure to create a specific designation, to be carried out by the executive branch, then it must have implicitly designated the authority to do so.

Together these examples suggest that ex ante congressional authorizations are themselves sufficient to designate substantive powers to the executive, independent of preexisting legislation, if the authorization plainly states the goal and at least either the explicit powers or the specific arrangement to realize the goal. The absence of one of these factors invites one to "fill in the gaps"; the absence of both invites allegations that the executive is engaging in legislative activity.

The exercise of legislative or rulemaking power, as opposed to executive or rule-enforcing power, was foremost illustrated in *Field* through the Court's explanation that the president's imposition of tariffs was not legislative, as Congress had set the specific tariff rates, the conditions upon which they would be triggered, and the overarching goal to equalize tariff rates between the United States and foreign nations.[129] The president's sole discretion was factual, determining when the triggering condition of unequal tariff rates was present and concerning what commodities.[130]

Similarly, in *J.W. Hampton Jr. & Co. v. United States*, the Court found that the president was allowed to choose when to impose tariffs pursuant to an act of Congress when there existed an "intelligible principle to which the person or body authorized to fix such rates is directed to conform."[131] While the Supreme Court has never chosen to explicitly define "intelligible principle," these cases demonstrate that an intelligible principle exists when the goal of Congress is explicit and the executive has been vested in the sufficient and specific powers to ensure the goal, even if the exact arrangement is up to executive discretion.[132] It follows that the authority to see a goal through and the arrangement to see a goal through imply each other. Thus, the absence of one of these factors does not imply the executive is acting with legislative authority.

The GHG pricing amendment does clearly speak to the goal of reducing air pollution, the same goal Congress consented to when passing the amendment to APPS to implement Annex VI. Thus, the above point shifts the question as to whether that goal was accompanied by either the explicit power to accept amendments or the arrangements those amendments must create. Given the latter is not present, we must focus on the former, and ask how much power Congress intended to delegate to the Secretary of State.

121. 478 U.S. 221 (1986).
122. *Id.* at 224.
123. *Id.* at 236.
124. *Id.*
125. *Id.* at 241.
126. IMO Res. MEPC.176(58), *supra* note 53, at 39-40.
127. APPS, Pub. L. No. 96-478, 94 Stat. 2297 (1980), *amended by* Maritime Pollution Prevention Act of 2008, Pub. L. No. 11-280, 122 Stat. 2611 (which added Annex VI to the modified amendment procedure).
128. Alaska v. Kerry, 972 F. Supp. 2d 1111, 1134 (D. Alaska 2013).
129. Field v. Clark, 143 U.S. 649, 692 (1892):
> Congress cannot delegate legislative power to the President is a principle universally recognized as vital . . . . The Act . . . is not inconsistent with that principle. It does not in any real sense invest the President with the power of legislation. . . . Congress itself prescribed in advance the duties . . . [b]ut when he [the President] ascertained the fact that duties and exactions reciprocally unequal and unreasonable were imposed upon . . . the United States . . . it became his duty to issue a proclamation . . . which Congress had determined should occur.

130. *Id.*
131. J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).
132. *Id.* In *Hampton*, the exact arrangement that was left up to the executive to determine was when and how much to modify or terminate import duties on foreign goods.

As noted in *Alaska*, the congressional record does reflect Congress' assumption that the whole expedited amendment would be used for "technical" amendments. Specifically, the House Committee on Merchant Marine and Fisheries stated, "This rapid amendment process provides for relatively rapid updating of technical provisions . . . . [It] is necessary to stay abreast of new technology, thereby ensuring effective control of pollution from ships operating in the marine environment."[133] Hence, the question is whether the GHG pricing mechanism constitutes a "technical" provision.

At first glance, "technical" in this statutory context may simply mean "relating to technology," and thus would suggest the amendment process intends to update which technologies may be used. For instance, in 2017, MARPOL Annex VI was amended to allow ships to use high-sulfur fuel if they have an alternative technology to reduce their sulfur emissions, such as scrubbers.[134] This amendment was uncontroversial,[135] likely because it fits into the core definition of a "technical" amendment. However, it demonstrates that technical amendments need not blanketly allow or prohibit certain technologies; they may act to promote the adoption of those technologies.[136] This more faithfully reflects that "technical" provisions are not just squarely focused on technology itself, but exist to "stay abreast" of new technology.

Further, Annex V, which can also be amended through the expedited process, expressly encourages governments to adopt "compliance incentive systems" for managing maritime pollution, such as "tax incentives . . . loan guarantees . . . special funds . . . [and] government subsidies."[137] Thus, if the annexes that are statutorily permitted to be amended through an expedited amendment have already been subject to "technical" amendments that promote adoption of new technologies to reduce maritime pollution, and those annexes also include provisions to encourage the use of economic incentives to reduce maritime pollution, there is no reason to think those "technical" amendments would be barred from adopting economic incentives that promote the adaptation of new technologies to reduce maritime pollution.[138]

However, some may argue that to combine the two considerations as such is inappropriate, given that there may be something too inherently political about the power to tax to attempt to pass it off as technical. For instance, Article 1, §9 of the Constitution dictates that Congress alone has the power of the purse.[139] *Clinton v. City of New York* further found that the executive did not even have the power to prevent specific spending, particularly through line-item vetoes of appropriations bills, to say nothing of the president's ability to spend.[140]

Yet, the political nature of taxation likely does not arise from the fact that it involves financial matters. Over the decades, the U.S. Treasury has been afforded *Chevron* deference on monetary and financial policies numerous times,[141] and given that *Chevron* was often justified as respect for the technical acumen of administrative agencies,[142] it is clear that at least some economic policies may be considered technical regulations.

Instead, the political nature of taxation may derive from the fact that it may create a debt pursuant to a political end. While financial policy may be a technical matter when it is a question of achieving the goals set by political actors, a new financial scheme that creates its own ends would be impossible to assess "without an initial policy determination of a kind clearly for nonjudicial discretion."[143] Therefore financial regulations can avoid this allegation if they are strictly instrumental to the realization of the politically set goal.[144] If the GHG pricing amendment was designed to strictly close the price gap between high- and low-carbon fuels, it would only be a technical scheme to reach the politically negotiated end of lessening air pollution, similar to the U.S.-Japanese agreement approved by *Japan Whaling*.[145]

Thus, the comparable cases distinction between executive and legislative rulemaking did lead to the previously proposed tripartite scheme to understand what constitutes an "intelligible principle" for executive fulfillment of ex ante congressional authorization—that is, the existence of a congressionally approved goal and either the delegated authority or specific form to conclude it. Given the lack of direction APPS provides toward the arrangement or form of an amendment, one can only justify the scheme if it is argued that Congress did delegate the power to conclude amendments, particularly technical ones, and that the

133. *Alaska*, 972 F. Supp. 2d at 1138-39.
134. IMO, Res. MEPC.286(71), at 6, IMO Doc. 71/17/Add.1 (July 7, 2017).
135. "Uncontroversial" in the sense that it was passed in the United States through the tacit amendment procedure, meaning the nation never expressed an opinion on it, and thus it was tacitly approved.
136. In this case, you can use cheaper, high-sulfur fuels, if you pay to install the necessary scrubbing equipment.
137. IMO, Res. MEPC.295(71), at 27-28, IMO Doc. 71/17/Add.1 (July 7, 2017).
138. *See generally* Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 146 (1941) ("In an increasingly complex society, Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing, for example, a tariff rate . . . .").
139. U.S. Const. art. I, §9.
140. 524 U.S. 417 (1998).
141. *See generally* John F. Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 Admin. L. Rev. 39, 72-78 (2003) (describing the history of the general deference granted to the Treasury Department under *Chevron*); *see generally* David A. Brennen, *Treasury Regulations and Judicial Deference in the Post-*Chevron *Era*, 13 Ga. St. U. L. Rev. 387 (1996/1997) (arguing that the end of *Chevron* will change the amount of deference granted to the Treasury Department).
142. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 866 (1984) ("the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests, and is entitled to deference: [when] the regulatory scheme is technical and complex").
143. Baker v. Carr, 369 U.S. 186 (1962).
144. While Congress did not ex post agree to the goal of limiting GHGs, Section 1.A demonstrated that they did consent to follow the goals of MARPOL, specifically as APPS requires that "the Secretary shall administer and enforce the MARPOL Protocol." *See* 33 U.S.C. §1903(a). Further, the executive has broad discretionary powers to negotiate treaties and set objectives, and the issue largely comes from the implementation of these treaties. *Cf. supra* Section I.B (describing the executive's capacity to negotiate and set the goals of the Paris Agreement, but that it is insufficient to ensure any substantive actions could be taken).
145. Japan Whaling Ass'n v. Cetacean Soc'y, 478 U.S. 221, 222 (1986).

GHG pricing mechanism fits into this category. However, the GHG pricing mechanism, as an economic measure, may be designed in a way that includes a political edge, making it an imperfect argument.

Conceivably, this may not be an issue. The delegated powers to conclude an agreement need not be particularly great, if the agreement itself does not require those powers, such as the minor and technical amendments that have already been passed through APPS §1909(b). This begs the question of how much delegation the executive would need to accept and implement the GHG pricing scheme, which invokes the final set of considerations. The third group of considerations consists of how the agreement affects state laws, its impact on the nation as a whole, its duration, and whether it needs subsequent legislation. Each of these considerations is touched on by one of the most high-profile cases involving an executive attempt to bypass Article II, *Made in the USA Foundation v. United States*.[146]

This case concerned the controversy arising from the George H.W. Bush Administration's ratification of the North American Free Trade Agreement (NAFTA) through an executive-congressional agreement pursuant to the NAFTA Implementation Act.[147] One of the three questions raised was whether NAFTA should be considered a "treaty," thus necessitating use of the Article II treaty procedure.[148] The case addresses the arguments surrounding treaty status in regard to state and federal sovereignty issues, the extent of the agreement, and the duration of the agreement.[149]

As context, the Made in the USA Foundation sued in the interest of preventing manufacturing jobs from moving overseas through NAFTA,[150] and given the lack of statutory evidence concerning the respective scopes of the Article II and congressional-executive amendment processes, addressed "the language of the Framers, from historical practice and from Supreme Court precedents."[151] The federal government argued that each of these points was misguided,[152] and that there was no compelling reason to argue about the procedure an agreement should follow, which the judge identified as the "interchangeability" argument. It argued that this suggested NAFTA was allowed to be an executive-congressional agreement, as much as it was allowed to be an Article II treaty.[153] The ruling pointed out that this argument would mean that any agreement could be a congressional-executive agreement.[154]

The state sovereignty issue was largely proffered by the plaintiff, who argued that NAFTA had the opportunity to substantially infringe on state law by both dictating domestic regulations and subjecting domestic compliance to international arbitration.[155] It then argued the Compact Clause demonstrates that the Framers of the Constitution divided treaty types based on their impacts on sovereignty, and that senatorial testimony reflects that they too believed the sovereignty issues would require NAFTA to be a treaty.

Yet, the arguments oscillate on the importance of sovereignty, at some points suggesting that "agreements impinging domestic sovereignty *must* be ratified as treaties,"[156] and at other points only that "the *degree* to which an international agreement . . . [has] a direct impact on matters normally regulated by state and federal legislative processes" or "a treaty is distinguishable from a non-treaty by . . . *the degree* to which it constrains sovereignty."[157] In response, the government argued that *United States v. Belmont*,[158] *United States v. Pink*,[159] and *Dames & Moore v. Regan*[160] each demonstrated the Supreme Court upholding a congressional-executive agreement that contravened state law, thus suggesting that sovereignty infringements alone do not guarantee that an agreement must be a treaty.

Interestingly, both perspectives can be simultaneously correct, if one takes the expansive view of the plaintiff's arguments. For context, the plaintiff's theory is referred to by both the government and the judge as a multipronged test,[161] which clearly illustrates that there are multiple features to consider. And given that it was created to fill the statutory silence on the question, it necessarily includes a collection of indirect or peripheral arguments to fill this ambiguity.

Often when legal tests include a number of considerations,[162] all considerations are meant to be balanced together, unless a test explicitly specifies that only one,[163] some,[164] or all prongs must be met.[165] The inverse interpretation—that the plaintiff intended for the fulfillment of only one prong to satisfy their proposed "features test"—would be hard to justify, since it includes considerations that no party would find dispositive, such as "analysis provided by law review articles."[166] If this test is to be rightfully understood as a balance of all of these considerations, then the government's position that courts have sometimes accepted international agreements in the form of congressional-executive agreements despite them violat-

146. 56 F. Supp. 2d 1226 (N.D. Ala. 1999).
147. *Id.* at 1229.
148. *Id.* at 1230 ("Do NAFTA and the Implementation Act constitute a 'treaty' as contemplated by Article II, Section 2 of the Constitution?").
149. *Id.* at 1280-305.
150. *Id.* at 1249-50.
151. *Id.* at 1290.
152. *Id.* at 1280-305.
153. *Id.* at 1285-86.
154. *Id.* at 1286-87 ("Thus, the Government's argument effectively amounts to an 'interchangeability' argument, claiming that the President and Congress may utilize congressional-executive agreements in place of the Treaty Clause procedure under almost any circumstances.").
155. *Id.* at 1283-85.
156. *Made in the USA Found.*, 56 F. Supp. 2d at 1281 (emphasis added).
157. *Id.* at 1282, 1283 (emphasis added).
158. United States v. Belmont, 301 U.S. 324, 332 (1937) ("this rule in respect of treaties [of them preempting state law] is established by the express language of cl. 2, Art. VI, of the Constitution").
159. United States v. Pink, 315 U.S. 203 (1942).
160. Dames & Moore v. Regan, 453 U.S. 654 (1981).
161. *Made in the USA Found.*, 56 F. Supp. 2d at 1279-80.
162. Such as the four factors of the fair use test. *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (for an example of its usage).
163. Such as the political question doctrine test. *See generally* Baker v. Carr, 369 U.S. 186 (1962) (where the Court created the test).
164. Such as the Howey test. *See generally* Securities & Exch. Comm'n v. W.J. Howey Co., 328 U.S. 293 (1946) (where the Court created the test).
165. Such as the Lemon test. *See generally* Lemon v. Kurtzman, 403 U.S. 602 (1971) (where the Court created the test).
166. *Made in the USA Found.*, 56 F. Supp. 2d at 1286.

ing state sovereignty is in no way conclusive, as that is just one of many features.

