

**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 Westphalia² 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 powerful 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 various 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.

In a pure Westphalian system, the Bush administration's decision to withdraw from the Kyoto Protocol and its general wariness about adopting measures that might put American businesses at a competitive disadvantage must be accepted by the international community as the final word about American participation until their term ends in 2009. However, the national monopoly over international relations has been challenged from above and below by supranational institutional arrangements such as the European Union ("EU") and by sub-national units like states and regions, depending on the constitutional makeup of the country, that can have the power to enter into international agreements with other governmental entities.

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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).

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 Bush administration. Prior to the 2008 election, the proximity of their positions on global warming created a strong incentive for closer collaboration between California and the EU, and the main question was the form that this partnership should take given that states do not normally exercise treaty making power. Given that the newly elected Obama administration will likely take positions on global warming that will be closer to the European perspective, it is important to reassess for the rationale for collaboration between California and the EU.

In this paper we explore the following questions. First, what are the non-formal treaty options for a state like California that wishes to enter into its own agreements with Europe? Second, what is the value of such non-treaty agreements given that they are predominantly voluntary? Thirdly, how has the outcome of the 2008 Presidential elections changed the motivations for such agreement?

In the sections that follow, we will first show that there are a variety of informal agreement mechanisms that a state can pursue that would further international environmental cooperation. We will describe in some detail one such mechanism that California has already used for international environmental agreements – the Memoranda of Understanding (“MOU” or “MOUs”) – with several Canadian provinces, Great Britain and Mexico and suggest that it is the best possible avenue for future EU-California environmental cooperation. 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 (and hence prohibit California from promising to implement the Kyoto Protocol unilaterally), California can sign a non-binding promise with the EU to follow some loose mutual aims. Additionally, signing an MOU would serve both California and the EU's aims at establishing a reputation as a leader on environmental regulations and, at the same time, put pressure on the federal government to sign an international environmental treaty. Finally, we will argue that even though the incoming administration will likely undercut some of the motivation for such an agreement, there may still be political and commercial value to an agreement.

II. The Legality and Value of Informal Legal Agreements

As will be discussed below, although US states do not have the authority to enter into formal treaties with the European Union or more specifically with the European Commission (the “Commission”) – the EU entity with legal personality – US 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.³ Other informal international

³ 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).

agreements such as MOUs, nonbinding resolutions, joint communiqués, and joint declarations are essentially non-legally binding “pledges.”⁴

Although somewhat controversial,⁵ 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.”⁶ This “expression” by the legal community may come in the form of, *inter alia*, 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, certain resolutions of intergovernmental organizations.”⁷ “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 been reluctant to enter binding agreements out of fear of harm to domestic corporations.⁸ 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.

Since these mechanisms are purely voluntary and non-binding, the calculations behind why US states sign informal agreements, while similar, might differ slightly from those behind formal ones signed by countries. Since US states do not have the authority to sign binding agreements, their motivations for signing voluntary agreements may mirror the motivations behind why countries sign binding agreements since that is their only option for entering into international agreements. An assessment of why countries, as opposed to US states, sign voluntary agreements would require a completely different analysis. It is instructive therefore to

⁴ 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).

⁵ 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.

⁶ Cynthia Crawford Lichtenstein, *supra* note 3 at 1433-34.

⁷ Boleslaw Adam Boczek, *supra* note 5.

⁸ *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).

review some of the usual reasons given in the 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 are for a nation state entering a treaty are: (1) to signal a message to other states, (2) to build its reputation, (3) to precommit itself and restrain certain future actions, and (4) to bind other states and promote international cooperation.

A. 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.⁹ By visibly committing to certain actions, a state communicates that its intentions are serious and invites others to base their actions accordingly. 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, in effect signaling to EU member states that it was serious about complying with EU treaties and regulations. To accede to the EU, states must first fulfill each of the thirty-five chapters of the EU’s *acquis*, and then the EU member states must unanimously agree to the applicant state’s membership.¹⁰ Turkey has made efforts to fulfill these requirements, but has yet to complete the process.¹¹ To support its EU application, Turkey has attempted to signal to EU member states that it is serious about complying with EU treaties and regulations. The EU and its member states have particular concerns with Turkey’s lack of human rights protections, including the Turkish occupation of Cyprus,¹² restraints on the freedom of expression,¹³ and the violation of Kurdish minority rights.¹⁴ By signing the

⁹ Goldsmith & Posner, *supra* note 4 at 114-15.

¹⁰ These *acquis* include, *inter alia*, permitting the free movement of goods, free movement of workers, revising competition policy, coordinating economic and monetary policy, strengthening the judiciary and fundamental rights, and conforming environment regulations.

¹¹ Turkey was granted associate member status to the European Union (then European Economic Community) in 1963 and ever since has aimed to become a full member. *See* European Union web site re: Enlargement, available at <http://www.euractiv.com/en/enlargement/eu-turkey-relations/article-129678>.

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.

¹³ Article 301 of the Turkish penal code has been the subject of criticism by the EU 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 for his expression. *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 abolish 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

European Convention on the Protection of Human Rights and Fundamental Freedom, Turkey aimed to show its efforts to fulfill the *acquis* requirements, promote human rights, reform its laws, and make progress to prepare for membership.¹⁵

California in a similar way might want to distinguish itself from the previous federal administration's position on global warming and environmental regulation. Just as Turkey aims to signal the EU that it embraces European values with respect to human rights so California might want to distinguish its position from the rest of the US, or at least from the Bush administration's environmental policies. 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 EU), so California might gain more trade and commercial opportunities for its green industries as a result of an agreement, and, at a minimum, avoid some of the growing anti-American sentiment prevalent in Europe by the end of the Bush administration. The signal by agreement might also be intended for the US federal government, demonstrating California's concern that the federal government should strengthen its environmental regulations.

