Transatlantic Environmental Regulation-Making: Strengthening Cooperation between California and the European Union

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I. Introduction

Global warming and other environmental threats pose serious collective action challenges to an international system that since the Treaty of Westphalia[2] has been predicated on national sovereignty. International cooperation normally requires national government consent. In a pure Westphalian system, the right and power to make international agreements to curb the causes of global warming rests exclusively with national governments, and thus, cooperation can be stymied if one or more significant national leaders opposes the effort. But the reality of the contemporary international system is less pure and more complex than the abstract Westphalian model, and hence, the possibilities for forms of environmental cooperation other than formal national treaties are greater than they might initially seem.

Environmental issues like global warming or pollution require international cooperation, because they arise as negative externalities from industrial and commercial activities within separate countries. Choosing to act alone in an effort to curb global warming or reduce harmful environmental effects can impose significant costs on a nation's economy and living conditions, potentially putting the economy of the country that chooses to act unilaterally, or even with a subset of other nations, at a competitive disadvantage. In addition, because nations cannot be excluded from the benefits of ending global warming or limiting pollution even if they choose not to cooperate, there are free-rider problems that must be overcome as well.

Prior to the 2008 presidential election when this California-European Union project was initially proposed, the proximity of California and the E.U.'s positions on global warming created a strong incentive for closer collaboration. At that time, the main question was the form that this partnership should take since that U.S. states are prohibited from entering into treaties. Given that the newly elected Obama administration has taken a strong position on global warming that is more closely aligned with the progressive European perspective, it is important to reassess the motivation behind the collaboration between California and the E.U.

While President Barack Obama's election may have shifted the U.S. Executive Branch's environmental policy from the Bush administration's general wariness about adopting environmental measures, this shift in executive policy may not reflect a change in national

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[2] For a brief explanation see Encyclopedia of Public International Law (EPIL); the Westphalian system mirrors the ideas of the Dutch legal philosopher Hugo Grotius (1583 – 1645) as laid down in his main work "De iure belli ac pacis" (About the law of war and peace – 1625).

policy. With the current economic crisis, Congress may not exactly welcome President Obama's efforts to strengthen environmental regulations. And even if Congress *does* support the administration's proposed policies, the bodies will have to be realistic about what they will be able to accomplish, particularly in light of the economic and security issues at hand.

In this sense, cooperation between California and the E.U. on environmental issues is even more relevant under the Obama administration than it was under the Bush administration because California can set an example that the federal government may actually follow. California and the E.U. have the opportunity to serve as trailblazers on environmental issues while the U.S. federal government focuses on economic stimulus. By using California as a model, the E.U. may be able to lead by example that promoting green technologies can translate into an economic stimulus — which is part of the motivation behind why the parties are interested in attracting this industry.

This project supports the idea that supranational institutional arrangements such as the E.U. and sub-national units like states and regions (depending on the constitutional makeup of the country) have challenged the national monopoly over international relations. California has staked out a leadership role domestically in environmental protection, adopting state measures that are at variance with the federal government's official policies. As a consequence, its position on environmental issues, especially global warming, has been closer to that of Europe and other North American countries than to the U.S. federal government. Additionally, as the sixth largest economy in the world, its actions affect the globe. Professor Ann Carlson characterizes leading states like California as "superregulators" functioning through "iterative federalism" or "singling out a particular state or states and allowing them to regulate more stringently than a national standard."[3] These "superregulators" enable the federal government to learn from their efforts and adopt or adapt their successful policies.

In the sections that follow, we will explore an informal agreement mechanism that California has already used to further international environmental cooperation with several Canadian provinces, Great Britain, and Mexico – the Memoranda of Understanding ("MOU" or "MOUs") – and suggest that it is the best possible avenue for cooperation between the E.U. and California on environmental policies. We will then outline how signing an MOU would serve both parties aims at establishing a reputation as a leader on environmental regulations, shifting behavior, and exchanging information, while providing a model for the U.S. federal government on policies that could be successful if carried out. Next, we will examine the legal implications of such agreements. More specifically, we will argue that although California does not have the authority to enter into formal agreements, binding or non-binding, relating to international matters that are directly in conflict with U.S. foreign policy, California can sign a non-binding promise with the E.U. to follow mutual aims. Along these lines, we will outline how the E.U. can ensure that the agreement will be treated as non-binding despite European Court of Justice decisions enforcing "soft law" instruments. Finally, we will argue that there is still a political and commercial value to such agreements even under the Obama administration. Our aim is to encourage California and the E.U. to sign an MOU on environmental issues to promote

[3] Ann E. Carlson, *California Motor Vehicle Standards and Federalism: Lessons for the European Union*, COOPERATING IN MANAGING BIOSAFETY AND BIODIVERSITY IN A GLOBAL WORLD: EU, US, AND CALIFORNIA (2009).

cooperation and provide an example of successful environmental policies for the U.S. federal government and foreign states.

II. The Value of Informal Legal Agreements

Although U.S. states do not have the authority to enter into formal treaties with the European Union, U.S. states do have the ability to enter into informal agreements such as a memorandum of understanding. Treaties are international contracts that legally bind signatory states.[4] Other informal international agreements such as MOUs, nonbinding resolutions, joint communiqués, and joint declarations are essentially non-legally binding "pledges."[5]

Although somewhat controversial,[6] many scholars have adopted the view that a non-legally binding agreement can be categorized as "soft law" or "a 'norm' expressed by the international community to which it is hoped, at least by the group of states articulating the 'norm,' that states will adhere, but to which there is no obligation of adherence."[7] This "expression" by the legal community may come in the form of a "treaty not yet in force, voluntary observed standards, written guidelines and code of conduct issued by intergovernmental organizations (mainly in international economic, financial, and environmental matters), final acts of international conferences, joint statements, gentleman's agreements, or certain resolutions of intergovernmental organizations."[8] "Soft law" can be used to argue state practice and hence can harden into "hard law" in the form of customary international law or those aspects of international law that are derived from custom established by states, the public, organizations, courts, and corporations or be codified in a treaty. "Soft law" has been particularly helpful in advancing international environmental laws and regulations as states have

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4 *See* Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 586 (2005). Some scholars characterize treaties as "hard law" or agreements which bind states "for the breach of which it or they are responsible, whatever form of action or penalty that responsibility may entail." Cynthia Crawford Lichtenstein, *Hard Law v. Soft Law: Unnecessary Dichotomy?*, 35 INT'L L. 1433 (2001).

5 Raustiala, *supra* note 3, at 586; *see also* Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT.L L. 113, 114 (2003).

6 The criticism stems from a demand for clarity on whether an agreement is law or not. According to Boleslaw Adam Boczek in INTERNATIONAL LAW: A DICTIONARY (2005), "Critics have charged [soft law] with blurring the distinction between the law in force (*de lege lata*) and the law in the process of formation (*de lege ferenda*) and, more generally, between what is actually binding and what is not." *See e.g.* Richard Bilder, *Beyond Compliance: Helping Nations Cooperate*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 65, (Dinah Shelton ed., 2000) at 71 ("[i]t seems inappropriate and unhelpful to use the term soft *law* to describe norms and normative instruments which are clearly not in legal form, not intended to be legally binding, and thus not, in any of the usual senses in which we use the word, law at all"); Armin Schäfer, Resolving Deadlock: Why International Organisations Introduce Soft Law, EUROPEAN LAW JOURNAL 2006, pp. 194 – 208.