Importantly, a sign that this is the correct interpretation of state sovereignty issues within the framework of the multipronged test, specifically that it acts as a persuasive but not determinate part, would be that the only cases to allow for state sovereignty violations did so when none of the other listed factors were influenced. The three cases offered by the federal government—*Belmont*, *Pink*, and *Dames & Moore*—all have to do with the highly specific subject matter of settling foreign financial claims within the United States, despite the government's claim this represents a universal principle. If this were a universal principle, one would expect the federal government to have been able to find precedent outside the exceedingly narrow power of the executive being able to violate state law on a power that is already acknowledged to be within the purview of the executive branch.[167]

The judge in *Pink* emphasized this, extolling at length on how the president already has special power to settle foreign claims.[168] It follows that if the president already has the specific authority, then the states have already somewhat consented to being encroached upon, negating this consideration in these narrow circumstances. Yet, this in no way suggests that states have always consented to being encroached upon in every way, and thus the state sovereignty factor may still be influential, if not dispositive.

This explanation also may be one of the least controversial readings of the government's own position concerning the small number of cases that would actually require the Article II process—those that could not be passed by congressional statute.[169] Congressional statute cannot override the Constitution; therefore, anything approaching an infringement of a constitutionally established reserved power would naturally be subject to the Article II process. Quoting Prof. Anne-Marie Slaughter, Prof. Laurence Tribe mentions that the Senate has a unique connection to the states:

> The Senate is accountable to the people as a whole, but also ensures the equal representation of the states, sovereign entities in their own right. . . . [T]he Senate must give its consent by a super-majority of two thirds, ensuring that the interests of the people and the states cannot be bargained away to a foreign nation by a simple majority.[170]

In short, it may simply be said that as an issue approaches infringement on state sovereignty, the stronger the justification for demanding the Article II process.

Whether the GHG pricing scheme would infringe upon states' reserved powers would depend on whether only international shipping or both international and domestic shipping are priced. The capacity to regulate foreign and interstate trade is a power of Congress under Article I, §8, Clause 3,[171] yet intrastate trade regulation is a reserved power of the states.[172] While intrastate maritime commerce makes up only a fraction of U.S. commerce, it has grown significantly since the 2007 creation of the Maritime Highway System.[173] In particular, at least Alabama, Alaska, Arkansas, California, Hawaii, Louisiana, Texas, and Virginia each include a minimum of one route that includes at least two of their own ports,[174] making any transit between them possibly "intrastate."[175]

Thus, if the GHG pricing scheme were to be applied exclusively from the power of the federal government, the usual state and federal sovereignty issues that surround emissions control policies could arise. As will be explained in Part II, this is one of the reasons that a SIP call pursuant to the CAA could be helpful.

Made in the USA goes on to address the last two of the C-175 considerations together—the extent of the agreement affecting the nation as a whole and the duration of the agreement[176]—through the lens of the Founders' intent. The plaintiff insisted, and the defense did not argue, that

167. In fact, the executive's power to settle foreign claims is not even traditionally based on any concern of the delegation of power or federal preemption (the only concerns that would make this power relevant as an example to show that treaties may generally violate state law), but as a matter of convenience. *See* McDougal & Lans, *supra* note 83, at 269 ("[I]t would be a breach of good faith and, in the phraseology of international jurists an 'international delinquency,' if Congress there-after failed to appropriate funds to pay the award.").

168. United States v. Pink, 315 U.S. 203, 230 (1942) ("Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President . . . .").

169. *Made in the USA Found.*, 56 F. Supp. 2d at 1286-87 ("Thus, the Government's argument effectively amounts to an 'interchangeability' argument, claiming that the President and Congress may utilize congressional-executive agreements in place of the Treaty Clause procedure under almost any circumstances." This begs the question of what falls outside of "almost any.").

170. Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1268 (1995).

171. U.S. Const. art. I, §8, cl. 3.

172. This is given that the Commerce Clause only applies to interstate commerce, *see id.*, and the Tenth Amendment limits the powers of the federal government only to what is delegated. *See* U.S. Const. amend. X.

173. U.S. Maritime Administrator Mark Buzby testified in 2019 that the program moved 35,215 20-foot equivalent units (a common unit to measure maritime freight) by water. *See Hearing Highlights Benefits of U.S. Maritime*, Seafarers Int'l Union (Aug. 1, 2019), https://www.seafarers.org/seafarerslogs/2019/08/hearing-highlights-benefits-of-u-s-maritime/.

174. *See generally* Maritime Administration, U.S. Department of Transportation, United States Marine Highway Routes (2025), https://www.maritime.dot.gov/sites/marad.dot.gov/files/2025-02/U.S.%20Marine%20Highway%20Program%20Routes%20Map_FEB-2025.pdf (presenting a map of the current highway program and its ports).

175. This consideration may be sidestepped in the same way that EPA has historically been able to regulate (intrastate) motor emissions, by treating clean air as a cross-state market good and allowing it to be regulated as interstate commerce, but this strategy has weakened over the years as federal supremacy in environmental matters has waned. *See* Molly Weiner, *Clearing the Air: Navigating Commerce Clause Complexities in Federal Environmental Regulation Amidst Rising Air Pollution Challenges*, Yale Ctr. for Env't L. & Pol'y (Oct. 30, 2023), https://envirocenter.yale.edu/posts/2023-10-30-clearing-the-air-navigating-commerce-clause-complexities-in-federal-environmental.

176. While the precise meaning of "[t]he extent to which the agreement involves commitments or risks affecting the nation as a whole" and "[t]he proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement" could be an article unto itself, here I use the least controversial gloss of both—that is, the importance of the agreement's impacts and the duration of the agreement.

much of the Framers' original intentions surrounding the use of international agreements were influenced by the writings of Emmerich de Vattel.[177] The plaintiff argued that the Supreme Court in *Holmes v. Jennison* stated that the Framers' familiarity with Vattel should indicate that their intentions for Article II were for agreements "having greater consequences."[178]

The judge, in her own reading of Vattel, disagreed, stating that Vattel's true distinction between treaty and agreement was temporal, with treaties being only those intended to last for a considerable time, and agreements permissible for more transitory issues.[179] Because NAFTA statutorily was able to be terminated on short notice, the judge considered that Vattel, and thus the Founders, would have considered it an agreement.[180]

Yet, the factor of duration is hardly helpful to distinguish between treaties and agreements, absent any frame of reference on how durable an agreement must be in order to be considered of notable long or short duration. President Dwight David Eisenhower's Administration took the view that a congressional-executive agreement could only be valid for the duration of the presidential term in which it was created.[181] However, with the rise of congressional-executive agreements following the Eisenhower era, a large swath of the United States' foreign agreements have surpassed the term in which they were signed, making such a position politically infeasible.[182]

Luckily, the total life-span of an agreement may be immaterial if, in practice, it may be shortened. NAFTA's withdrawal clause is what allowed the judge in *Made in the USA* to reason it was not a treaty.[183] This makes sense in theory, as a shorter agreement would necessarily need less delegated power and thus a lower bar of congressional approval. This relationship is typified by trade agreements, given they are one of the most likely types of agreement to be concluded not Article II treaties,[184] and also are some of the most likely to include withdrawal agreements.[185] If the GHG pricing mechanism were to be passed without additional congressional action, a withdrawal clause, ideally based on technical and objective criteria, would be a necessity.

This leaves only the final of the C-175 factors, "the extent to which the agreement involves commitments or risks affecting the nation as a whole." Extent-wise, the plan could either be interpreted as incredibly narrow or broad, depending on whether the second-order effects are considered. The breadth of the impact of the Secretary of State joining the scheme would be, on a primary level, only that American-owned vessels would be subject to an unknown level of economic surcharges or rebates at various points during the trade process.

Yet, on a secondary, deeper level, if we consider the United States joining the plan as important for the scheme to actually succeed, the Secretary of State's assent is also helping to create an international system in which all trade is impacted, and thus exists the possibility of a widespread rise in prices. Importantly, this is not a given; if the system ends up being a perfect closed system, in which every dollar raised through fees is dispersed as rebates, then the only injection point of higher prices would be from the higher costs of alternative fuels that ships would be incentivized to use.[186] Thus, a priori, it is difficult to determine how much this system would affect the nation's economy, but it presents the possibility that the scheme becomes an "extraordinary case," in terms of the MQD.

Taken together, the group of signal considerations suggests that the GHG pricing amendment would receive no additional support from the existing powers of the executive. Assuming the amendment contains substantive provisions, and barring the support of any other piece of legislation, the ex ante delegation from Congress to the executive would require both the goal of the agreement and either the specific powers or specific arrangements to be stated. Congressional intent, constituting the only consideration that, absent clear statutory language, speaks to the amount of delegated power, solely demonstrates the goal of the agreement and opens the door to something like the GHG pricing amendment under the guise of a "technical" scheme; but it does not affirmatively outline this as a possibility, lowering the understood level of delegated powers.

The agreement itself, as something that could be both wide-reaching and potentially durable, impactful on state sovereignty, and most comparable to other treaties that did have a higher level of congressional authorization, does seem to require a more explicit delegation of power from Congress. This disconnect between the level of delegated powers through APPS and what would be needed for the GHG pricing amendment to be passed without further congressional action introduces issues with the NDD and the MQD.[187]

177. Made in the USA Found. v. United States, 56 F. Supp. 2d 1226, 1280, 1288 (N.D. Ala. 1999).
178. *Id.* at 1280.
179. *Id.* at 1317.
180. *Id.* at 1281. The case also notes that this is the same interpretation of Vattel in *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978), but also reads Vattel's opinion on the treaty versus agreement distinction to have intended the need for implementing legislation to be an additional consideration.
181. Oliver J. Lissitzyn, *Duration of Executive Agreements*, 54 Am. J. Int'l L. 869, 870 (1960).
182. *See generally* Hathaway, *supra* note 68 (discussing the general rise of the congressional-executive agreement through the latter half of the 1900s).
183. *Made in the USA Found.*, 56 F. Supp. 2d at 1317 ("[T]he ability of a party to unilaterally terminate on short notice at least suggests that there may not be a treaty in the Treaty Clause sense.").
184. Hathaway, *supra* note 68, at 1240.
185. *See* Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 Duke L.J. 1615 (2018).
186. Admittedly, a perfectly closed freebate system would still cause the prices of different routes and commodities to be individually distorted, even if those distortions equalize out. The depth of these impacts would likely be proportional to however high the fees are set.
187. The same issues would likely be faced by administrative agencies, given that APPS §4(c)(1)-(2) dictates that it is the U.S. Coast Guard and EPA that have to actually promulgate the regulations after the Secretary of State accepts the amendments. *See* 33 U.S.C. §1903(c)(1)-(2). *See infra* Section II.D.

C. Issues With the Separation-of-Powers Doctrines

An executive action lacking the appropriate delegated authority would create potentially judiciable issues as a violation of any specific constitutional article, yet such situations may often be adjudicated in the broader terms of the NDD and the MQD. This is particularly true with potential violations of the Treaty Clause, given that the court in *Made in the USA* reminds us that "in the over two hundred years of this nation, the Supreme Court of the United States has not specifically and definitively decided the principles applicable to"[188] determining which international agreements need to rightfully be an Article II treaty, as opposed to a congressional-executive agreement. This section addresses both in turn.[189]

1. The NDD

The NDD has never been well-defined,[190] with some academics arguing it never existed.[191] Yet, the Supreme Court has not shied away from using it, broadly defining it as the legislature wrongfully delegating its own power away, which would conflict with Article I, §1 of the Constitution dictating that "all legislative power" be vested in Congress.[192] The Court has also recognized that, in an increasingly complicated society, some amount of factual and technical determination needed to be performed outside of Congress, for functionality reasons.[193] The line between permissible and impermissible delegations, touched upon earlier as the distinction between legislative and executive power and the existence of an "intelligible principle," has been hotly debated for decades, if not centuries.[194]

The most famous examples, *Hampton* and *Mistretta*, both emphasized the previously noted notion of an intelligible principle as Congress having the power to "lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, [and] such legislative action is not a forbidden delegation of legislative power."[195] And in quoting *American Power & Light Co. v. Securities & Exchange Commission*, the Court deemed it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[196]

Yet, in *Loving v. United States*, the Court noted that the NDD has generally loosened over the years, only having been used twice, and the Court has upheld, "without exception, delegations under standards phrased in sweeping terms,"[197] disagreeing with its own intelligible principle test and shifting the question from the existence of an intelligible principle to "whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority."[198] In other words, whether there were boundaries set within the delegation and how much existent authority the executive already has constitutionally.

Taking the Court at its word, the "very broad delegation" would simultaneously suggest that the original understanding of the NDD, which was found to be violated twice in the New Deal era, has expanded, and that these examples of "very broad delegations" represent the current outer bounds of delegations accepted in the purview of the NDD.