7 Cynthia Crawford Lichtenstein, *supra* note 3 at 1433-34.

8 Boleslaw Adam Boczek, *supra* note 5.

been reluctant to enter binding agreements out of fear of harm to domestic corporations.[9] That is, non-binding agreements can help to overcome deadlocks on certain issues between states, like environmental issues, when binding resolutions are not successful due to the collective action and free-riding principles discussed above.

As these mechanisms are purely voluntary and non-binding, the calculations behind why U.S. states sign informal agreements, might differ slightly from those behind formal ones signed by countries. Since U.S. states do not have the authority to sign treaties, their motivations for signing voluntary agreements may mirror the motivations behind why countries sign binding agreements because that is their only option for entering into international agreements. It is instructive therefore to review some of the usual reasons given in academic literature for why states enter into formal treaties and see how they apply to various informal agreements, particularly in light of emerging notions on the influence of "soft law." The standard rationales for a nation state entering a treaty are (1) public relations (signaling a message to other states and building reputation), (2) shifting behavior (precommiting itself to restrain certain future actions and binding other states to promote international cooperation), and (3) exchanging information.

A. Public Relations

A primary motivation for why the E.U. and California may opt to sign an MOU is to strengthen their role as environmental leaders. This can be done by signaling a message to states that they are committed to this policy issue, which in turn, builds their reputations.

1. Signaling to Other States and the Federal Government

A nation might sign a formal treaty in order to send a signal to other states about how it intends to act prospectively.[10] By visibly committing to certain actions, a state communicates that its intentions are serious. For instance, an emerging democracy might sign a human rights treaty in order to show its allegiance to the values of older democracies. Such was the case when Turkey signed the European Convention on Human Rights and Fundamental Freedoms,[11] in effect signaling to E.U. member states that it was serious about complying with E.U. treaties and regulations. The E.U. and its member states have particular concerns with Turkey's record on human rights protections, including the Turkish occupation of Cyprus,[12] restraints on the

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[9] *See* Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 424 (1991) (finding that "soft law" emerges from repetition and cross-referencing institution decisions and agreements, particularly in the environmental context).

[10] Goldsmith & Posner, *supra* note 4 at 114-15.

[11] It should be noted that the Convention is not a legal instrument originating from the E.U., but rather arose from the Council of Europe and is an older, regional human rights treaty and thus part of international law. However, the Convention plays a pivotal role as a common human rights standard. This has been stressed by the European Court of Justice, *see e.g.* Case 44/79, *Hauer*, (1979) ECR-3727, 3745, para. 17 (available at http://eur-lex.europa.eu).

[12] In 1974, Turkey invaded the Republic of Cyprus and currently still illegally occupies the northern forty percent of the county. The parties have made numerous attempts at reunification, but to no avail.

freedom of expression,[13] and the violation of Kurdish minority rights.[14] By signing the European Convention on the Protection of Human Rights and Fundamental Freedom, Turkey aimed to show its efforts to fulfill the E.U.'s membership requirements by promoting human rights and reforming its laws.

California, in a similar way, may desire to distinguish itself from the previous federal administration's position on global warming and environmental regulation. Just as Turkey aims to signal to the E.U. that it embraces European values with respect to human rights, so California might want to distinguish its position from the rest of the U.S., or at least from the former Bush administration's environmental policies. Currently, California may want to signal that it will lead the way and provide an example for the Obama administration. By signing an informal environmental agreement, California can signal its willingness to do as much as is permitted to ending global warming and protecting against environmental hazards. And just as Turkey's signal serves an instrumental purpose (that is, being accepted in to the E.U.), so California might gain more trade and commercial opportunities for its green industries as a result of an agreement. The signal by agreement might also be intended for the U.S. federal government, demonstrating California's concern that the federal government should strengthen its environmental regulations. Even though the Obama administration has emphasized the importance of environmental issues, this does not mean that Congress will necessarily follow. And even if Congress and the President aim to strengthen environmental regulations, both bodies have to plan for what can reasonably be accomplished considering the other domestic and international issues at hand.

For the E.U., the agreement may similarly serve to signal that it is and will remain a leader on environmental issues and show that the parties agree that there is an urgent need to address climate change. Signing the MOU would show that the parties aim to promote and carry out broader cooperative activities regarding environmental issues through exchanging information; finding new solutions by way of regulations, legislation, or otherwise; and working to educate the public on the need for aggressive action to reduce greenhouse gas emissions, increase the efficiency of energy use, and promote "green" technology. These efforts would be consistent with the New Transatlantic Agenda and its Joint Action Plan adopted in 1995 to open dialogue between the United States and the European Union to cooperate on a full range of political and economic issues, including the preservation of the environment.

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[13] Article 301 of the Turkish penal code has been the subject of criticism by the E.U. and the international community. The article prohibits individuals from publicly insulting Turkishness, punishing offenders by imprisonment of between six months to two years. Turkey's restriction on the freedom of expression was brought to the attention of the international community during the September 2005 trial of the Nobel Prize in Literature novelist Orphan Pamuk. *See* http://www.independent.co.uk/news/world/europe/leading-turkish-writer-faces-jail-after-incurring-wrath-of-military-481368.html. In September 2006, the European Parliament called on the Turkish government to abolition laws such as Article 301, "which threaten European free speech norms." *See* http://news.bbc.co.uk/2/hi/europe/5385954.stm.

[14] Among the Turkey's ongoing human rights violations include those involving their large Kurdish population. Since Turkish independence after World War I, the Kurds have only recently seen minor gains in their linguistic and cultural freedoms, and their plight in Turkey has been marred by rampant underdevelopment in the South Eastern region as well as continued suppression in the form of banning of forms of Kurdish identity and language.

2. Building a Reputation in the International Community

Treaties and international agreements can also communicate messages that build a reputation in the eyes of other nations.[15] A reputation in this sense is the estimation or image that other countries have of a given state or country. It can be shaped by a pattern of repeated behaviors or changed by dramatic and symbolic acts. A nation, for instance, that enters into a bilateral investment treaty might hope to improve its reputation in the international community as a "business-friendly" state. This in turn could lead to increased business investment in that state and increased international commerce.

Normally the reputation of sub-national jurisdictions in the international community derives heavily or even exclusively from the national government's reputation, both because trade and foreign policy is made at the national level and because information about regions and localities is more imperfect and incomplete than at the national level. Still, many U.S. states compete for foreign investments and business and send their governors, legislators and other state officials on trips abroad to drum up business for their states. In a similar way, informal international agreements can fill the information void that exists at the sub-national level and help the international community distinguish between a particular state and the national government.

Specifically, in signing this agreement, California and the E.U. would hope to shape their reputations in the international community as environmentally concerned and green business friendly. While the federal government, particularly the Bush administration, held back on taking meaningful steps towards strengthening environmental regulations, California could establish a distinctive image for itself by its willingness to move beyond the federal government's policies. Governor Schwarzenegger expressed this position explicitly: "[Waiting for other countries to act first is] not how we put the man on the moon. We did not say let's everyone else do the same thing and then we will do it . . . We want to be out there in front . . . I think we have a good opportunity to do the same thing also with fighting global warming."[16] A strong reputation on environmental issues might serve both parties well in the competition for trade in the green economy.

B. Shifting Behavior

Another motivation behind signing such an agreement is to shift behavior. This includes shifting California and the E.U.'s own behavior by precommitting themselves and also binding other states to promote international cooperation.

1. Pre-committing to Environmental Regulations

The more binding the agreement, the more "committed" the parties are to the course of action outlined in an agreement. Hence a domestic agreement enforced by the coercive power of

[15] Goldsmith & Posner, *supra* note 4 at 133.

[16] Interview with Governor Schwarzenegger, "This Week with George Stephanopoulos," July 13, 2008.

the state is the strongest form of "precommitment," but a binding treaty entails greater commitment than an informal agreement, including an MOU. While there is little difference between formal and informal commitments with respect to signaling and reputation building, there is more of a difference between these types of agreements with respect to the affect on commitment.

A political leader might enter into an international agreement to "precommit" his or her state to a certain political future or to restrain future actions to the contrary.[17] The Nuclear Nonproliferation Treaty ("NPT"),[18] for instance, binds five nuclear weapon states not to transfer to or in any way encourage other nations to develop nuclear weapons, and non-nuclear signatories to not receive or attempt to build such devices. If a nation fails to comply with the NPT, it can face serious consequences such as economic and trade sanctions.

By comparison, a state is less likely to factor precommitment in complying with informal international agreements since they are not intended to be legally binding. That said, a commitment motive can still play a role, even if a lesser one, in motivating an informal agreement in the sense that backing out of public declarations can have adverse political consequences for elected officials who fail to follow through on their promises much as the failure to follow through on campaign promises can be disadvantageous.

For example, the plain language of the MOUs between California and the Canadian provinces as well as between California and Mexico express a purpose that serves to publicly precommit the respective states to strengthening environmental regulations. The MOU on Environmental Cooperation between California and Mexico states that its purpose is to "promote and carry out broader cooperative activities regarding environmental issues among the Parties in the framework of their respective purview and based on principles of equality, reciprocity, information exchange and mutual benefit."[19] This statement can serve to precommit California

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[17] Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2057-58 (2003); *see also* Jeremy J. Waldron, *Precommitment and Disagreement*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 271, 274-81 (Larry Alexander ed., 1998).

[18] Treaty on the Non-Proliferation of Nuclear Weapons, U.N.T.S. (1968).

[19] "Memorandum of Understanding on Environmental Cooperation Between the California Environmental Protection Agency, The California Department of Food and Agriculture and the California Resources Agency of the State of California, United States of America and the Ministry of Environment and Natural Resources of the United Mexican States," Feb. 13, 2008 (copy on file with authors). Similarly, the California agreement with Ontario indicates, "Working together, California and Ontario commit to build upon current efforts, share experiences, find new solutions, and work to educate the public on the need for aggressive action to address climate change and promote energy diversity." *See* "Memorandum of Understanding between the Province of British Columbia and the State of California on Pacific Coast Collaboration to Protect Our Shared Climate and Ocean," (copy on file with authors). The agreement between Manitoba and California outlines, "in the spirit of this Declaration, the Participants have decided to work co-operatively to the fullest possible extent, consistent with the laws and existing treaties between their respective nations, to advance greenhouse gas emission reductions, particularly in the areas of clean energy, sustainable transportation and sustainable agriculture. In so doing, the Participants intent to work in consultation with the California Air Resources Board and the California Climate Action Registry." *See* "Memorandum of Understanding between the Province of British Columbia and the State of California on Pacific Coast Collaboration to Protect Our Shared Climate and Ocean," (copy on file with authors).

and Mexico to this purpose. Failing to comply with this purpose may lead to adverse political consequences by the public and interest groups within Mexico and California as well as other states. The fact that the California public is so supportive in general of strong environmental regulation raises the stakes of backing out of a publicly declared commitment to a given course of action. Conversely, precommitment might be less a motivation for the E.U., where there is less public involvement and accountability in the regulation-making process.

2. Binding Others and Promoting International Cooperation

In addition to precommitting itself, a state might elect to sign a treaty to convince other nation states that the agreement is the right policy.[20] To illustrate, in signing the New York Convention on the Recognition and Enforcement of Arbitral Awards, a nation state agrees to recognize foreign judgments related to arbitration agreements and awards issued in fellow signatory states so long as the awards or agreements do not violate basic due process principles.[21] By reciprocally recognizing these awards, states promote the resolution of private international disputes by way of international arbitration. At the same time, by signing this Convention, other nation states are similarly encouraged to bind themselves to the Convention in order to ensure that their state will be viewed as supportive of international business and the rule of law.

Similarly, although an informal agreement on environmental regulations would not be binding on the other party, it would marginally increase the incentives to comply for the reasons discussed above. After signing an agreement, and assuming it received a great deal of publicity, if either party backed down on the regulation-making or amending process, it could receive public attention that would ultimately harm their respective reputations and ability to persuade other states to cooperation in the future. And by promoting repeated interactions in this way, informal agreements further the cause of international cooperation.

C. Exchanging Information

California and the E.U. may elect to sign an MOU as a means to exchange information on key issues within environmental policy. Although both California and the E.U. are leaders in sustainable environmental management, they have served as leaders for different aspects of environmental policy. For example, Governor Schwarzenegger signed into law the Global Warming Solutions Act of 2006 which places an economy-wide cap on greenhouse gas emissions and requires a reduction of emissions in California to 1990 levels by 2020. He has also set administrative targets to reduce greenhouse gas emissions in the State to eighty percent below 1990 levels by 2050. Yet another example is the California Department of Health and Human Services' Birth Defects Monitoring Registry, which is a database of medical and demographic information on children with birth defects.[22] The aim is to prevent birth defects by

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[20] Ratner, *supra* note 18, at 2058.

[21] *See generally* New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38 (1959).

[22] *See* California Health and Human Services website, *available at* *http://oehha.ca.gov/public_info/TDenviro.html#birth_defects_monitoring (last visited June 15, 2009).*

finding their causes and any relation to environmental factors. The federal government has yet to develop such a database. California can share information with the E.U. on how the database was established, maintained, and used and the scientific methods used for the studies.

Meanwhile, the E.U. has taken significant steps to establish a supranational framework to regulate genetically modified organisms ("GMOs") in a community where their introduction would otherwise occur at the point of least regulation. The E.U. has accomplished this through a number of directives and regulations that govern the labeling and authorization of GMOs. The E.U. has also worked to improve the protection of human health and the environment by identifying and evaluating harmful chemical substances in entering into force the Registration, Evaluation, Authorisation, and Restriction of Chemical substances ("REACH") (EC 1907/2006).[23] An MOU between the parties could serve to promote the exchange of information and technologies on environmental issues not as familiar to each party.