Together, both *Hampton* and *Mistretta* cite a number of precedents in regard to this outer scope: *National Broadcasting Co. v. United States*, which found that the Federal Communications Commission was empowered through the Communications Act of 1934 to cancel broadcasting licenses "in the public interest"[199]; *New York Central Securities Corp. v. United States*, which found that the Interstate Commerce Commission could allow, through the Transportation Act, transportation firms to be merged for the sake of the "public interest in the adequate transportation service [that was] sought to be secured by the Act"[200]; *Yakus v. United States*, which found that the president was allowed to appoint a price administrator through the Emergency Price Control Act of 1942 as long as he followed the Act's objectives (to stabilize commodity prices and prevent wartime inflation) and boundaries (the price fixings need be fair, equitable, and set in consideration to pre-war prices)[201]; and *Whitman v. American Trucking Ass'ns*, which found that EPA was allowed to promulgate national ambient air quality standards (NAAQS), based on whether they were "requisite to protect public health" with "an adequate margin of safety."[202] In *Whitman*, the Court summarized the

188. *Made in the USA Found.*, 56 F. Supp. 2d at 1230.
189. Some have claimed that the NDD is pointless because it has only been successfully used twice. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002). Yet, given Justice Neil Gorsuch's dissent in *Gundy v. United States*, which advocated for a revival of the NDD, it is reasonable to assume it may be back in play. *See* Gundy v. United States, 588 U.S. 128 (2019) (Gorsuch, J., dissenting). Some have argued that this belief is further justified given the Supreme Court's docket including two recent cases alleging NDD violations, *Schools, Health & Libraries Broadband Coalition v. Consumers' Research* and *Federal Communications Commission v. Consumers' Research*. *See* Scott Abeles, *Move Over* Loper Bright*—Nondelegation Doctrine Is Administrative State's New Battleground*, Carlton Fields (Dec. 3, 2024), https://www.carltonfields.com/insights/publications/2024/move-over-loper-bright-nondelegation-doctrine-is-administrative-states-new-battleground (citing the then-upcoming Federal Commc'ns Comm'n v. Consumers' Rsch., No. 24-354 (U.S. June 27, 2025)).
190. *See* Chad Squitieri, *Towards Nondelegation Doctrines*, 86 Mo. L. Rev. 1240, 1240 (2022) (claiming that the "malleable test [the NDD's intelligible principle] has failed to produce a judicially manageable standard").
191. *See generally* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021) (arguing that, prior to 1789, multiple instances of legal delegations of powers occurred, thus refuting the claim that the Founders intended to create an NDD); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379 (2017) (stating that the NDD has never been used by courts to limit legislative delegations of power).
192. U.S. Const. art. I, §1.
193. Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 146 (1941).
194. *See* Whittington & Iuliano, *supra* note 191; Squitieri, *supra* note 190.
195. Mistretta v. United States, 488 U.S. 361, 409 (1989).
196. *Id.*
197. 517 U.S. 748, 772 (1996).
198. *Id.* at 773.
199. 319 U.S. 190, 200 (1943).
200. 287 U.S. 12, 13 (1932).
201. 321 U.S. 414, 426-28 (1944).
202. 531 U.S. 457, 458 (2001).

trend well by remarking that "[i]n *Touby*, for example, we did not require the statute to decree how 'imminent' was too imminent, or how 'necessary' was necessary enough, or even—most relevant here—how 'hazardous' was too hazardous," and thus these limited words provided a sufficient intelligible principle.[203]

Applying these precedents, the difference between the delegated authority necessary to pass the GHG pricing amendment under APPS and the actual amount of delegated authority through APPS seems, at first, minor enough to avoid NDD issues. The limited set of comparable environmental cases in the previous section suggests that for APPS to be valid, it should at least communicate the intention of the amendment, and then either confer the substantive power or specific arrangements to achieve these goals. Thus, the outer limits of what can avoid NDD issues seems sufficiently broad for our case.

Specifically, both *Whitman* and *Yakus* demonstrate that, as long as there is a specific objective, the executive need not have the preexisting power to reach or much of a congressionally pre-specified arrangement on how to reach that objective. At most, it suggests that the eventual arrangement has some kind of "boundary." As previously stated, §1909(b) largely writes a blank check for what any amendment will look like, which was taken to mean that any claim on implicit delegated authority was dampened, as opposed to having the Act fully specify the arrangement, as the Tariff Act of 1890 did.[204] Yet, *Yakus* more specifically draws the line as to where the specified level of congressional ex ante arrangement needs to be for an arrangement to not be "legislative"—that is, it must have boundaries.[205]

Asking whether §1909(b) has boundaries would, at first glance, lead to a resounding no. Nothing in the specific section refers to a boundary of what the amendment may entail.[206] Yet, *National Broadcasting* and *New York Central Securities Corp.* both emphasize that the intelligible principle of a vague delegation of power may be found through its statutory context. APPS includes two sections creating substantive, specific obligations: §1904, which concerns the issuance of air pollution certificates, and §1905, which concerns the proper creation and maintenance of pollution reception facilities. Thus, relevance to these sections may constitute some boundary.

However, the boundaries discussed in *Yakus* are distinct, as they introduce additional considerations, independent of the actual goal itself, to limit what may be done to accomplish the goal. As the government argued in *Alaska*, §1909(b) amendments are certainly bound by their relevance to the subject matter of APPS itself.[207] However, this vague criteria of relevance does little to define what those boundaries are. Returning to *Whitman*'s citation of *Touby*, it is true that "imminent," "necessary," and "hazardous" did not need to be defined to constitute a boundary, yet those boundaries only limited what substances could be added to a regulation schedule, not how to create the regulatory scheme itself.[208] Thus, ill-defined boundaries seem sufficient when they bind the goal of the regulatory scheme, not when they concern the extent of the executive's ability to author the statutory scheme or the power to implement it. Upon second glance, the NDD issues of APPS §1909(b) become clear.

Nevertheless, one might argue that, as an international agreement, the potential amendment would benefit from deference to the executive in foreign affairs, negating NDD allegations. For instance, the defense in *Alaska* made this point.[209] The executive is certainly entitled to some additional deference in terms of power already within the president's purview, as remarked in *United States v. Curtiss-Wright Export Corp.* that the executive is the "sole organ of the federal government in the field of international relations."[210] This deference related to international agreements was demonstrated through *Japan Whaling*, which afforded the executive branch broad powers to create a regulatory framework based only on certain goals and delegated powers (in that case, the ability to impose economic sanctions).[211]

While APPS does not have specified powers to use in pursuit of its goal to reduce maritime air pollution emissions, it does have some powers to pursue that goal. That is, the executive does have the explicit ability to broadly accept or reject international agreements.[212] Therefore, a limit to what may or may not be accepted as an amendment would be sufficient to justify that the executive has sufficient powers to implement the agreement, which together with a specified goal would implicitly justify any scheme to use those powers to achieve the goal.

Yet, this would only concern the executive's prima facie ability to accept an agreement in general.[213] Indeed, if the discussion was pursuant to whether the Secretary of State could simply accept an agreement, and it implicated no substantive commitments, then much like the Paris Agreement[214] it would likely not violate any separation-of-powers doctrine. Yet, APPS §1909(b) makes clear that both the Secretary of State would be required to accept it and EPA and the U.S. Coast Guard would be required to promulgate regulations based on it.[215] The non-self-executing nature means that one cannot, as it stands, argue that the powers have already been delegated, which alongside a congressionally accepted goal would have allowed the executive the leeway to create the details of the arrangement, as happened in *Japan Whaling*.[216]

203. *Id.* at 476.
204. *See* Ackerman & Golove, *supra* note 75, at 827.
205. *Yakus*, 321 U.S. at 435.
206. 33 U.S.C. §1909(b).
207. Alaska v. Kerry, 972 F. Supp. 2d 1111, 1146 (D. Alaska 2013).
208. *Whitman*, 531 U.S. at 476.
209. *Alaska*, 972 F. Supp. 2d at 1147.
210. 299 U.S. 304, 321 (1936).
211. Japan Whaling Ass'n v. Cetacean Soc'y, 478 U.S. 221, 222 (1986).
212. 33 U.S.C. §1909(b).
213. Something already demonstrated in the case of amendments to MARPOL through APPS §1909(b) in Section I.A.
214. Paris Agreement, *supra* note 7.
215. 33 U.S.C. §1909(b).
216. *See supra* Section I.B.3 (for analysis of *Japan Whaling Ass'n v. Cetacean Soc'y*).

Therefore, putting aside the foreign affairs exception, the lack of sufficiently bounded standards for what constitutes an acceptable regulatory scheme under §1909(b) suggests that the executive cannot use the regulatory scheme, in conjunction with the congressionally approved goal of MARPOL, to justify the use of necessary powers to implement it, thus making any attempt to do so a violation of the NDD. As will be discussed in the next part, CAA §115 solves this issue by granting EPA a bounded power to address the issues of international air pollution.

2. The MQD

Further issues may arise under the MQD if the amendment was passed through APPS. The MQD, similar to the NDD, involves the interpretation of ambiguous statutes[217] and comes from the separation-of-powers doctrine,[218] yet distinctly is more concerned with the overall extent of the powers granted in context,[219] as opposed to whether they were granted with an intelligible principle or boundary. Recently, academics have characterized the doctrine as an older and newer version.[220]

The old version, which was never actually considered to be a unified doctrine, was most succinctly described in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, which concerned the Food and Drug Administration's claim that it may regulate nicotine and tobacco products under the Federal Food, Drug, and Cosmetic Act's mandate to regulate "drugs" and "devices."[221] Justice Sandra Day O'Connor stated that such an arrangement was misunderstood, as it would "delegate a decision of such economic and political significance to an agency in so cryptic a fashion," particularly given that it would require a "strained understanding" of certain keywords and would ignore the plain implication of Congress.[222] This idea, as supporters would claim, helps to maintain the separation of powers and prevent executive aggrandizement, by requiring Congress to be more specific the larger the power it intends to delegate.[223] This was often applied in relation to *Chevron*, either being used as a reason to reject *Chevron*, or at its first or second step.[224]

But since *West Virginia v. Environmental Protection Agency*,[225] the MQD has had new life breathed into it. There, the Court formalized the doctrine, declaring that the ability for an executive agency to answer a "major question" was dependent on a clear authorization from Congress.[226] As Justice Elena Kagan summarized in her dissent, this new doctrine seems based on two steps: first, deciding whether the agency action constitutes an "extraordinary case," based on a number of unspecific factors; and second, whether there is clear congressional authorization, above what is normally required.[227]

Given that the Court did not define what constitutes an "extraordinary case," there have been ongoing attempts to formulate a conception of it. For instance, "majorness" may be based on cost, political significance or controversy, novelty, and/or the majorness of downstream policies that could be enabled by the original statute in question being interpreted expansively.[228] Otherwise, it may be based on whether the agency's action was distinct from its traditional sphere of action, it may change the scope of the agency's powers, and it may be a "big deal."[229]

While the MQD has yet to be applied to international agreements, some have warned that agreements pursuant to a treaty, or ex ante congressional-executive agreements, may be largely found to run afoul of the new doctrine.[230] Prior delegations of power are often largely implied, and their agreements have had far-reaching impacts, making them ripe for conflict with the new doctrine.[231] APPS §1909(b) fits squarely in this designation, yet the vagueness of its congressional authorization was largely dealt with in the previous subsection on the NDD, leaving open only the question of whether the GHG pricing amendment would be an "extraordinary case."

While the extraordinariness of the scheme would largely depend on the emissions price, a wide range of prices could be considered major or not dependent on whether the first- or second-order economic effects are considered. The first-order economic impacts would be the fees that American citizens and their ships paid into the mechanism, and second-order impacts would be the economic ramifications of far-off and seemingly obscure parts of global supply chains now having to contend with, and likely pass on, the cost of the mechanism. Notably, the primary impacts would be minimal at most, largely because the vast majority of the world's ships are flagged for "flag of convenience" States, such as Liberia and Panama.[232] Of the world's top 30 maritime shipping companies, only Matson, at Number 28, is American.[233] The secondary impacts could be much larger,

217. Biden v. Nebraska, No. 22-506, slip op. at 8-9 (U.S. June 30, 2023) (Barrett, J., concurring) (describing that the MQD is justified via the fact that "clarity may come from specific words in the statute, but context can also do the trick").
218. *See* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 Ohio St. L.J. 192, 197 (2022).
219. *Biden v. Nebraska*, No. 22-506, slip op. at 8 (Barrett, J., concurring).
220. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1023 (2023).
221. 529 U.S. 120, 136 (2000).
222. *Id.* at 161.
223. *See* Lin Ritter, *Elephants in Mouseholes: The Major Questions Doctrine in the Lower Courts*, 76 Stan. L. Rev. 1381, 1392 (2024).
224. Kate Bowers, Congressional Research Service, The Major Questions Doctrine 1, 2 (2022).
225. 597 U.S. 697 (2022).
226. *Id.* at 703.
227. *Id.* (Kagan, J., dissenting).
228. Deacon & Litman, *supra* note 220, at 1051 (describing various interpretations that may constitute a "majorness").
229. *See* Thomas W. Merrill, Stanford University, The Major Questions Doctrine: Right Diagnosis, Wrong Remedy 3 (2023) (describing more interpretations of what may trigger the MQD).
230. *See* Eichensehr & Hathaway, *supra* note 22, at 1866.
231. *Id.*
232. Encyclopedia of World Problems and Human Potential, *Evasion of Shipping Regulations and Taxes by Flags of Convenience*, https://encyclopedia.uia.org/problem/evasion-shipping-regulations-and-taxes-flags-convenience (last updated Oct. 4, 2020).
233. AXS Marine, *Alphaliner TOP 100*, https://alphaliner.axsmarine.com/PublicTop100/ (last visited June 13, 2025); *MSC Industrial Direct Full Year 2024 Earnings: EPS Misses Expectations*, Yahoo Fin. (Oct. 26, 2024), https://finance.yahoo.com/news/msc-industrial-direct-full-2024-121731956.html.

depending on the size of the emissions price, yet importantly might be a given, whether or not the United States joins the scheme.

Amendments to MARPOL only pass when more than 70% of the world's tonnage accepts them. Given the United States' minimal merchant fleet, the nation makes up less than 1% of global tonnage, meaning its acceptance or nonacceptance does little to meet the actual ratification criteria. Whether the mechanism is accepted globally is what determines whether the larger, second-order impacts are felt. If it is, then whether or not the United States accepts it would have little impact on the American merchant fleet, given that in the course of any international trade, they would be required to pay for their emissions on the high seas, making the United States' nonacceptance near meaningless. If we include the IMO's other criteria, realizing that only oceangoing ships of more than 1,000 tons would be charged under any plan, then the exemption of U.S.-flagged ships through a nation not joining the mechanism would only exempt 92 vessels.[234] Further, U.S. acceptance would have little to no effect on the price increases involved with foreign trade, felt as a secondary impact from the plan, given that foreign trade would still be subject to the mechanism.[235]

The courts may disagree, owing to the United States' hegemonic position that may influence whether other nations join, thus making the second-order economic impacts affected by the United States' decision to join. However, this would put the Court in an awkward place of attempting to judge the political ramifications of a given political decision. The Supreme Court did not challenge President Jimmy Carter's congressionally unapproved imposition of a fee on oil imports through the Trade Expansion Act of 1962.[236] Further, the Court has never fully overturned any of the two dozen economic sanction regimes that have been created by the president, solely on the basis of the International Emergency Economic Powers Act (IEEPA) of 1977.[237]

Attempting to use the economic cost of a foreign affairs arrangement to squash the executive branch's acceptance of the GHG pricing scheme would quickly put the Supreme Court in the seat of foreign affairs policymakers, something that is expressly not their purpose.[238] Thus, any consideration of costs via political ramifications to the United States' joining of the mechanism, by spurring other nations to join, is likely outside the purview of the Court. Therefore, second-order economic effects as the political ramifications of a decision seem unlikely to warrant the new MQD.

The courts may still find issue, though, in the political extraordinariness of the scheme. A review of four of the most prominent cases[239] in formation of the new doctrine may provide a more pragmatic definition for how we may define a politically extraordinary case. In *Alabama Ass'n of Realtors v. Department of Health & Human Services*, the Court found that the Centers for Disease Control and Prevention (CDC) could not impose a national housing eviction moratorium on the basis of being "necessary to prevent the introduction, transmission, or spread of communicable diseases."[240] In *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*, the Court found that the Occupational Safety and Health Administration could not compel large private employers to force their employees to get COVID-19 vaccines as a form of occupational health and safety standards.[241] In *Biden v. Missouri*, the Court found that the Affordable Care Act's mandate that citizens must buy health insurance does not follow as a function of the power to regulate commerce.[242] In *Biden v. Nebraska*, the Court found that the U.S. Department of Education could not wipe away debt from student loans on the basis of the Health and Economic Recovery Omnibus Emergency Solutions Act provision that they "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency."[243]

234. The 92 ships in question are Jones Act-compliant ships over the IMO's planned weight cutoff for emissions pricing, which is 1,000 tons. *See* Joe Greco, *What Is the Jones Act? The Benefits and Limitations of the 1920 Merchant Marine Act*, 150 U.S. Naval Inst. Proc. 1459 (2024).

235. Moreover, the consideration of secondary impacts from executive rate setting may be irrelevant altogether. *See* Memorandum Opinion from Theodore B. Olson, Assistant Attorney General, to the Deputy Attorney General, The President's Power to Impose a Fee on Imported Oil Pursuant to the Trade Expansion Act of 1962, at 78 (Jan. 14, 1982), https://www.justice.gov/file/149796/dl [hereinafter Olson Memorandum] ("[T]he Supreme Court's language in the *Algonquin* decision had distinguished between import fees, which have an 'initial and direct impact' on imports, and actions with only 'a remote impact on imports.'").

236. Proclamation No. 4744, 94 Stat. 3736 (Apr. 2, 1980).

237. *See* Andrew Boyle, *Reining in the President's Sanctions Powers*, Brennan Ctr. for Just. (Aug. 4, 2021), https://www.brennancenter.org/our-work/analysis-opinion/reining-presidents-sanctions-powers. Two recent sanction regimes under the IEEPA have received injunctions from lower courts. The first, in which the Trump Administration attempted to ban TikTok from app stores in the United States, resulted in a preliminary injunction in the U.S. District Court for the District of Columbia, before being rescinded by the Joseph Biden Administration before a final verdict was reached. *See* TikTok v. Trump, No. 1:2020cv02658 (D.D.C. 2020) (order granting preliminary injunction).

The second involves the now-ongoing dispute surrounding the second Trump Administration's use of the IEEPA to justify tariffs on several foreign nations, which sparked numerous lawsuits. The most notable, *V.O.S. Selections v. United States*, saw the Court of International Trade grant an injunction against the tariffs, arguing that the use of the IEEPA in such a manner violated the NDD by lacking an intelligible principle as to what would limit the president's tariff-making capability and violated the MQD for attempting to interpret a statue as a delegation of a vast amount of power without explicit congressional authorization. *See* V.O.S. Selections v. United States, Nos. 25-00066 & 25-00077, slip op. at 25-66 (Ct. Int'l Trade May 28, 2025). However, the injunction was stayed by the U.S. Court of Appeals for the Federal Circuit pending appeal. *See* Order at 50, V.O.S. Selections v. United States, No. 25-1812 (Fed. Cir. June 10, 2025).

238. *See* U.S. Const. art. II, §I (vesting the executive and legislature with the power to make treaties, implicitly stating the judiciary is not involved in foreign affairs policymaking).

239. *See generally* Kristin E. Hickman, *The Major Questions Quartet*, 136 Harv. L. Rev. 262 (2022) (for a broader discussion on these four cases).

240. 594 U.S. ____, slip op. at 3 (2021).

241. 595 U.S. ____, slip op. at 1-9 (2022).

242. 595 U.S. ___ (2022).

243. 600 U.S. ___, slip op. at 3 (2023).

These cases reiterate the ultimate character of the MQD as a response to potential issues regarding the separation of powers. The executive may not use indeterminate language to pass entirely new statutory schemes that otherwise would have likely needed further congressional consent, especially when the intention of the statutory basis is clearly oriented toward ends of a different subject matter. This may be considered the guidepost to envision how much any prong, or any of the multi-prong explanations of what constitutes an "extraordinary case," needs to be satisfied to actually be considered evidence of extraordinariness. In other words, this sets the level of textual demonstrability that Justice Kagan refers to as "beyond those sensible principles [that normally dictate questions surrounding agency discretion]" in *West Virginia*; it is to the level expected when Congress is granting new and substantive powers.[244]

The GHG pricing amendment's potential extraordinariness begs the question of whether there are ways to rescue the majorness of the proposed GHG pricing scheme while keeping its ambitions the same. While cost and political significance will depend on the technical design choice, certain features are more inherent, such as the traditional sphere of action for the agency, the novelty of the action, the potential downstream policies, and the change to the scope of the agency's powers. Thus, the challenge of Part III will be to identify the more flexible variables that may reduce the scheme's political significance while still maintaining its carbon-abating goals.

Together, the two separation-of-powers principles present substantive issues for passage of the GHG pricing amendment through APPS §1909(b). The NDD may be violated given that the delegation of power within APPS is not sufficiently bounded, allowing the executive to stray into the realm of legislating. The solution, as will be addressed in the next part, is to augment the delegation of power through a different piece of legislation, the CAA, and its bounded procedure, laid out in §115.

The MQD may be violated due to the GHG pricing scheme simply being "a big deal," particularly in many of the ways that C-175 illustrated, such as infringing on state sovereignty and potentially being of unlimited duration. The solution, as will be illustrated in Part III, is to craft the scheme in a way that minimizes its impacts while still reducing maritime emissions. Both solutions together work to minimize the gap between how much authority was delegated under APPS and how much authority is needed to pass the GHG pricing amendment, by raising the former and lowering the latter, sufficiently that the MQD and NDD should no longer be an issue.

II. CAA §115 as a Response to the NDD

While APPS provides the goal necessary to justify passage of the GHG pricing amendment through §1909(b), it fails to confer sufficient delegated powers to the executive to do so, or the specifics of the statutory scheme through which delegated powers may realize the goal. If the amendment is to entail substantive obligations, unlike the current phase of CORSIA or the Paris Agreement, it would need a clearer grant of delegated authority significant enough to justify the pricing scheme, yet bounded enough to not allow for inappropriate discretion. As was demonstrated by the Minamata Convention,[245] the use of existing statutes conferring substantive powers may resolve this.

A. *Why Choose CAA §115?*

The use of older pieces of legislation that delegated powers to the executive, to bolster the validity of an (expansive) international agreement pursuant to (limited) ex ante congressional delegation of power, is no panacea, particularly when it is too broad or specific. Of concern is how "the agreement negotiated fit[s] within the fabric of existing law"[246]—that is, the relevance and scope of existing law need to be sufficient to cover the agreement's obligations.

For instance, the George W. Bush Administration could have attempted to accept the Stockholm Convention on Persistent Organic Pollutants without congressional authorization, based on specific powers granted by the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[247] Yet, it was never adopted, given that these Acts may have specified powers to regulate pollutants, but not the specific powers to regulate persistent organic pollutants, and thus would need implementing legislation.[248] Therefore, the choice of legislation the executive may use to argue that certain powers are already within its purview must walk a fine line of sufficiently empowering to justify the action, but not so specific as to rule out new powers through *expressio unius est exclusio alterius*.

The legislation that would ground the GHG pricing amendment would need to delegate to the president specific and necessary powers, be based on some kind of procedure or arrangement so as to argue the executive is not legislating on its own, have the procedure be based on technical criteria so as to argue the executive is only acting as a fact finder, and incorporate some level of state and federal cooperation to avoid state sovereignty issues.

Based on these criteria, §115 of the CAA is optimal. It confers on the Secretary of State the decision to accept, and on EPA the ability to implement, an air pollution control regime based on an international agreement,[249] without being so specific as to have prescribed that air pollutants are

244. West Virginia v. Environmental Prot. Agency, 597 U.S. 697, 711 (2022) (Kagan, J., dissenting).

245. *See supra* Section I.B.3 (for review of the Minamata Convention).

246. Harold Hongju Koh, *Twenty-First-Century International Lawmaking*, 101 Geo. L.J. 725, 733 (2013).

247. Paul E. Hagen & Michael P. Walls, *The Stockholm Convention on Persistent Organic Pollutants*, 19 Nat. Res. & Env't 49, 51 (2005) (describing the legislative and political history of the United States' attempt to domestically implement the Stockholm Convention).

248. *Id.* at 51-52.

249. An Act to Improve, Strengthen, and Accelerate Programs for the Prevention and Abatement of Air Pollution, as Amended, 42 U.S.C. §7415 (2012) (CAA).

covered.[250] The section has a three-step procedure,[251] which is partially based on international technical reports,[252] negating most claims of executive law making. Lastly, it would trigger a SIP call,[253] enabling federal and state officials to work together to craft regulations acceptable to both sides.

B. CAA §115 Context

Section 115, entitled International Air Pollution, includes just three currently relevant steps.[254] First, when the EPA Administrator receives a report from a "duly constituted international agency" that gives "reason to believe" U.S. air pollution is harming the health or public welfare of another country, or at the behest of the Secretary of State, the Administrator must notify the governor of the state where the emissions originate.[255] Second, this constitutes a finding under §110, which triggers creation of a plan to correct the endangerment, with the foreign nation invited to participate.[256] Third, this whole process can only happen if the Administrator determines the United States has been given the same rights outlined in this section by the other nation to prevent that country's pollution.[257]

Section 110, the section invoked by the endangerment finding, lays out the provisions of how the state and EPA are supposed to work together to abate the issue, "including economic incentives such as fees, marketable permits, and auctions of emissions rights."[258] This brevity is admittedly one of the key reasons some have argued against its potential in mitigating global GHGs.[259] Further, its historical obscurity leaves little record to analyze in terms of original intent, as "[n]othing in the legislative history from the 1977 amendments mentions the international air pollution section."[260] But the brevity and obscurity are partially mitigated through the section's three pieces of case law.

First, in 1980, the United States and Canada intended to use §115 to create a bilateral acid rain agreement, and signed a memorandum of understanding. Canada then adopted the reciprocal statutes,[261] causing the head of EPA to issue endangerment findings in the form of two letters to the Secretary of State.[262] The incoming Ronald Reagan Administration allowed the process to pause, causing the state of New York in *New York v. Thomas* to sue EPA through §304 of the CAA, which allows any person to bring a civil action against EPA to compel Agency action. The court found that issuance of the endangerment finding meant EPA was obligated to continue the process,[263] yet on appeal in *Thomas v. New York* the decision was overturned, as the court found the endangerment findings were "rules" and thus required a notice-and-comment period that EPA had failed to undertake.[264]

Second, in 1990 in *Her Majesty the Queen in Right of Ontario v. Environmental Protection Agency*, the province of Ontario attempted to restart the §115 process, but the court ruled against it, owing to the finding that the letters did not reflect final agency action.[265] *Thomas* emphasizes that §115 does not constitute the Administrative Procedure Act's definition of "general rules" and so must go through the full rulemaking process, while *Ontario* establishes a wide latitude of deference for EPA in this process owing to its technical nature, and that it cannot be challenged until it is a final agency action.[266] Hence, the §115 procedure becomes very difficult to challenge, as its rulemaking process is largely clear, unable to be paused, subject to deference, and protected until final agency action.

Third and finally, in 2021, *City of New York v. Chevron Corp.* saw a group of climate activists sue foreign oil companies for their contributions to climate change on state public nuisance and trespass grounds.[267] In the final ruling, the judge cited §115 as the lone provision able to regulate foreign emissions, and implicitly suggested GHG emissions were included there.[268]

While still largely open-ended, §115 raised many hopes near the end of the Obama Administration, during which scores of environmental lawyers pushed to use it as the basis of substantive carbon policies such as the Clean Power Plan.[269] Others have suggested that "the President arguably *already* has the authority to put in place a cap-and-trade system, or even a carbon- or energy-based tax, based on the congressional delegation in section 115,"[270] and that endangerment and reciprocity findings could be found based on existing U.S. treaties.[271] However, such bold claims are checked by a number of procedural and substantive issues that would arise from the section's usage.