Additionally, information exchange could benefit the localities within California and the E.U. For example, California localities have conducted research on land use, which could be particularly helpful to rural parts of France. Adopting building standards is also within the discretion of localities since the private market is not likely to adopt green building standards on its own. Exchanging information on local building standards within California and E.U. Member States could help the parties reach creative solutions on unregulated environmental issues. In doing so, the parties would in essence be codifying their existing efforts on unregulated issues. Although the aim would be to transfer information, the strength of the agreement would almost entirely depend on the quality of the MOU participants and whether they will elect to follow through on their promises. But signing such an agreement encourages agencies to act on issues they might not have acted on but for the agreement. Setting forth these mutual aims in writing encourages information exchange and action on environmental issues.

III. The Legality of MOUs [24]

A. Treaty-Making Authority and the Foreign Affairs Doctrine Under U.S. Law

The U.S. Constitution grants formal treaty-making power to the federal government. Article I, Section 10 of United States Constitution indicates, "No State shall enter into any Treaty, Alliance, or Confederation," granting the authority to regulate foreign affairs to the federal government. This power ensures that the United States speaks with a united voice and

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[23] With respect to renewable energy see Directive 2001/77/EC of the European Parliament and the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity markets; OJ L 283, 27.10.2001, pp. 33-40.

[24] For a detailed analysis on the legality of various forms of cooperation between California and the E.U. see Daniel Farber, *Legal Guidelines for Cooperation Between the European Union and American State Governments*, COOPERATING IN MANAGING BIOSAFETY AND BIODIVERSITY IN A GLOBAL WORLD: EU, US, AND CALIFORNIA (2009).

enters into agreements as a whole, rather than on a state-by-state basis.[25] More specifically, state laws that intrude or impinge on the federal government's authority to regulate foreign affairs are prohibited.[26] This is known as the Foreign Affairs Doctrine.

A strict interpretation of this clause could lead to a conclusion that any agreement between a U.S. state and a foreign government unconstitutional. There is no absolute prohibition, however, on state actions that influence foreign affairs: a party asserting foreign policy preemption must show "clear conflict" between the state law and the federal foreign policy[27] and the conflict must have more than an "incidental effect" on foreign affairs.[28] Therefore, states may and have affected foreign relations through, for example, negotiating informal agreements with foreign governments to strengthen environmental regulations.[29]

As an illustration, in *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, automobile dealers and manufacturers brought an action against the Executive Officer of the California Air Resources Board to challenge the validity of California Assembly Bill 1493 ("AB 1493") – a bill

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[25] *See Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) ("the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution was pointed out by authors of The Federalist in 1787, and has since been given continuous recognition by [the United States Supreme] Court"); *see also* Alexander Hamilton, *The Federalist Papers* No. 80: The Powers of the Judiciary (1788) ("the peace of the WHOLE ought not be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever be accompanied with the faculty of preventing it"); *c.f.* The Supremacy Clause of Article VI of the Constitution grants Congress the power to preempt state law.

[26] *See e.g. Zchernig v. Miller*, 389 U.S. 429, 434-36 (deciding that Oregon probate law that condition nonresident inheritance rights upon the individuals ability to demonstrate that his or her country of origin would grant reciprocal inheritance rights to U.S. citizens had "more than some incidental or indirect effect in foreign countries" and was therefore unconstitutional); *Crosby v. Nat'l Forest Trade Council*, 530 U.S. 363 (2000) (holding that Massachusetts law regulating business contracts with Myanmar was unconstitutional because it potentially conflicted with federal bill imposing sanctions); *Amer. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (deciding that California's Holocaust Victim Insurance Relief Act of 1999, which required insurance companies to disclose any involvement they may have had with insurance policies of Holocaust victims, intruded on federal powers because it had more than an incidental effect on foreign relations).

[27] *See Garamendi*, 539 U.S. at 421 (holding that a party asserting foreign policy preemption must show "clear conflict between the policies adopted by the two"); *see also Chrysler* , 529 F.Supp.2d at 1186-87(finding that an "interference must be with a policy, not simply the means of negotiating a policy").

[28] *Zchernig v. Miller*, 389 U.S. at 418-19.

[29] *See e.g.* "Memorandum of Understanding on Environmental Cooperation Between the California Environmental Protection Agency, The California Department of Food and Agriculture and the California Resources Agency of the State of California, United States of America and the Ministry of Environment and Natural Resources of the United Mexican States," Feb. 13, 2008 (copy on file with authors); *see also* Memorandum of Understanding between the Province of Ontario and the State of California for collaboration on climate change and energy efficiency," May 13, 2007 (copy on file with authors); *see also* "Memorandum of Understanding between the Province of Manitoba, Canada and the State of California, United States of America," Dec. 2006 (copy on file with authors); *see also* "Memorandum of Understanding between the Province of British Columbia and the State of California on Pacific Coast Collaboration to Protect Our Shared Climate and Ocean," (copy on file with authors).

regulating vehicle emissions and greenhouse gases.[30] The plaintiff alleged that the regulation conflicted and interfered with U.S. foreign policy and therefore was unconstitutional.[31] The California district court disagreed, finding that although the Clean Air Act[32] "expressly preempts state regulation of motor vehicle emissions," California could be granted a waiver of preemption to more stringently regulate certain emissions.[33] Referencing a Supreme Court decision,[34] the court pointed out that the EPA is "not authorized to pronounce United States foreign policy" and therefore the EPA's "pronouncement of what foreign policy is cannot be taken as authoritative absent some showing of State Department approval."[35] Since there was no clear pronouncement from the State Department on federal environmental policy and certainly nothing to support the idea that federal policy was to limit its effort or the efforts of states to control emissions, the court found the policy constitutional.[36]

To show that the California law unconstitutionally interfered with U.S. foreign policy, the court held that the plaintiffs had to demonstrate a "clear conflict" between state law and a federal treaty or agreement: that AB 1493's effort to limit emissions interfered with federal governments efforts to reduce emissions pursuant to a treaty or agreement.[37] The court found no such clear conflict, distinguishing previous cases in which state legislation was aimed directly at a foreign country from AB 1493 which was aimed internally at limiting emissions in California.[38]

As examples of state legislation aimed directly at a foreign conflict, in *Zchernig v. Miller*, the Oregon probate law in question conditioned nonresident inheritance rights upon the individuals ability to demonstrate that his or her country of origin – in this case, East Germany – would grant reciprocal inheritance rights to U.S. citizens.[39] The Supreme Court found that this law had "more than some incidental or indirect effect in foreign countries" and was therefore unconstitutional.[40] Likewise, in *Crosby v. National Forest Trade Council*, a Massachusetts law

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30 *Central Valley,* 529 F.Supp.2d 1151, 1154 (E.D.Cal. 2007) (AB 1493 was codified as Cal. Health & Safety Code § 43018.5).

31 *Id.*

32 The EPA is empowered through the Clean Air Act to "promulgate regulations necessary to prevent deterioration of air quality." 42 U.S.C., § 7601(a).

33 *Central Valley*, 529 F.Supp. 2d at 1156.

34 *Massachusetts v. E.P.A.*, 127 S.Ct. 1438, 1463 (2007).

35 *Central Valley,* 529 F.Supp.2d at 1185.

36 *Id.* at 1186-87.

37 *Id.* at 1187.

38 *Id.* at 1187-88.

39 *Zchernig v. Miller*, 389 U.S. at 434-36.

40 *Id.*

regulated business contracts with Myanmar due to human rights violations.[41] The Supreme Court also found this regulation unconstitutional because it potentially conflicted with a federal bill imposing sanctions.[42] Lastly, in *American Insurance Association v. Garamendi*, California's Holocaust Victim Insurance Relief Act of 1999, required insurance companies to disclose any involvement they may have had with insurance policies of Holocaust victims.[43] The Court similarly found that the law intruded on federal powers because it had more than an incidental effect on foreign relations.[44]

An MOU between California and the E.U. to strengthen environmental regulations would be directed internally at the environmental issues of each respective signatory. Unlike the Oregon law in *Zchernig*, which aimed to influence foreign probate law, the Massachusetts law that regulated contracts with Myanmar in *Crosby*, and the California law that regulated foreign insurance companies in *Garamendi*, an MOU between California and the E.U. would informally outline voluntary standards for environmental regulations for the respective parties. As a result, an MOU on environmental issues is similar to the environmental legislation in *Chrysler-Jeep* because both aim to change behavior in California rather than abroad: in this case, the MOU is aimed at limiting emissions and improving air and water quality in California.

Additionally, there is no "clear conflict" between more stringent California regulations and federal foreign policy as outlined in *Chrysler-Jeep* since there is no evidence supporting the idea that federal policy is to limit state efforts to control emissions, as the U.S. has signed but not ratified the Kyoto Protocol. Therefore, California would likely have the authority to sign an informal agreement, like an MOU, without hard limits but that expresses some mutual aims to voluntarily reduce carbon emissions. Such a loose informal agreement would have only an "incidental effect" on foreign policy since the agreement is non-binding and a completely voluntary promise to strengthen environmental regulations.

Prior MOUs that California has signed with other governmental bodies are instructive of their "incidental effect." The "Memorandum of Understanding on Environmental Cooperation Between the California Environmental Protection Agency, The California Department of Food and Agriculture and the California Resources Agency of the State of California, United States of America and the Ministry of Environment and Natural Resources of the United Mexican States," states that the "Parties will coordinate efforts and promote collaboration for environmental management, scientific and technical investigation, and capacity building, through cooperative actions focused particularly" on certain priority areas. The MOU also outlines the manner in which the Parties will cooperate, which includes exchanging information; designing, implementing and financing studies; developing and promoting environmental publications; sharing technology; developing capacity building programs; developing joint seminars and

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41 *Crosby v. Nat'l Forest Trade Council*, 530 U.S. at 363.

42 *Id.*

43 *Amer. Ins. Ass'n v. Garamendi*, 539 U.S. at 396.

44 *Id.*

conferences.[45] These agreements do not directly conflict with the Kyoto Protocol and set out mutual aims to strengthen environmental regulations. In this sense, they are not in direct conflict with U.S. foreign policy.

B. Legal Implications of "Soft Law" Instruments Under E.U. Law

As discussed above, there are growing discussions on the legal implications of "soft law" and its transformation into "hard law." In international law circles, this transformation is generally viewed as positive since non-binding agreements can help to overcome deadlocks on certain issues between states and eventually lead to compliance. But recent developments in E.U. law may inhibit the E.U.'s willingness to enter into "non-binding" agreements, such as an MOU with California.

The European Court of Justice and E.U. Commission have interpreted some informal agreements as possibly self-binding in situations where an institution has set rules for itself but did not follow those rules.[46] *See Ragusa v. Commission* [1983] Case 282/81, ECR 1245 (finding that the Director-General was obligated to comply with its own internal memorandum even though it was not prescribed by the Staff Regulations); *Turner v. Commission* [1985] Case 263/83, ECR 893(deciding that a Guide to Staff Reports was binding on the Commission); *Thyssen v. Commission* [1983] Case 188/82, ECR 3721 (recognizing that government bodies

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[45] *See* Addendum B: Comparison of Memoranda of Understanding between California and Manitoba, California and Ontario, California and British Columbia, and California and Mexico (A Chart of Parallel Provisions).

The "Memorandum of Understanding between the Province of Ontario and the State of California for collaboration on climate change and energy efficiency," outlines that the Parties will "Develop a Low Carbon Fuel Standard in [their respective] regions . . . Collaborate on energy efficiency programs and policies . . . Promote innovative technology."

The "Memorandum of Understanding between the Province of Manitoba, Canada and the State of California, United States of America," explains the goals to "Set achievable short- and long-term targets and objectives within each jurisdiction for overall emission reductions through a range of solutions including, but not limited to, market mechanisms, improved energy efficiency, new industrial processes and technologies, sustainable transportation, sustainable agriculture and forestry practices, better waste management, and the use and promotion of cleaner and greener forms of energy . . . [to] pursue the development, exchange and implementation of best practices and strategies on emission reduction." The Participants outline their plans to adopt legislation and/or regulations to promote these goals.

Lastly, in the "Memorandum of Understanding between the Province of British Columbia and the State of California on Pacific Coast Collaboration to Protect Our Shared Climate and Ocean," the parties agreed to cap greenhouse gas emissions by 2020, reduce greenhouse gases from the transportation sector, pursue aggressive clean and renewable energy policies, build a Hydrogen Highway from B.C. to Baja California, combine efforts to improve air quality, coordinate efforts to encourage clean technologies, and monitor and record improvements."

[46] *See also* Alberto Alemanno, *The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Walls or the Way Forward?,* European Law Journal 5:3 (2009) (arguing that soft law instruments may produce legal effects in E.U. law and therefore be directly enforceable before European Community courts).

may be bound by their own informal practices on the basis of the principle of equal treatment); *Huls v. Commission* [1992] Case T-9/89, ECR II-499 (holding that when the Commission imposes procedural rules on itself it "may not depart from rules which it has thus imposed itself"); Grimaldi [1989] Case C-322/88, ECR 4407 (deciding that recommendations may be legally binding).

The cases are generally distinguishable from the aims of this project because none of the cases has specifically addressed a memorandum of understanding with a sub-national state. Additionally, the "soft law" instruments found to be enforceable in these cases were internal policies issued by E.U. governmental bodies, not agreements between the E.U. and other states or sub-national states. The primary distinction is that the MOU serves primarily as a political statement of mutual intent whereas the agreements found enforceable under E.U. law were internal rules or practices applied within the execution of administrative discretion.