250. 42 U.S.C. §7415(a). Section 115 makes no reference to criteria for air pollutants, and as will be seen, this need not be an assumption from the fact that it calls for SIPs.
251. *Id.*
252. *Id.*
253. *Id.* §7415(c) (referencing CAA §110).
254. There is a fourth step, considering the recommendations of abatement conferences before 1977, but this is irrelevant to the Article's topic of the IMO's GHG pricing mechanism. *See id.* §7415(d).
255. *Id.* §7415(a).
256. *Id.* §7415(b).
257. *Id.* §7415(c).
258. *Id.* §7410(a)(2)(A).
259. Nathan D. Richardson et al., *Greenhouse Gas Regulation Under the Clean Air Act: Structure, Effects, and Implications of a Knowable Pathway*, 41 ELR 10098, 10104 (Feb. 2011), https://www.elr.info/articles/elr-articles/greenhouse-gas-regulation-under-clean-air-act-structure-effects-and.
260. Roger Martella & Matthew Paulson, *Regulation of Greenhouse Gases Under Section 115 of the Clean Air Act*, 43 Daily Env't Rep. 1, 6 (2009).
261. For a description of the memorandum, see U.S. EPA, United States-Canada Memorandum of Intent on Transboundary Air Pollution: Strategies Development and Implementation Interim Report (Feb. 1981).
262. New York v. Thomas, 613 F. Supp. 1472, 1487-93 (D.D.C. 1985).
263. *Id.* at 1486-87.
264. 802 F.2d 1443, 1447-48 (D.C. Cir. 1986).
265. 912 F.2d 1525 (D.C. Cir. 1990).
266. *See Thomas*, 613 F. Supp. 1472.
267. No. 18-2188 (2d Cir. Apr. 1, 2021).
268. *Id.* at 43.
269. *See* Dawn Reeves, *Section 115 History Might Inform Efforts for Broader EPA GHG Rules*, InsideEPA (Oct. 18, 2016), https://policyintegrity.org/files/news/10.18.16_InsideEPA_ML_CAA.pdf.
270. David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 Harv. Env't L. Rev. 516, 560-61 (2015).
271. *See* Michael Burger et al., *Legal Pathways to Reducing Greenhouse Gas Emissions Under Section 115 of the Clean Air Act*, 28 Geo. Env't L. Rev. 359, 416 (2016).

C. How the CAA §115 Process Would Proceed With the GHG Pricing Scheme

If the Secretary of State accepted the IMO GHG pricing amendment through §1909(b) of APPS, this could immediately trigger the start of the §115 process. The first step of §115 specifies multiple criteria: that the EPA Administrator would inform the governors of all relevant states after having received a report from a "duly constituted international agency" that U.S. air pollution was causing harm in other nations, or after being requested by the Secretary of State, who alleges there is U.S. pollution causing foreign harm.[272] The statute's wording leaves open the possibility that the Secretary's allegation may be open to scrutiny as to whether the pollution is actually causing harm. Thus, this step may not immediately be satisfied by the simple request of the Secretary of State, something that can be assumed just by their accepting the IMO GHG pricing amendment, so it is worth looking at whether the IMO is a "duly constituted international agency" and how strong its report must be.

Only one duly constituted international body has ever used the procedure, the International Joint Commission (IJC) between the United States and Canada. Some scholars have largely dismissed the question of what is a "duly constituted international body," simply stating that organizations like the Intergovernmental Panel on Climate Change (IPCC) are such a body,[273] under the plain meaning of "duly constituted international agency." Others have taken an inverse approach, by exhaustively describing every feature of the IJC and the IPCC to see how similar they are.[274] Yet, any such argument is quite difficult to use to reach a conclusion, given that there is a lack of clarity on what threshold of similarity to the IJC an organization needs to meet to also be considered "duly constituted."

In other words, it is unclear what bodies are *sufficiently* similar or dissimilar to the IJC. Therefore, the plain meaning is likely the most important lens of analysis. The IMO is undoubtedly international and is "duly constituted" under the 1948 Convention on the International Maritime Organization,[275] which the United States ratified as an Article II treaty in the same year.[276] The report's necessary strength is equally difficult to define, especially given that it is not understood in absolute or objective terms, but instead evaluated based on subjective criteria of whether it causes the Administrator to have "reason to believe" that U.S. pollution is causing harm to other nations.[277] Given how low this bar is, many have suggested the IPCC report could fulfill it, as it makes that exact conclusion, and the IMO reiterating its main conclusion in the preamble of the GHG pricing amendment may also fulfill this criteria. If successful, this constitutes the endangerment finding.

The second step would be to secure the reciprocity finding, that "the Administrator determines [the other country] has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section."[278] In *Thomas*, the court confirmed the view first presented in Administrator Douglas Costle's letters that there are two parts to this consideration: one static and one dynamic.[279] The static portion concerns whether the text of the foreign statute provides for the same coverage and circumstances by which respective governments would limit emissions, whether the public may participate in rulemaking, and how the federal government may step in if state or provincial governments fail to address the issue.[280] The dynamic portion concerns whether the government continues to interpret the text in a way that provides these rights, which may negate the agreement if one party substantially reinterprets their own laws and does not provide the same rights to the other party.[281]

The IMO's GHG pricing mechanism, as a globally negotiated agreement, would likely end in a state acceptable to all Parties. Thus, the assumption would be that each Party would implement the same mechanism, and each would provide the others with identical rights. Two caveats may apply: that certain States may attempt to gain economic advantage by underapplying the mechanism by reducing the rates demanded for GHG emittance, thus unfairly incentivizing trade to flow into their own ports; or that the mechanism itself may attempt to reduce responsibilities for certain nations or routes, particularly developing nations, under the guise of common but differentiated responsibility (CBDR).[282]

The first caveat would negate the reciprocity finding on dynamic terms and could cause the United States to pull out, but this would be a contingent possibility to be addressed in the future, and would not impact the ex ante reciprocity finding. The second caveat could provide reason for EPA to deny the reciprocity finding on static grounds, but will be based on the exact mechanism the IMO negotiates, which will be discussed in the next part. The timing of concluding both findings would need to be carefully considered, since after the endangerment and reciprocity findings have been formalized the process cannot be paused, nor can it be brought to judicial review until final agency action.[283]

272. 42 U.S.C. §7415(a).
273. Martella & Paulson, *supra* note 260, at 7.
274. Adam D. Orford, *Clean Air Act Section 115: Is the IPCC a "Duly Constituted International Agency"?*, 34 Geo. Env't L. Rev. 215, 227 (2022).
275. Convention on the International Maritime Organization, Mar. 6, 1948, 289 U.N.T.S. 3, 9 U.S.T. 621.
276. *Id.*
277. 42 U.S.C. §7415(a).
278. *Id.* §7415(c).
279. 613 F. Supp. 1472, 1488 (D.D.C. 1985).
280. *Id.*
281. *Id.*
282. *See* Charlotte Epstein, *Common but Differentiated Responsibilities*, Encyclopedia Britannica, https://www.britannica.com/topic/common-but-differentiated-responsibilities (last visited June 13, 2025) (defining CBDR as the "principle of international environmental law establishing that all states are responsible for addressing global environmental destruction yet not equally responsible, . . . [given] the need to recognize the wide differences in levels of economic development between states.").
283. *See* Her Majesty the Queen in Right of Ontario v. U.S. Env't Prot. Agency, 912 F.2d 1525 (D.C. Cir. 1990) (specifically noting that once the rulemak-

The third step would be for the EPA Administrator to issue a finding under CAA §110, which would call for a revision of the applicable implementation plan to resolve the endangerment finding.[284] Usually, this requires EPA to list the pollutant in question as a criteria pollutant under §108, which then allows it to set NAAQS under §109.[285] This would effectively mean that EPA would have to create a national GHG regulation scheme, something well beyond its authority. Yet, Hannah Chang argues that §115 does not need NAAQS,[286] as its legislative history makes clear that international air pollutants were originally meant to be treated under the now-discarded conference procedure, which was a procedure distinct from NAAQS,[287] and its statutory text never explicitly says SIPs are exclusively for NAAQS nonattainment but instead that revisions to SIPs may be called to "comply with any additional requirements established under this chapter [as opposed to NAAQS]."[288]

The "additional requirements" in this context could be the regulations prescribed by the EPA Administrator under APPS to fulfill the now-amended MARPOL, which would also be the basis of a SIP call. This SIP call would likely only apply to states with international ports, and would legally rely on *American Electric Power Co. v. Connecticut*'s citation of *Massachusetts v. Environmental Protection Agency*, which further reestablished that the CAA preempts a state's ability to establish GHG standards.[289] With that authority, EPA could call for revision of these states' SIPs to comply with the GHG pricing system, particularly to adopt the regulations of the pricing mechanism as "enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights),"[290] and to provide "necessary assurances that the State . . . will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof)."[291]

Further, APPS dictates that EPA regulate "[t]he issuance of Engine International Air Pollution Prevention [EIAPP] certificates [which] shall be consistent with any applicable requirements of the Clean Air Act or regulations prescribed under that Act."[292] If the IMO GHG pricing amendment is crafted in a way to verify the compliance of ships with the GHG pricing mechanism through the existing maritime air pollution certificate system, which must be in compliance with the CAA; and the CAA, through §115, requires that states adopt a uniform system of verifying an updated version of APPS permits that address GHG emissions pricing compliance, then both pieces of legislation reinforce each other.

D. Potential Issues Arising From a Supporting §115 Finding

The complicated nature of such a strategy naturally raises a number of potential issues, which will first be addressed concerning the validity of the §115 procedure, then the validity of its scope, and finally the threat that it may be viewed as a newfound or unheralded power.

First, in terms of the §115 procedure, the text of the section is fairly short[293] and EPA has never successfully used it,[294] suggesting that it may be in desuetude. While U.S. law rarely applies the concept of desuetude, the *Loper Bright Enterprises v. Raimondo* decision affirmatively ended *Chevron* deference and seemed to promote *Skidmore* deference,[295] under which the federal court's deference to an agency's interpretation is weighted by, among other things, "the validity of its reasoning"[296] and "its consistency with earlier and later pronouncements."[297] Even before the end of *Chevron*, some warned that climate action through §115 was simply "an elephant in a mousehole,"[298] and that any regulatory program would realize its "foundation is built on sand."[299] Therefore, the brevity and implementational history of §115 may itself pose a challenge to the NDD by allowing the EPA Administrator too broad a grant of power.

The brevity point is somewhat misguided. While it is true that §115 is only a few hundred words, it mainly defines the endangerment and reciprocity findings.[300] The actual regulatory scheme that aims to provide relief is channeled through §110, a much larger and more detailed provision.[301] Compare these two sections to the single sub-

ing process starts, it should not be arbitrarily paused, as "[o]nce the endangerment finding is made, the SIP revision process must follow").

284. 42 U.S.C. §7410.
285. *Id.* §§7408-7409.
286. Hannah Chang, *Cap and Trade Under the Clean Air Act?: Rethinking Section 115*, 40 ELR 10894, 10897 (Sept. 2010), https://www.elr.info/articles/elr-articles/cap-and-trade-under-clean-air-act-rethinking-ss115.
287. *Id.* at 10897-99.
288. *Id.* at 7. *See also* Martella & Paulson, *supra* note 260, at 8.
289. American Elec. Power Co. v. Connecticut, 564 U.S. 410, 411-12 (2011).
290. 42 U.S.C. §7410(a)(2)(A).
291. *Id.* §7140(a)(2)(E).
292. 33 U.S.C. §1903(b)(1).
293. Nathan Richardson, *Is This Short Provision in the Clean Air Act the Best Means to Regulate Greenhouse Gases?*, 30 Env't F. 46, 46, 51 (2013) ("[T]hey urged the administrator to make the finding under Section 115, a short bit of prose granting broad powers to EPA to address the international effects of emissions," and "the extremely short section (about 300 words) imposes no real limits on EPA's authority.").
294. As noted, the three cases of *New York v. Thomas*, *Thomas v. New York*, and *Ontario* were all unsuccessful in using CAA §115.
295. Loper Bright Enters. v. Raimondo, No. 22-451 (U.S. June 28, 2024) (reaffirming the importance of *Skidmore* in contrast to *Chevron* deference), *contra* Christopher J. Walker, *What* Loper Bright Enterprises v. Raimondo *Means for the Future of* Chevron *Deference*, Yale J. on Regul.: Notice & Comment (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/ ("[M]any court watchers and administrative law scholars expected *Skidmore*—not *de novo* or plenary review—to replace *Chevron* if the Court had enough votes to overrule *Chevron*. In my view, the answer is not clear from the Chief Justice's opinion.").
296. Loper Bright Enters. v. Raimondo, No. 22-451, slip op. at 10 (U.S. June 28, 2024).
297. *Id.*
298. Richardson, *supra* note 293, at 51.
299. Richardson et al., *supra* note 259, at 10104.
300. 42 U.S.C. §7415(a)-(b).
301. *Id.* §7410.

section of Federal Reserve Act §13(3),[302] which has allowed the federal government to institute emergency lending programs that have shaped its responses to everything from the Great Depression to the 2008 financial crisis[303] to the COVID-19 pandemic,[304] and they begin to look much longer. Therefore, the idea that §115 is dramatically or notably short seems unfounded in the context of the CAA.[305]

The point on implementation history seems equally misguided. Consistency specifically between earlier and later pronouncements should be null in this case, as EPA has never made any official and valid pronouncements concerning §115. As *Equal Employment Opportunity Commission v. Arabian American Oil Co.* illustrates, this prong of *Skidmore* more naturally applies to situations in which an agency takes one position in response to a set of variables, and later, in the same situation, takes a contradictory position.[306] Admittedly, one could argue that the lack of §115 usage in light of the ever-present effects of climate change may amount to this conflict.

Yet, *Thomas v. New York* held that EPA need not, nor should, issue §115 findings without receipt of an international report from a foreign nation and simultaneous to issuing the SIPs.[307] Without these steps, the endangerment and reciprocity findings could not have been rightfully found. Thus, to use §115 now to address emissions, despite its historic non-usage in the face of climate change, is not inconsistent, insofar as §115 could not have been used without the request of a foreign nation, which has only happened once, and even in that instance incorrectly.