But even if the Court were to extend their holdings to this circumstance, the E.U. can ensure that the agreement will not be deemed binding by including a limitation clause. Therefore, signing an MOU with California would not be binding if drafted in the appropriate manner, so the agreement could still serve its purpose of reputation, behavior shifting, and information exchange while serving as a model for the U.S. federal government and other foreign states. From our analysis of the respective parties' laws, we have suggested a draft MOU that would comply with U.S. and E.U. laws.[47] Included in this draft is a clause that explicitly prohibits enforcement bodies from treating the instrument as binding. Specifically, we suggest the following language to ensure that the European Court of Justice, Court of First Instance, or Commission would not treat the MOU as "self-binding:"

> It is understood that this MOU merely constitutes a non-binding statement of the mutual intentions of the Parties with respect to the areas of cooperation and, except as specified in the last sentence of this Section, creates no legal obligations on the part of either Party hereto. Notwithstanding the foregoing, the provisions of Sections E through L hereof will be fully binding upon the execution hereof.[48]

In addition to this express assurance that the instrument be interpreted as non-binding, the agreement would only serve as a commitment to promote environmental regulations already in place and to promote the exchange of information. Therefore, even in the event that the agreement was treated as binding and the limitations clause was not enforced, there would be no risk of binding the E.U. to an environmental action to which it was not already committed.

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47 *See* Addendum A: Suggested MOU Draft (Memorandum of Understanding between the State of California and the European Commission to Promote Cooperation on Environmental Protection).

48 For a complete review of the proposed MOU, see Addendum A: Suggested MOU Draft (Memorandum of Understanding between the State of California and the European Commission to Promote Cooperation on Environmental Protection).

VI. The Precedent of California's Memoranda of Understanding on Global Warming

One method of reaching international cooperation, the memorandum of understanding, has already been used by the Schwarzenegger administration in conjunction with foreign governments to show support for measures aimed at reducing global warming and promoting green industries. A review of the MOUs that California has entered into with certain Canadian provinces, Great Britain and Mexico can shed some light on the advantages and disadvantages of this type of international agreement.

A. The Bush Administration's Role in the Development of California's MOUs

Until nearly the end of the Bush administration, the administration had been skeptical about the science behind global warming predictions and leery of international agreements that might saddle U.S. businesses with environmental costs that might create disadvantages in the global marketplace. Shortly after coming into office in 2000, President Bush announced that the U.S. would pull out of the Kyoto Treaty, which it and fifty-four other nations had signed in 1997 but had not yet ratified. European states in particular were upset at the President's decision. While only one other signatory nation had ratified the treaty at the time, there was a widespread belief in Europe that the Kyoto framework was the best chance to reduce greenhouse gases.

Opposition to the Bush administration's decision grew between the first and second terms within the U.S. public. By 2005, unusual weather patterns and declining confidence in the competence of the Bush administration in the wake of its mishandling of Hurricane Katrina and the Iraq war created the conditions for increased support for the Kyoto protocol within the U.S. In May 2005, a bipartisan coalition of 132 mayors pledged their cities to a reduction of "heat trapping gas emissions" to the Kyoto standard of seven percent below 1990 levels.[49] Al Gore's 2006 movie, *An Inconvenient Truth*, further heightened public awareness of the issue.

Conditions had changed as well for California's Governor Arnold Schwarzenegger. Elected in a recall in 2003, the Governor's popularity had slipped significantly in 2004 and 2005 due to his support for President Bush's re-election in 2004 and his own attempt to pass several conservative ballot measures in a special election in 2005. Faced with low popularity numbers and a difficult upcoming re-election campaign in 2006, Schwarzenegger made amends with the Democrats who controlled the legislature and adopted California Assembly Bill 32 ("AB 32"), a bill by then California Assembly Speaker Fabian Nunez that established a comprehensive set of regulatory and market mechanisms to reduce greenhouse gases. AB 32 required the California Air Resources Board to develop a plan for reducing greenhouse gas emissions twenty-five percent by 2020.

There was, in other words, a convergence of forces at work behind California's MOUs: on the one hand, foreign countries were anxious to signal their disapproval of the Bush administration policy with respect to Kyoto while the Governor and the legislature were touting their own efforts to curb global warming. Even before AB 32 was signed, the Schwarzenegger administration had entered into its first agreement with Britain in July 2005 to collaborate on

[49] Eli Sanders, New York Times (May 14, 2005).

climate change and clean energy. Speaking at the signing ceremony, the Governor was explicit about diverging from the Bush administration's global warming policies: "California will not wait for our federal government to take strong action on global warming. Today, we are taking an unprecedented step by signing an agreement between California and the United Kingdom.[50] The UK agreement, similar to the MOUs that would follow, pledged to explore the use of market based mechanisms, to exchange information and technology research and to enhance linkages between British and Californian scientific communities.

The Canadian MOUs followed shortly thereafter. In December 2006, the Governor signed an agreement with the Canadian province of Manitoba, again pledging to adopt cap and trade schemes and to share information and technology, but also adding a clause about trade partnerships related to hybrid and hydrogen vehicles. Once again the Governor was explicit in stating that the agreement with Manitoba will "address an issue that the federal government has yet to tackle."[51] Two more agreements with Canadian provinces followed in the spring of 2007.

On May 30, 2007 Ontario signed an agreement that in addition to pledging cooperation and information exchanges committed Ontario to adopting California's low carbon fuel standard. Remarks by the Ontario Premier make it clear that these agreements also allowed for the respective governments to claim credit for their environmental measures: "Our government took leadership in Canada by committing to close coal plants, banning inefficient light bulbs, enabling the investment of two billion dollars in energy conservation and contracting for 1800 megawatts of renewable power."[52]

The next day Schwarzenegger signed a similar agreement with British Columbia. The Governor outlined in detail the business connections between green companies in both states (citing for instance, a British Columbian company that produces natural gas truck engines that limit emissions and a California company that builds stations to fuel those trucks). He also noted that the agreement "does not dictate how we achieve the goals in our greenhouse gas emission cap or low carbon fuel standards . . . The market and consumer choice will determine those kinds of decisions."[53] These remarks about trade and market forces underscore an important point about these MOUs: to a certain degree, they are outgrowths of the traditional state exercise of promoting California business abroad and in the U.S. And since the pledges are explicitly voluntary, there is no attempt to forge treaty like commitments against the will of the federal government. Both of these features lessened hostility from the Bush administration to what they could have seen as politically embarrassing rebukes from domestic and foreign allies.

The political advantages of an MOU from the Governor's point of view are clear: it can be initiated with minimal consultation with the legislature or outside approval. This allows him to sidestep potential disagreements over the particular steps that would be taken to reduce

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[50] Press Release, Office of the Governor, State of California (July, 31, 2006).

[51] Press Release, Office of the Governor, State of California (December 14, 2006).

[52] Press Release, Office of the Governor, State of California (May, 30, 2007).

[53] Speech, Office of the Governor, State of California (May 30, 2007).

greenhouse gases and whether to rely on traditional regulatory or market mechanisms. The publicity surrounding the signing of these agreements also burnished the Governor's pro-environmental reputation and sent strong signals about California's position on global warming to the U.S. federal government and to the international community as a whole. Therefore, the signaling and reputational motives were very much in evidence. But it remains to be seen whether either California follows through on its pledged commitments.