Second, the scope of §115 is left ambiguous. It is unclear whether EPA can use §115 to regulate extraterritorial emissions, whether it can regulate GHGs as if they were conventional air pollutants, and whether it can regulate certain sources such as oceangoing vessels separately, and thus avoid a regulatory cascade.

The extraterritoriality of §115 was most recently addressed in *City of New York v. Chevron Corp.*, where the court suggested that §115 was one of the few exceptions for the general rule of U.S. environmental law lacking any extraterritoriality.[308] Notably, §115 does not allow the United States to exercise any jurisdiction beyond its sovereign territory, but it does allow EPA to make agreements that regulate U.S. emissions, in a way that foreign nations would reciprocate, thus creating an extraterritorial impact. This follows the lead of certain maritime pollution laws, which allow the United States to regulate foreign ships in American waters, based on the actions they took while on the high seas.

Specifically, in *Spector v. Norwegian Cruise Line*, the Court held that the Americans With Disabilities Act applies on foreign ships in American waters, establishing the broader precedent that these ships may be subject to regulations as long as those regulations do not infringe on the ships' "internal affairs and operations."[309] Further, in *United States v. Royal Caribbean Cruises*, a cruise ship was caught dumping oil in international water and then lying to U.S. authorities through the falsification of records as required by APPS, eventually arguing in court that this was not justiciable given that the act of polluting was outside of the United States.[310] The State argued that the true crime was the lie told at port in U.S. waters.

The court considered that acts conducted outside of a nation's territory but that have an effect within its territory may be within the court's jurisdiction, per *United States v. Williams*.[311] The §115 procedure, given that it aims to regulate emissions occurring internationally but will likely in practice be enforced through verification of permits within domestic ports, could follow the same practice. This is even more justifiable given that the emissions of GHGs will have a domestic effect, as will be verified and confirmed by the international report the EPA Administrator will receive to begin the §115 process.

The application of §115 to GHGs could create more of an issue. While many have advocated that §115 could apply to GHGs under the plain meaning of "air pollutants" and *Massachusetts*'s precedent that EPA must provide a clear reason whenever it excludes GHGs from this definition,[312]

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302. 12 U.S.C. §343(3).
303. Arthur Long, *Revised Section 13(3) of the Federal Reserve Act*, Bus. L. Today (Mar. 2019), https://www.gibsondunn.com/wp-content/uploads/2019/11/Long-Revised-Section-13-3-of-the-Federal-Reserve-Act-Business-Law-Today-ABA-3-22-2019.pdf.
304. David C. Wheelock, *Emergency Lending to Nonbank Borrowers*, Fed. Rsrv. Hist. (May 10, 2022), https://www.federalreservehistory.org/essays/emergency-lending-13-3.
305. Even on a more general level, the idea that shorter statutes are inherently less detailed, *ceteris paribus*, is like saying the cost value of a cheaper product is inherently worse. The level of detail of a text, or the cost value of a commodity, is the relative relationship between two characteristics, regardless of their absolute size.
306. *E.g.*, 499 U.S. 244, 258-60 (1991). In this case, the petitioner took the position that the U.S. Equal Employment Opportunity Commission (EEOC) decision that he was wrongfully terminated under Title VII protections should apply extraterritorially, despite the EEOC never having a history of doing so. The Court ruled against this for multiple reasons, but concerning the *Skidmore* prong of consistency of reasoning, the Court specifically took issue with the fact that the EEOC's "early pronouncements on the issue supported the conclusion that the statute was limited to domestic application." Silence on the matter would be one thing, but taking the affirmatively opposite position is what caused the Court to find issue with the EEOC's claim.
307. Thomas v. New York, 802 F.2d 1443, 1447-48 (D.C. Cir. 1986).
308. No. 18-2188, at 43 (2d Cir. Apr. 1, 2021) ("this lone provision in the Clean Air Act as one of the few exceptions to the general rule that federal environmental statutes are silent about extraterritorial effect").
309. 545 U.S. 119, 121 (2005).
310. 11 F. Supp. 2d 1358 (S.D. Fla. 1998).
311. *Id. See generally* Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 Mich. L. Rev. 55, 83 (2023):
> Is the statute foreign or domestic for purposes of considering the [U.S. Securities and Exchange Commission's] delegated authority under the statute? On the one hand, the focus of the statute is on eliminating bribes to foreign officials, an activity that presumably is focused overseas. That makes it seem foreign; indeed, "foreign" is in the title! On the other hand, many (but not all!) of the covered entities are located in the United States.

312. Massachusetts v. Environmental Prot. Agency, 549 U.S. 497, 533 (2007):
> [O]nce EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.

this argument does create separation-of-power issues. Particularly, if the MQD is viewed as a clear statement rule, as Justice Neil Gorsuch has suggested in dissent elsewhere,[313] GHGs would not be included in "air pollutants," because it would expand the powers of EPA absent clear congressional authorization. However, the subsequent ruling of *Utility Air Regulatory Group v. Environmental Protection Agency* muddied the water, as the Court found EPA could not include GHGs under general "air pollutants" if "(1) the underlying claim of authority concerns an issue of 'vast "economic and political significance,"' and (2) Congress has not clearly empowered the agency with authority over the issue."[314]

The first prong was addressed to note that the vastness of the economic impacts entirely depends on the level of economic impacts considered.[315] The second prong would suggest that Congress did not intend GHGs to be regulated here, as they are not specially named. However, no gases are specifically named in this section, nor were any gases named in *Massachusetts*.[316] The only criteria one may use to determine what is considered an appropriate air pollutant is whether it is causing harm to "public health or welfare."

While "public welfare" may be considered synonymous with "public health," under the canon against surplusage this usage of the word "welfare" must be understood as referring to something other than health. The second, more conventional understanding of welfare thus becomes well-being, which encompasses a broad range of considerations. EPA uses similar terminology in §108 when describing NAAQS, dictating a distinction between standards to protect public health called "primary standards," and standards to protect public welfare called "secondary standards."[317]

In its documentation, EPA has specified that the public welfare of "secondary standards" relates to, among other things, "climate and material impacts," such as whether the pollution may "affect the climate by absorbing or reflecting sunlight, contributing to cloud formation, and influencing rainfall patterns."[318] Considering the impacts of climate change on weather systems and agriculture, and thus food security, it would be difficult to claim it does not impact public welfare. Thus, EPA under §115 is easily understood to be empowered to regulate GHGs, as public-welfare-impacting gases.

The issue of the potential for a regulatory cascade is part of a broader concern in the usage of the CAA, that endangerment findings for most sections are sufficiently similar to each other that a finding for one could trigger others.[319] However, there are three levels of narrowing that the adoption of the IMO's GHG pricing mechanism through §115 would necessarily implicate, which avoids this possibility. First, §115 has a unique endangerment finding that would not trigger others, because it is based on the endangerment of public welfare or health exclusively in a foreign nation, while every other endangerment finding exclusively considers domestic harms.[320] Second, §115 does not necessitate NAAQS, and other arrangements may be promulgated to determine which SIP is in attainment.[321] This parses down the fear that EPA would attempt to regulate all GHGs in all coastal states, admittedly still meaning the majority of the United States.

Third, EPA has created SIP calls to set limits with tailoring to specific classes of mobile sources, such as the 1990 nitrogen dioxide (NO_x) SIP call, which included emissions from automobiles in its purview.[322] Thus, a SIP call to specifically regulate the emissions of oceangoing vessels in specific states is defensible, even without regulating other sources of the same air pollutant. Ironically, a conservative viewpoint on this question is that EPA *should* be able to regulate GHGs from a class of mobile sources, because this would be the less expansive view of the Agency's powers.[323] This is broadly defensible under §110(a)(2)(D)(ii), which states that "[e]ach implementation plan [shall contain adequate provisions] . . . insuring compliance with the applicable requirements of sections 7426 and 7415 [§115] of this title (relating to interstate and international pollution abatement)."[324] If the applicable requirements for §115 concern the specific regulation of oceangoing vessels, this clause presents a plain presumption of its legality.

Finally, even if the use of GHGs in the §115 process is justifiable with the text and implementational history of the section, the Supreme Court may still take issue with it, interpreting it as EPA finding new powers. For example, in *Ziglar v. Abbasi*, the Court cautioned that "when a party seeks to assert an implied cause of action under a federal

313. Gundy v. United States, 588 U.S. 128 (2019) (Gorsuch, J., dissenting).
314. Bowers, *supra* note 224, at 1 (citing Utility Air Regul. Grp. v. Environmental Prot. Agency, 573 U.S. 302, 305 (2014)).
315. *See supra* Section I.C.2 (for a discussion concerning primary and secondary economic impacts to be expected if the United States joins the GHG pricing mechanism).
316. 549 U.S. 497 (which concerned the meaning of "any air pollutant").
317. 42 U.S.C. §7408.
318. U.S. EPA, Fact Sheet: Notice of Proposed Rulemaking for the EPA Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (2023), https://www.epa.gov/system/files/documents/2023-01/PM%20NAAQS%202022%20-%20Standards%20-%20Fact%20Sheet.pdf.
319. The worry is specifically about §§108, 111, 112, 202, 211, 213, 231, and 615 endangerment findings. *See* Martella & Paulson, *supra* note 260, at 4.
320. *Id.*
321. *See supra* Section II.C (discussing the non-need for NAAQS).
322. Patricia Ross McCubbin, Michigan v. EPA*: Interstate Ozone Pollution and EPA's "NO_x SIP Call,"* 20 St. Louis U. Pub. L. Rev. 47, 49 (2001).
323. Some may respond that this is simply attempting to revive another tailoring rule, as the Court took issue with in *Utility Air*. Yet, in that case, EPA's tailoring rule was controversial because it was being tailored to "modify unambiguous requirements imposed by a federal statute." *See* Utility Air Regul. Grp. v. Environmental Prot. Agency, 573 U.S. 302, 325 (2014). The GHG pricing mechanism case is much more analogous to *Morton v. Ruiz*, also mentioned in *Utility Air*, which found that the Bureau of Indian Affairs was allowed to provide benefits to Native Americans living off-reservation under the guise of providing assistance to "Indians throughout the United States." The Court in *Morton* stated, and later emphasized in *Utility Air*, that this was permissible as it was "within the bounds established by Congress." As this discussion is about reasonably limiting the very wide and ambiguous scope that Congress granted to §115, as opposed to implicitly expanding it with the tailoring rule in *Utility Air*, the precedent of *Utility Air* is not relevant. *See Utility Air Regul. Grp.*, 573 U.S. at 324 (citing Morton v. Ruiz, 415 U.S. 199 (1974)).
324. 42 U.S.C. §7410(a)(2)(D)(ii).

statute, separation-of-powers principles are or should be central to the analysis."[325] Further, the Court noted in its opinion in *Utility Air* that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' . . . we typically greet its announcement with a measure of skepticism."[326] In other words, there is an added burden of evidence needed when an executive power is not immediately present.

To this end, an important distinction must be drawn between powers that are plainly observable and those that are triggered. For instance, three of the most notable cases concerning the revival of the MQD involved an agency using a power that was not only of questionable statutory validity but, more so, concerned subject matters considered generally outside of their purview.[327] In Justice Kagan's words, "In each case, the Court thought, the agency had strayed out of its lane,"[328] such as CDC trying to regulate housing policy.[329]

In contrast, EPA's ability to regulate air pollution affecting public health and welfare in foreign nations is, under the plain meaning of §115, statutorily acceptable. Admittedly, it has never been triggered, but that does not equate to it having been "found." Analogously, the president was allowed to pass NAFTA through the "fast track" procedure, enabled by the Trade Act of 1974 and extended through the Trade Act of 2002, and that allowed the president to accept trade deals without congressional approval.[330] It was never used continuously, only to pass a few trade deals in roughly two decades.[331] Importantly, this power was conditional upon a given trade deal helping to achieve pre-specified objectives.[332] Thus, when the president used this piece of legislation to pass NAFTA, the power was not considered to have been randomly "found," but instead understood to have always existed in theory, only sporadically and infrequently used because it was only applicable when specific and infrequent triggering circumstances arose.

CAA §115, if enacted through its pre-specified procedure, would not constitute EPA having "found" a new power, given that since the Act was passed in Congress it has always been a vested power in the Agency—it has simply never been activated. As *Utility Air* prescribed, "agencies exercise discretion only in the interstices created by statutory silence or ambiguity."[333] Thus, the GHG pricing amendment could pass through APPS, triggering and calling upon the authority of the CAA in the same way that NAFTA used fast track. This power would be necessary, as Part I described the lack of statutory authority delegated to APPS on its own, suggesting that if it alone were used, it would likely result in an NDD claim.