B. The Need for an MOU between California and the E.U. Despite the Obama Administration's Environmental Policy Aims

Representatives from California and the E.U. may ask whether there is any reason to pursue an agreement with California given the outcome of the 2008 election. The rationale for such an agreement prior to 2008 was premised on the divergence between California and the Bush administration in terms of addressing the climate change specifically and environmental regulations generally. An MOU in that context would have signaled California's belief in the urgency of the world's environmental problems and its compatibility with the E.U.'s position on these issues. It would have also produced progress in a significant part of the U.S. even as other states followed the national governments lead.

The election of President Barack Obama has undercut some of these reasons. As a presidential candidate, President Obama was clear about his commitments to ending global warming, strengthening environmental protections, and promoting a more cooperative, multilateral approach to U.S. policy generally. President Obama has repeated this message in various speeches since coming to office. He has asked Congress to deliver "comprehensive energy legislation that would spur a transition to a clean energy economy, create thousands of green jobs and wean U.S. of our dependence on foreign oil."[54] Additionally, the administration has indicated that it intends to reduce greenhouse gas emissions to 1990 levels by 2020 and eighty percent below 1990 levels by 2050 through an economy-wide cap and trade system. This cap and trade system would be accomplished through pollution credits auctioned off and the proceeds used in clean energy investments, habitat protection and rebates/relief for disadvantaged consumers. Relevant cabinet and administration officials have been meeting regularly to consider how to implement a cap and trade system for greenhouse gas emissions and the House Energy and Commerce Committee intends to have a draft climate change bill by Memorial Day. Given this favorable movement, what value would an MOU between California and the E.U. add?

There are indications that President Obama's proposed national policies may encounter significant difficulties in the Senate and that the administration may be looking for partial and phased implementation of the cap and trade rather immediate 100% implementation. Although the Democrats might eventually pick up another Senate seat in Minnesota, the Democrats in the Senate will not be able to achieve a cloture vote on a filibuster without at least one or two Republican votes. The option of pursuing a global cap and trade bill through the budget

[54] Washington Post, April 8, 2009, Juliet Epstein, "White House May Postpone Auctioning Emissions." The administration also proposes to invest $150 billion in clean energy technologies and has set the goal of providing ten percent of electricity by renewable sources by 2012.

reconciliation process (a technique the Congress uses for budget votes that bypasses need for a super-majority cloture vote) has been closed-off in the interim when the Senate voted 67-31 in early April against using the reconciliation process for enacting an emission auctioning bill. This means that the Senate vote will require Republican cooperation, which could at least delay the enactment and quite possibly alter the content of the final bill significantly.

Secondly, faced with an economic crisis and likely opposition from industrial and conservative interest groups, the Obama administration is considering phased strategies for implementing an emission auction. This suggests that there might be a willingness to allow for state and sector variation.

Thirdly, states such as California can move much more quickly than the federal government or the Environmental Protection Agency where the development of rules and their implementation occurs slowly. Even if the current administration does act aggressively on climate change, there are still very significant implementation hurdles. For example the EPA may not have the proper staff to develop and implement a complex climate program. California can, therefore, serve as a laboratory for what works and serve as a policy pioneer.

Along these lines, aside from the political opportunity that is emerging, there might be benefits to letting California take the lead in implementing cap and trade or indeed in other kinds of environmental regulation. As Professor Carlson's paper demonstrates, California has served the role of "superregulator" on environmental issues.[55] When the Clean Air Act was enacted, California was allowed to pursue stricter regulations because of its particular vulnerability to smog and air pollution. This turned out to be advantageous because it provided a successful model for the rest of the nation. Similarly, allowing California to sign an MOU with the E.U. could make it the "superregulator" on global warming. This would allow for the system to be tested on a large state, giving feedback to the rest of the country on features that need tinkering or repair, and giving an empirical basis for speculations about the impacts that an emissions auction might have on business recovery. It would also allow other parts of the country that are tied to traditional manufacturing and carbon emitting economies to phase in their participation over a longer period of time and with more information about the California experience.

As before, an agreement with the E.U. signals the commitment and allows for useful exchanges between the E.U. and the U.S. on the operation of an emissions auction as well as other environmental matters. But where the agreement in the context of the previous administration would have been more a signal of disagreement, an agreement in this context, if properly vetted with the administration, could be a useful experiment in phased implementation.

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[55] Ann E. Carlson, *California Motor Vehicle Standards and Federalism: Lessons for the European Union,* COOPERATING IN MANAGING BIOSAFETY AND BIODIVERSITY IN A GLOBAL WORLD: EU, US, AND CALIFORNIA (2009).

VI. **Conclusion**

The election of Barack Obama seemingly changes the political context of any California-E.U. agreement, but does not undercut the value of such an agreement. On its face, the administration's environmental proposals substantially close the gap between the E.U. and U.S. on global warming issues. Nonetheless, there is uncertainty about how quickly the new administration will move forward with its plan. The administration promised only to establish yearly emission reductions targets rather than pledging to any specific numerical goals. Now, with the collapse of the financial markets and the possibility of a long recession, there is some question as to how quickly the administration will implement the cap and trade system and how stringent the emission limits will be in the next few years.

California, by contrast, is well into the implementation of its plan. It has already met its goals for 2007: determining the baseline 1990 statewide greenhouse gas emissions levels, deriving an inventory of historic emissions and establishing the 2020 emissions goal.[56] The state's timetable calls for approving a plan in January 2009 to achieve the maximum feasible and cost effective greenhouse gas reductions by 2020, having enforceable regulations by January 1, 2010 that implement the "early action measures;" and then putting the rest of the regulatory measures in place by 2012.

Public support remains strong for these measures, which enables California to serve as a trailblazer. A poll released in June 2008 by Fairbanks, Maslin, Maullin and Associates found that seventy-four percent of Californians support measures to reduce global warming pollution, and fifty-eight percent support doing so even if it would mean higher prices. At the same time, representatives of the business community have expressed their anxieties about the length of time it will take to develop these regulations, and whether the details of the cap and trade will fairly credit them for measures they have previously taken to reduce pollution.[57]

There are several implications to the Obama administration and California's plans in light of the current state of the economy. First, California is much further along the path to implementing its plan than the federal government. Second, there is no guarantee that the federal timetable will be as ambitious as California's, at least in the short run, since the Obama administration has only set long term goals. Third, the California plan will likely serve as a superregulator model in any event, providing guidance to the federal government based on the problems and successes California faces. Finally, there is no guarantee in the face of a recession that the federal government will be able to tackle environmental issues, particularly because of the need for Republican support in the Senate in order for any plan will emerge from the Congress. Much will depend on the path Republicans choose to follow in the wake of two successive defeats in national elections. Many prominent conservatives are arguing for the adoption of a purer conservative posture and stronger protection of business interests. Complicating matters in both houses is the ironic political consequence of winning more seats: many of the new members added to the Democratic caucus will be of the blue dog, fiscal

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56 *See* Climate Change Draft Scoping Plan, released June 2008.

57 "Firms Seek Clarification of New Emission Laws," AP, Jan 23, 2007 by Samantha Young, and "Eco-fight Looms on Gas Credit, Timothy Roberts, San Jose Business Journal, March 19, 2007

conservative persuasion, and may be reluctant to adopt measures that could be seen as imposing costs on business in a bad economy.

In short, apart from the commercial benefits of an agreement between the E.U. and California, an MOU might stimulate national action and instruct the national effort if and when it occurs in the future. California and E.U. are further along than most of the states and the federal government, and by creating a stronger alliance in this effort, might pave the way for future U.S. federal action.

ADDENDUM A: SUGGESTED MOU DRAFT

Memorandum of Understanding between the State of California and the European Union to Promote Cooperation on Environmental Protection

[*DATE*]

Whereas the State of California and the European Union (collectively, the "Parties") agree that there is an urgent need to address climate change and energy diversity;

Acknowledging the existing excellent cooperation between the State of California and the European Union;

Promoting the New Transatlantic Agenda and its Joint Action Plan adopted in 1995 to open dialogue between the United States and the European Union to cooperate on a full range of political and economic issues, including the preservation of the environment;

Recognizing that Parties are leaders in sustainable environmental management, including but not limited to:

(1) Governor Schwarzenegger signed into law the Global Warming Solutions Act of 2006 which places an economy-wide cap on greenhouse gas emissions and requires a reduction of emissions in California to 1990 levels by 2020. He has also set administrative targets to reduce greenhouse gas emissions in the State to eighty percent below 1990 levels by 2050;

(2) The European Union has taken significant steps to establish a supranational framework to regulate genetically modified organisms ("GMOs") through a number of directives and regulations that govern the labeling and authorization of GMOs and has worked to improve the protection of human health and the environment by identifying and evaluating harmful chemical substances in entering into force the Registration, Evaluation, Authorisation, and Restriction of Chemical substances ("REACH") (EC 1907/2006);

Taking into Account the global nature of environmental problems and the ability of joint efforts to enhance policies for environmental protections and sustainable natural resources;

Resolved to seek decisive and immediate action to address greenhouse gas emissions and other pressing environmental issues listed *infra*; and

Agreeing to the following:

I. **Mission**: The purpose of this Memorandum of Understanding ("MOU") is to promote and carry out broader cooperative activities regarding environmental issues through exchanging information; finding new solutions by way of regulations, legislation, or otherwise; and working to educate the public on the need for aggressive action to reduce greenhouse gas emissions, increase the efficiency of energy use, and promote "green" technology.

II. **Scope of the MOU:**

A. **Areas of Cooperation**

The Parties agree to cooperate on the following:

1. Educate the public on the need for aggressive action to reduce greenhouse gas emissions;

2. Increase the efficiency of energy use to address:

   a. Climate change;
   b. Air quality;

3. Encourage sustainable urban development and housing;

4. Promote "green" technology to address:

   a. Fuel quality standards;
   b. Water quality;
   c. Chemical safety;
   d. GMOs;

5. Any other area agreed upon by the Parties.

B. **Forms of Cooperative Activities**

The Parties' cooperative activities include but are not limited to:

1. Exchange of information;

2. Joint sponsorship of conferences, workshops, meetings, and technical visits;

3. Exchange of scholars and experts;

4. Development and dissemination of publications;

5. Direct collaboration between researchers jointly funded by the Parties; and

6. Coordinated efforts to strengthen environmental regulations.

C. Coordination and Oversight

The Parties agree to establish a Steering Committee to coordinate cooperative activities under the MOU. The California Environmental Protection Agency and the European Commission's Directorate General- Environment shall supervise the Steering Committee. The Steering Committee will be responsible for the following tasks:

1. Identifying the objectives of the Parties;

2. Developing implementation plans;

3. Reviewing and evaluating the completed activities;

4. Reporting [*specify period of time: biannually*] on cooperative activities;

5. Coordinating information exchange on programs, practices, laws and regulations relevant to cooperation under this MOU; and

6. Ensuring coordination and exchange of information with the Parties' other relevant activities with a view to increase synergies and avoid overlap.

D. Funding

Cooperative activities under this MOU are subject to the availability of appropriated funds.

E. Confidentiality

Each Party shall safeguard, preserve and maintain the confidential nature of both Parties confidential information and shall otherwise treat all such confidential information in the same manner as it would treat its own valuable, confidential and proprietary information of like importance, and in no even with less than reasonable care. Neither Party shall use any such confidential information, disclose, or permit disclosure of any such confidential information to any third party or parties. The Parties agree and acknowledge that confidential information does not include any information that: (i) was already in its possession, without restriction as to further disclosure or use, as of the effective date of this MOU; (ii) has entered the public domain through no fault of the receiving party; (iii) has been disclosed to it by a third party entitled to disclose the confidential information; or (iv) has been developed by the receiving party independently of any confidential information disclosed to it

pursuant to this MOU. The burden of establishing any of the above exceptions shall rest on the receiving party.

F. Treatment of Intellectual Property

The term "Intellectual Property" shall include all: (i) patents and patent applications and disclosures, and any renewals, reissues, reexaminations, extensions, continuations, continuations-in-part, divisions and substitutions relating to any of the patents and patent applications, as well as all related foreign patent and patent applications that are counterparts to such patents and patent applications; (ii) trade secrets, know-how and confidential or proprietary information relating thereto (whether or not patentable) and improvements thereto.

Each Party or individual involved with this MOU shall retain exclusive ownership over preexisting Intellectual Property except as expressly granted by the owner. Any Intellectual Property created by one Party to this MOU without the assistance of the other as a result of this MOU, shall be owned by the Party or individual who created that Intellectual Property unless otherwise expressly agreed. Joint Intellectual Property that arises from activity under this MOU shall be governed by the Governing Law of this MOU.

G. Effective Date

This MOU is effective on the date set forth above and will remain in effect for five (5) years from such date unless terminated or extended by mutual written agreement of the Parties.

H. Modification

This MOU may be modified only by the mutual written agreement of the Parties.

I. Governing Law

This agreement shall be governed by and construed in accordance with the laws of the [*State of California or a specific European Union Member State- must choose one otherwise may face a conflicts of law issue with respect to sections E through K*], without reference to conflicts of laws principles. The parties consent to jurisdiction in [*State of California or a specific European Union Member State*].

J. Integration

This is the complete agreement between the Parties and it supersedes oral communications.

K. Disputes

Should any issue arise with respect to the Parties respective obligations under this MOU, [*specify lower level representatives*] will use reasonable, good faith efforts to resolve such issue. Should those executives be unable to resolve any issue, the issue will be referred to [*specify higher level representatives*], who will likewise use reasonable, good faith efforts to resolve any differences.

L. Limitations

It is understood that this MOU merely constitutes a non-binding statement of the mutual intentions of the Parties with respect to the areas of cooperation and, except as specified in the last sentence of this Section, creates no legal obligations on the part of either Party hereto. Notwithstanding the foregoing, the provisions of Sections E through L hereof will be fully binding upon the execution hereof.

This MOU is accepted and agreed to as of the date set forth above.

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Government of the State of California
The Honorable Arnold Schwarzenegger
Governor of California
Or his designate

____
The European Union
[*Specify individual authorized to sign*]