E. *Potential Opportunities Arising From a Supporting §115 Finding*

Given the numerous issues that could arise, one may rightfully be skeptical of the utility of using a §115 finding. However, if an administration were sufficiently interested in passing the GHG pricing amendment, and could not realistically get it through Congress, these drawbacks are outweighed by the singular fact that §115 locates the necessary and sufficient powers to pass it squarely within the executive's purview. Specifically, the §115 process provides the intelligible principle to implementing the GHG pricing amendment that APPS lacks in three identifiable ways: (1) it grants powers that are broad to cover the scope of the GHG pricing mechanism, but not so specific as to exclude it by virtue of *expressio unius est exclusio alterius*[334]; (2) it requires a substantive procedure be followed that Congress approved, via the CAA's passage[335]; and (3) it imposes technical requirements, specifically the reports from the duly constituted international agency, putting the executive branch in the position of fact finders rather than legislators.[336]

Moreover, it also corrects a separate issue with APPS, that as a congressional-executive agreement, as opposed to an Article II treaty, it requires a lower bar of congressional approval, making any conflict it creates through its power more suspect, which in this case may be the fact that it could conflict with state sovereignty. Because it must implement its goals through §110, §115 is required to use the "cooperative federalist approach"[337] of SIPs, which the court in *City of New York* identified, such that "states are given a meaningful role in regulating greenhouse gases and other emissions."[338] In the context of the GHG pricing mechanism, this role is somewhat limited, as the price of the fee and the verification methods would likely need to be nationally uniform. The implementation of the North American ECA is illustrative though, as it

325. No. 15-1358, slip op. at 2 (U.S. June 19, 2017).
326. *Util. Air Regul. Grp.*, 573 U.S. at 305.
327. *See* Hickman, *supra* note 239.
328. West Virginia v. Environmental Prot. Agency, 597 U.S. 697, 716 (2022) (Kagan, J., dissenting).
329. Alabama Ass'n of Realtors v. Department of Health & Hum. Servs., 594 U.S. ____ (2021).
330. *See* Christopher A. Casey, Congressional Research Service, Trade Promotion Authority (TPA) 1 (2024).
331. *See* Hal Shapiro & Lael Brainard, Brookings Institution, Fast Track Trade Promotion Authority (2001). When NAFTA was passed through the TPA fast track procedure in 1993, only three other trade agreements had used this procedure: the Tokyo Round General Agreement on Tariffs and Trade (GATT) Agreements (1979), the United States-Israel Free Trade Agreement (1985), and the United States-Canada Free Trade Agreement (1988).
332. *See* Ian F. Fergusson, Congressional Research Service, Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy 1 (2015) ("trade negotiating objectives stand at the center of the congressional debate on TPA," and are generally found in the implementing legislation for each agreement that implements the ex ante congressional-executive agreement that a fast track trade deal is concluded as).
333. Utility Air Regul. Grp. v. Environmental Prot. Agency, 573 U.S. 302, 326 (2014).
334. *See supra* Section II.C (for details on EIAPP certificates).
335. *See supra* Section II.C (for details on how the §115 process could work).
336. *See generally* Field v. Clark, 143 U.S. 649, 692 (1892) (describing discretionary versus legislative power); Yakus v. United States, 321 U.S. 414, 453 (1944) (describing legislative versus executive power).
337. City of New York v. Chevron Corp., No. 18-2188, at 81 (2d Cir. Apr. 1, 2021).
338. *Id.*

demonstrates that states can still play a meaningful role by deciding on compliance verification, enforcement, and penalization procedures.[339]

State control, as well as the aforementioned procedure and its technical requirements, represent the greater reason §115 delegated power to the executive in an NDD-permissive way—that is, as it is bounded and finite. If the Secretary of State were able to justify any EPA action under APPS §1909(b), then EPA would suddenly have near-infinite power through a minor and short statutory provision, something expressly disallowed under the NDD. If instead EPA acts on its own predetermined and limited process through CAA §115, then the NDD becomes a moot issue.

However, this cooperative federalist approach may have less of an impact on the other separation-of-powers doctrine, the MQD. Despite their common basis, the two doctrines do have different criteria. The NDD is largely concerned with Congress delegating power in the proper way to avoid giving the president legislative powers, while the MQD focuses on the significance of an executive branch action in light of its delegated authority.[340] Therefore, even if the IMO GHG pricing scheme being passed through APPS §1909(b) and implemented through §115 satisfies the NDD, by providing an intelligible principle and boundary to its authority, it may still be too major to be passed without congressional approval. Therefore, in the next part, we investigate the remaining MQD issues with the GHG pricing mechanism and §115 finding together.

III. GHG Pricing Amendment Design Choices as a Counter to the MQD

As previously noted, there is nothing about the president accepting a treaty amendment through a legislatively approved procedure, or EPA regulating emissions, that is straying "outside of its lane." Instead, the issue with either of these actions is the extent to which both are being used: the president potentially accepting an agreement too significant to be an "amendment," and EPA regulating emissions in a way that is too impactful or far-reaching. Therefore, certain design choices are examined to reduce this majorness.

A. *Can the GHG Pricing Mechanism Be Modified to Reduce Political "Majorness"?*

The Minamata Convention was previously addressed as one of the key examples of an international environmental agreement that imposed substantive obligations on Parties, but was able to be passed without additional congressional authorization, owing to statutory powers previously delegated to the executive through older pieces of legislation.[341] This was no accident, as it came from the State Department's bad experience going down "a well-worn path that leads us to negotiate but then not be able to implement [an international agreement]."[342]

Reviewing Part 1 of this Article, a number of issues coming from C-175 and the mechanism's passage without additional congressional authority are its duration, its (political) importance, and its impact on state sovereignty. Thus, at least five key design options of the pricing scheme could affect how major it is seen to be: the type of pricing mechanism, the equity considerations built in, and how the scheme's revenue is dispersed (all three of which speak directly to how economically major the scheme is) as well as whether the agreement is framed as temporally unlimited or limited and whether fully domestic commerce is priced (both of which speak directly to how politically major the scheme is).

A draft text has been officially agreed upon by the IMO to be considered for adoption, but it has only received a majority of votes from members, instead of the usual, unanimous consensus-based agreement.[343] Awkwardly, this means that dozens of nations, such as the United States and Russia,[344] disagree with the plan yet would in theory still be liable to follow it. Under Article 5(4), all MARPOL signatory nations are required to apply MARPOL regulations to all ships, even ships of non-Parties to the Convention,[345] to prevent those non-Parties from being given more favorable treatment.[346]

Achieving unanimous consensus is important in the IMO because otherwise States would be obligated to force other nation's vessels in their ports to comply with regulations they never agreed to. If the current draft text is passed and no Parties shift their position on signing, States like France and the United Kingdom (as signatories) will be forced to either coerce American, Saudi Arabian, Qatari, and other non-signatory States' ships to pay their overdue

339. For instance, much of the compliance for the program is through port state control officers, through their port state control exams. *See* U.S. Coast Guard, Frequently Asked Questions: North American Emission Control Area (ECA) U.S. Coast Guard Office of Commercial Vessel Compliance (2024), https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/CVC2/psc/general/marpolVI/USCG_ECA_faqs_Rev_12-3-14.pdf.

340. *See generally* Samuel Buckberry Joyce, *Testing the Major Questions Doctrine*, 43 Stan. Env't L.J. 50 (2024) (theorizing how major an action may be before running against the MQD); *see generally* Anita S. Krishnakumar, *What the New Major Questions Doctrine Is* Not, 92 Geo. Wash. L. Rev. 1117 (2024) ("[T]he nondelegation doctrine asks whether Congress *can* delegate the authority at issue to an agency, whereas the major questions doctrine asks whether Congress actually *did* delegate the authority at issue to the agency.").

341. *See supra* Section I.B.3 (for review of the Minamata Convention).

342. Rebecca Kessler, *The Minamata Convention on Mercury: A First Step Toward Protecting Future Generations*, 121 Env't Health Persps. A304 (2013).

343. Josh Gabbatiss, *Q&A: Nations Agree Carbon-Pricing System to Steer Shipping Towards Net-Zero*, Carbon Brief (Apr. 11, 2025), https://www.carbonbrief.org/qa-nations-agree-carbon-pricing-system-to-steer-shipping-towards-net-zero/.

344. *Id.*

345. International Convention for the Prevention of Pollution From Ships, 1973, as modified by the Protocol of 1978, art 5.4, Feb. 17, 1973, 1340 U.N.T.S. 61.

346. The Coast Guard has expressly endorsed this position before, saying that "MARPOL . . . requires signatory states to apply the requirements equally to all vessels so no more favorable treatment is given to non-signatory vessels (MARPOL, Article 5(4))." Implementation of MARPOL Annex V Amendments, 78 Fed. Reg. 13481, 13843 (to be codified at 33 C.F.R. pt. 151).

GHG fees in their ports, or else choose to not enforce the GHG pricing scheme on them, violating the no more favorable treatment (NMFT) clause and undermining the efficacy and credibility of the whole system. In other words, a non-consensus-based GHG pricing scheme seems incredibly doubtful, and thus the draft text is likely to change before being adopted.

The draft's economic component, the Net-Zero Framework, has two main parts. First, it creates a system to calculate a GHG fuel intensity standard for each ship, and two tiers of annual compliance goals, the less strict "Base Target" and the more strict "Direct Compliance Target."[347] Second, it creates a system to assess the difference between a ship's actual compliance and its targeted compliance. If ships fail the Direct Compliance Target, they must purchase remedial units at $380 per unit.

If ships fail the Base Target but not the (more strict) Direct Compliance Target, they may purchase discounted remedial units at $100 per unit. If ships overperform the Base Target, they receive remedial units that they can transfer to another ship through the IMO's registry, bank for the future, or cancel as a voluntary mitigation contribution. If they meet the standard, then they receive no units and must not purchase any.[348] Further, ships using zero or near-zero GHG emissions technologies (ZNZs) may receive some, currently unspecified, financial rewards.[349]

This arrangement was, in fact, one of many originally being debated, and may end up shifting to reflect more of these other proposals, if the draft is not adopted. During the negotiation process, at least seven draft agreements were proposed, from the International Chamber of Shipping, Austria and others, Japan, Norway, Argentina and others, China, and the Marshall Islands and Solomon Islands.[350] From these proposals, it becomes clear that the mechanism will ultimately hinge on three major design choices: the type of pricing mechanism, its equity considerations and exemptions, and its revenue disbursement mechanism.

The first choice is the type of pricing mechanism, between levies, feebate, emissions trading, or a reward/penalty system. A levy system could itself take a variety of forms. For instance, the Marshall and Solomon Islands proposal suggests an adjustable fee for every ton of carbon emitted that would ratchet up over time[351]; the European Union (EU) proposal suggests a levy imposed on ships based on various metrics related to weight and fuel efficiency standards.[352] The principal economic theory behind such levies is that they bridge the price gap between high- and low-carbon fuels by internalizing the carbon externality.[353]

A feebate system builds on the idea of the carbon levy, most notably in the Japanese proposal for a Zero-Emission Shipping Incentive Scheme.[354] In this scheme, the capital raised from the conventional carbon levy would be used to subsidize the cost of zero-emission fuels.[355] Thus, whereas the levy would equalize prices by increasing that of carbon-intensive fuels, the feebate would do the same by additionally lowering the cost of carbon-light or carbon-free fuels.

An emissions cap-and-trade system presents a third alternative, and is the primary proposal of Norway, which suggests establishment of a global cap on emissions and a system of allocating ship emissions units that may be traded among vessels.[356] Like other proposals, this would help equalize the price of high- and low-carbon fuels, with the added benefit that the price could be determined via the market. Some proposals use a reward/penalty system that would incorporate the use of flexibility units, such as Angola's and others' plan to use remedial units[357] and the EU's plan to use GHG remedial units,[358] both of which are sometimes referred to as deficit units. Similar to the cap-and-trade proposal, this idea would incorporate the sale, via a centralized system, of these remedial units at a "dissuasive" price, which would allow ships that had violated some aspect of the GHG control mechanism to be brought back into compliance.[359]

This decision will likely be the most consequential, in terms of legality, as it will determine primarily what the mechanism is, and thus what it will be compared to analogously. For instance, the cap-and-trade or reward/punishment mechanism would intend to create an entire market for a government-created good, something that would invariably be seen as an act of legislating, considering that certain trading rules and regulations would need to be created to support the program. This is analogous to the generation-shifting scheme that the Supreme Court found to be unconstitutional for lack of sufficiently delegated power to EPA in *West Virginia*.[360]

A levy or feebate, in contrast, would simply be an exercise in rate setting. As seen in *Field* and *Hampton*, the executive does have a historic capacity to set rates related to foreign trade.[361] Even when the plaintiff in *Made in the USA* argued that NAFTA was an illegal use of rate-setting power by the executive due to the fact that it contained social and environmental goals instead of just economic

347. IMO, *Draft Revised MARPOL Annex VI*, at reg. 35, Circular Letter No. 5005 (Apr. 11, 2025).
348. *Id.* at reg. 36.
349. *Id.* at reg. 39.
350. IMO, *Report of the Ad-Hoc Expert Workshop on Comparative Analysis of Candidate Mid-Term GHG Reduction Measures*, IMO Doc. MEPC 80/INF.39/Add.1 (June 6, 2023).
351. *Marshall Islands, Solomon Islands Seek $100/mt Global Carbon Price for Shipping*, Ship & Bunker (Mar. 12, 2021), https://shipandbunker.com/news/world/582785-marshall-islands-solomon-islands-seek-100mt-global-carbon-price-for-shipping.
352. IMO, *Further Information on the GHG Fuel Standard (GFS)*, IMO Doc. ISWG-GHG 17/2/20 (Aug. 8, 2024).
353. *Id.* at 20.
354. IMO, *Comparative Analysis of Candidate Mid-Term Measures Fact Sheet*, IMO Doc. GHG-EW 3/INF.5.
355. *Id.* at 2.
356. IMO, *Comparative Analysis of Candidate Mid-Term Measures Fact Sheet*, IMO Doc. GHG-EW 3/INF.4.
357. IMO, *Further Consideration of the Development of Candidate Mid-Term Measure(s)*, IMO Doc. ISWG-GHG 17/2/9 (Aug. 9, 2024).
358. IMO, *Further Consideration of the Development of the Basket of Candidate Mid-Term Measure(s)*, IMO Doc. ISWG-GHG 17/2/2 (Aug. 9, 2024).
359. *Id.*
360. 597 U.S. 697, 725-28 (2022).
361. Field v. Clark, 143 U.S. 649, 650 (1892); J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

ones, as one may claim here, the court did not bother to mention the issue in its analysis, implicitly finding it to be moot.[362] Thus, the executive branch, in passing this amendment, would likely benefit from avoiding creation of new and complicated statutory schemes, and instead just using pricing to equalize the cost of high- and low-GHG emission fuels. The current draft proposal's decision to pursue a GHG remedial unit trade system much more closely resembles creating a market for a new good, as opposed to simply imposing a fee, and thus may face issues being implemented in the United States without congressional approval if it is not amended.

If the market-based aspect were removed, the question would shift to which, between a levy and feebate system, would be the most legal, meaning less major. While it would be difficult to argue which would be of more political significance, the feebate system would certainly be of less economic significance. Assuming they both equalized the prices between low- and high-carbon emission fuels, the feebate would only require half the tax burden as the levy; the feebate would reinvest the levied funds into rebates to cause the price of the two types of fuel to meet in the middle, as opposed to the levy, which would only raise the price of the high-carbon emission fuels to those of the low-carbon emission fuels. Thus, a feebate system would likely cause the fewest issues with either the NDD or the MQD.

An optional design choice would be to use a fuel tax on top of the feebate system—that is, by setting levies and rebates on the purchase of fuel as proxy for the emissions that would come from its combustion rather than on the emissions themselves. Any kind of economic scheme involving emissions inherently runs the risk of triggering the novelty standard of the MQD. Yet, as previously mentioned, the president does have the ability to levy fees on the sale of imported petroleum, under §232(b) of the Trade Expansion Act of 1962, and this may be combined with the powers of the Emergency Petroleum Allocation Act of 1973 to set levies on domestic petroleum as well, as President Carter did.[363] While this was undone via President Reagan's Executive Order No. 12287, the ability to modulate it by executive order suggests that, as a power, it is within the purview of the executive,[364] thus further reducing any claims of majorness via the idea that a novel power was "found."

Within the mechanism, the price of emissions would need to be set to narrowly ensure the goal of reducing emissions pursuant to the IMO's timeline for decarbonization. If done correctly, this system would simply be the executive enforcement of the congressionally approved goal of supporting the political ambitions of MARPOL and the IMO. However, if the price were set liberally, either generating excess revenue and/or creating undue hardship for shipowners by reaching the IMO's decarbonization goals needlessly early, this would suggest that the pricing mechanism was instead being used to support other political goals, inviting criticisms that the Parties of the IMO are abusing their narrowly granted discretion to pursue other political goals.

Thus, in total, the type of pricing mechanism would likely be the least legally challengeable if it were a feebate system, possibly pricing petroleum as a proxy for GHGs, which sets its price based not off of political considerations, but from the IMO's own technical modelling of what would most likely reach their decarbonization timeline. The draft text's dual price model of $100 and $380,[365] based on how far out of compliance ships are with GHG intensity standards, may avoid many of these criticisms by virtue of being granular enough to distinguish between moderate and severe noncompliance. However, as will be discussed regarding the revenue disbursement model, this argument may be harder to make if the price is purposely being set high enough to generate revenue for other purposes.

The second consideration is whether and how the equity considerations are built in, particularly whether every ship is subject to the same standards or whether those that call to port in developing nations or are carrying specific cargo are treated differently. The second and third of these options, sometimes called "route-based exceptions" and "cargo-based exceptions," are often justified on the grounds of CBDR, which suggest that the Global North, as the historic center of GHG emissions, should shoulder the brunt of the cost of abating them.[366] Yet, these strategies may easily run afoul of both the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), as they amount to a violation of the NMFT principle, which dictates that the free trade regime set up under the World Trade Organization (WTO) should provide little to no opportunity to impose selective and unequal trade barriers.[367]

Admittedly, the process of negotiating the agreement is usually via consensus, so some theoretical violation of WTO law may simply be "swept under the rug," as the consensus-building process usually requires that relevant claims be addressed for consensus to be achieved; and after it has been achieved, Parties may fear that introducing their leftover claims to the WTO Appellate Body may not be worth reopening the process. Given that this quasi-judicial body has no independent investigation mechanism,[368]

362. Made in the USA Found. v. United States, 56 F. Supp. 2d 1226 (N.D. Ala. 1999).
363. Olson Memorandum, *supra* note 235.
364. Exec. Order No. 12287, 46 Fed. Reg. 9909 (Jan. 28, 1981).
365. IMO, *Draft Revised MARPOL Annex VI*, at reg. 36, Circular Letter No. 5005 (Apr. 11, 2025).
366. *See* Goran Dominioni, *Towards an Equitable Transition in the Decarbonization of International Maritime Transport: Exemptions or Carbon Revenues?*, 154 Marine Pol'y 1 (2023), https://www.sciencedirect.com/science/article/pii/S0308597X23001963.
367. *See* Goran Dominioni, *The IMO Carbon Pricing Mechanism, the Equitable Transition of International Shipping, and WTO Law*, TESS F. on Trade Env't & SDGs (May 30, 2024), https://tessforum.org/latest/the-imo-carbon-pricing-mechanism-the-equitable-transition-of-international-shipping-and-wto-law.
368. *See* Gisela Grieger, European Parliamentary Research Service, International Trade Dispute Settlement: World Trade Organisation Appellate Body Crisis and the Multi-Party Interim Appeal Arbitration Arrangement 2 (2024), https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762342/EPRS_BRI(2024)762342_EN.pdf.

if no nation introduces a GATT or GATS violation, the WTO will not bring it up themselves, so the violation effectively does not exist. However, the text of the current draft was only adopted to be finalized via a majority vote, not consensus,[369] meaning some disgruntled nations could use this as potential leverage. In any event, the U.S. executive is still bound by the Byrd-Hagel agreement,[370] which may create domestic political tension if the GHG pricing mechanism is viewed as being an unfair burden to the United States, in comparison to the Global South.

In this light, route-based exemptions seem particularly unworkable, as they would create permanent exemptions for specific nations in violation of the above principles. However, cargo-based distinctions may fare better, as they more granularly respond to which actors are being the most burdened by the economic scheme and correspondingly allow for more target exemptions that would still alleviate the relevant equity concerns. This may avoid introducing further equity problems, such as by exempting certain ships for broad characteristics (such as the routes they serve) despite them not being unduly burdened by the scheme. By distinguishing based on cargo, there is no categorical violation of the NMFN principle or Byrd-Hagel. Moreover, such exemptions may avoid reducing the ambition of the overall scheme as much as route-based exemptions by lessening the number of exempted ships.

A realistic objection may be made that many developing nations tend to trade in bulk goods, while many developed nations tend to export refined and finished goods, so in practice cargo-based exemptions would benefit developing nations. Yet, if one assumes that economic trade barriers will largely be passed on to the consumer, then the real penalty is either felt by finished-product consumers with a higher willingness to pay, and finished-product producers who sell to consumers without the sufficient willingness to pay for the full increase in commodity prices, as these producers then must swallow some of these costs themselves. Which one of these two classes will be most affected is entirely undeterminable a priori.

In a more systematized sense, if the trade in both bulk goods and finished products occurs largely between the Global North and Global South, at least as much as either category of goods is traded between the nations of each hemisphere, then either category of goods being exempted from any economic levy on trade could burden either side to any extent, largely dependent on how much of the cost gets internalized by the producer or passed on to the consumer. To reiterate, without significant study, it is indeterminate how the costs will be internalized or passed on, and thus one cannot use such reasoning as a facial objection to cargo-based exemptions.

Therefore, while route-based exceptions seem unlikely, cargo-based exceptions may allow the mechanism to satisfy certain calls for equity from developing states, while not threatening the will of the WTO or Congress, unless substantial evidence can show it would create an economic asymmetry between certain groups of nations. However, the draft text currently contains no direct equity-based exemptions, for routes or cargo, much to the chagrin of some developing nations.[371] Instead, there is some revenue disbursement for States that would face food insecurity because of the plan, likely owing to food often being a cheap, bulky commodity, and so being disproportionately affected by GHG pricing. Thus, the only current equity considerations are cargo-based, ignoring other goods that were discussed in the same context, such as medicines and disaster response goods.[372]

The third and final consideration is the revenue disbursement model, such as whether the raised funds will be used as rebates within the same system, also called "in system" disbursement, or whether they will be used for general shipping industry GHG abatement and/or general sustainable development purposes, also called "out of system" disbursement.[373] The first of these options would only be accomplished through a feebate mechanism, while the latter would be achievable under any mechanism type, but would likely work best with any type that did not need to reinvest in itself, such as a flat levy.

The legality of this option largely reflects that of the mechanism type—that is, if out-of-system disbursements were made, the program would effectively become a tax. Given that Congress has the power of the purse,[374] this would make any claim to legality without their approval much more suspect. This is more so if the out-of-system disbursements were made for entirely unrelated ends, such as the World Bank's suggestion that it be used to support sustainable agriculture.[375] Further, the general understanding is that out-of-system disbursements would be in the pursuit of CBDR, so the lion's share would go to developing nations.[376]

This would effectively mean that the president would be unilaterally approving a tax to be managed by the IMO itself, which would raise the likely insurmountable issue that the president was attempting to pass delegated authority out of the country.[377] As the example of the United States' refusal to treat International Court of Justice judgments as self-executing demonstrates,[378] the Supreme Court is very wary of this practice. Therefore, the most legal option likely would be to use all funds as in system disbursements.

369. Gabbatiss, *supra* note 343.

370. S. Res. 98, 105th Cong. (1998) (expressing the view that Congress would not support the U.S. ascension to an international environmental instrument that created more obligations for the United States than other Parties).

371. Gabbatiss, *supra* note 343.

372. *See* Dominioni, *supra* note 366, at 3.

373. IMO, *Report of the Ad-Hoc Expert Workshop on Comparative Analysis of Candidate Mid-Term GHG Reduction Measures*, IMO Doc.80/INF.39/Add.1 (June 6, 2023).

374. U.S. Const. art. I, §9, cl. 7.

375. International Bank for Reconstruction and Development, World Bank Group, Distributing Carbon Revenues From Shipping 19, 31 (2023), https://doras.dcu.ie/28854/1/World%20Bank_Distributing%20Carbon%20Revenues%20from%20Shipping.pdf.

376. Ludovic Laffineur et al., *The Implications of the IMO Revised GHG Strategy for Shipping*, Glob. Mar. F. (Dec. 1, 2023), https://globalmaritimeforum.org/insight/the-implications-of-the-imo-revised-ghg-strategy-for-shipping/.

377. *See* Allen, *supra* note 20, at 502-04.

378. *See* Medellín v. Texas, 552 U.S. 491 (2008).

Despite this, the current draft proposal largely favors out-of-system disbursements. While there are some in system disbursement for ZNZs, there are many more out-of-system ones, such as "enabling a just transition for seafarers and other maritime workforce" and updating port infrastructure.[379] This could represent a large barrier to U.S. acceptance of the plan if congressional approval is not likely. Therefore, the exact apportionment of funds between these goals, which is to be determined at a later date based on the drawing of technical guidelines,[380] could be crucial in minimizing this barrier.

Finally, two additional provisions would counter any majorness claims. First, following the theory of the court in *Made in the USA* and the writings of Vattel,[381] including a withdrawal mechanism would allow the executive to accept the agreement without forever binding future governments to its obligations, which in turn reduces the majorness of the agreement. To further the technical aim of the agreement and reduce the discretionary, political power of the executive in this agreement, structuring the withdrawal clause as pursuant to a substantive finding of noncompliance by other States could be one of the least controversial methods of reducing the agreement's timescale. Despite this, the current draft text has no withdrawal clause.

Second, structuring the program to make the fees paid on intrastate maritime shipments optional would alleviate many of the state sovereignty concerns. Luckily, the draft text already does explicitly this, stating that the Net-Zero Framework does not apply to "ships solely engaged in voyages within waters subject to the sovereignty or jurisdiction of the State the flag of which the ship is entitled to fly."[382]

Over the course of the next few years, as the GHG pricing mechanism is finalized and operationalized, State Department negotiators will have to advocate for a careful crafting of the plan if they are skeptical of Congress' willingness to accept it. A feebate system imposed on fuel purchases and priced to match the IMO's shipping decarbonization timeline, which does not disburse funds outside the scheme but still attempts to be equitable through cargo-based exceptions, and that includes a withdrawal clause and intrastate exceptions, may be the scheme's most legal form.

IV. Conclusion

As the IMO has made clear, climate change poses an inexorable threat to humanity, and it has committed to a detailed timeline to phase out emissions from shipping, culminating in 2050 in a global shipping industry with net-zero carbon emissions.[383] To achieve this, States have been negotiating for years to include an emissions pricing mechanism as one of the timeline's mid-term GHG reduction measures.

However, the history of the United States' non-ratification of climate accords such as the Kyoto Protocol, and regulatory treaties for the world's oceans such as the United Nations Convention on the Law of the Sea, illustrates that this plan may have a hard time passing. In particular, there exists a disconnect between the powers granted through APPS §1909(b), by which the plan would be accepted as an amendment to MARPOL Annex VI, and the powers demanded to accept and implement such a plan, given both the status of the future agreement as an ex ante executive-congressional agreement and the overall ambition of the scheme.

One-half of the solution to bridge this disconnect is to bolster the executive branch's authority with a finding through CAA §115, as it would grant EPA a substantial, bounded, and congressionally approved power to implement the agreement without running into the NDD. The other half of the solution is to trim the fat of the agreement itself, making it more acceptable as an ex ante executive-congressional agreement by narrowing it to specifically address the political goal that Congress consented to when ratifying MARPOL Annex VI of limiting maritime air pollution, and thus reducing the executive branch's actions to the simple realization of these goals through a technical regulatory scheme.

This strategy, previously successful with the Minamata Convention, would not only benefit this particular international agreement, but may set a precedent for the future emissions-reduction schemes that will be necessary to keep the earth's temperature rise under two degrees Celsius.

379. IMO, *Draft Revised MARPOL Annex VI*, at reg. 41.1-41.2, Circular Letter No. 5005 (Apr. 11, 2025).
380. *Id.* at reg. 40.4.
381. *See supra* Section I.B.2 (for the discussion concerning Vattel and the duration of agreements affecting the validity of their states as treaties or agreements).
382. IMO, *Draft Revised MARPOL Annex VI*, at reg. 30.2.1, Circular Letter No. 5005 (Apr. 11, 2025).
383. *See* IMO Res. MEPC.377(80), *supra* note 1.