B. Building a Reputation in the International Community

Treaties and international agreements can also serve as signals meant to communicate messages that build a reputation in the eyes of other nations.¹⁶ 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 more 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 US 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.

underdevelopment in the South Eastern region, as well as continued suppression in the form of banning of forms of Kurdish identity and language.

¹⁵ It should be noted that the Convention is not a legal instrument originating from the EU, 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>).

¹⁶ Goldsmith & Posner, *supra* note 4 at 133.

Specifically, in signing an agreement with the Commission, California would hope to shape its reputation in the international community as environmentally concerned and green business friendly. While the federal government, particularly the Bush administration, has 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 policies of the current administration. Governor Schwarzenegger expressed this position explicitly on *This Week with George Stephanopoulos*, “[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.”¹⁷ A good environmental reputation might serve California well in the competition for trade in the green economy.

C. Pre-committing California to Environmental Regulations in the Future

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 the state is the strongest form of “precommitment,” but a binding treaty entails more 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 with respect to the strength of 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.¹⁸ The Nuclear Nonproliferation Treaty (“NPT”),¹⁹ 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. The failure of nations to comply with the NPT can have serious consequences, such as economic and trade sanctions.

By comparison, precommitment is less likely to be an important consideration 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 live to their promises much as the failure to live up to 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

¹⁷ Interview with Governor Schwarzenegger, “This Week with George Stephanopoulos,” July 13, 2008.

¹⁸ 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).

¹⁹ Treaty on the Non-Proliferation of Nuclear Weapons, U.N.T.S. (1968).

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.”²⁰ 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.”²¹ 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.”²²

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. Ironically, precommitment might be less a motivation for the EU, where there is less public involvement and accountability in the regulation-making process.

D. 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 option.²³ To illustrate, in signing the New York Convention on the Recognition and Enforcement of Arbitral Awards, a nation state agrees to recognize arbitral awards issued in fellow signatory states so long as the awards do not violate basic due process principles.²⁴ By reciprocally recognizing these awards, states promote the resolution of private international disputes by way of international arbitration.²⁵ At the same time, by signing this Convention, other nation states are encouraged to similarly 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.

²⁰ “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).

²¹ 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).

²² “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).

²³ Ratner, *supra* note 18, at 2058.

²⁴ *See generally* New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38 (1959).

²⁵ International arbitration is the resolution of private international disputes by way of a confidential *ad hoc* tribunal set-up by the contracting parties and applying the laws and rules preferred by the parties.

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 earlier: 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 get cooperation in the future. And by promoting repeated interactions in this way, informal agreements further the cause of international cooperation.

III. Treaty-Making Authority and the Foreign Affairs Doctrine

The U.S. Constitution grants formal treaty-making power to the federal government. Article I, Section 10 of United States Constitution indicates, *inter alia*, “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 enters into agreements as a whole, rather than on a state-by-state basis.²⁶ More specifically, state laws that intrude or impinge on the federal government’s authority to regulate foreign affairs are prohibited.²⁷ This is known as the Foreign Affairs Doctrine.

A strict interpretation of this clause could lead to a conclusion that any agreement between a US state and a foreign government is impermissible. However there is no absolute prohibition 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 policy²⁸ and the conflict must have more than an “incidental effect” on foreign affairs.²⁹ Therefore, states

²⁶ 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.

²⁷ 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 requiring 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).

²⁸ 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”).

²⁹ *Zchernig v. Miller*, 389 U.S. at 418-19.

may and have affected foreign relations through, for example, negotiating informal agreements with foreign governments to strengthen environmental regulations.³⁰

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 regulating vehicle emissions and greenhouse gases.³¹ The plaintiff alleged, *inter alia*, that the regulation conflicted and interfered with US foreign policy and therefore was unconstitutional.³² The California district court disagreed, finding that although the Clean Air Act³³ “expressly preempts state regulation of motor vehicle emissions,” states may be granted a waiver of preemption to more stringently regulate certain emissions.³⁴ Referencing a Supreme Court decision,³⁵ 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.”³⁶ The court further found that 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.³⁷

To show that the California law unconstitutionally interfered with US 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.³⁸ The court found no such clear

³⁰ 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).

³¹ *Central Valley*, 529 F.Supp.2d 1151, 1154 (E.D.Cal. 2007) (AB 1493 was codified as Cal. Health & Safety Code § 43018.5).

³² *Id.*

³³ 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).

³⁴ *Central Valley*, 529 F.Supp. 2d at 1156.

³⁵ *Massachusetts v. E.P.A.*, 127 S.Ct. 1438, 1463 (2007).

³⁶ *Central Valley*, 529 F.Supp.2d at 1185.

³⁷ *Id.* at 1186-87.

³⁸ *Id.* at 1187.

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.³⁹

For example, 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, Germany – would grant reciprocal inheritance rights to U.S. citizens.⁴⁰ The Supreme Court found that this law had “more than some incidental or indirect effect in foreign countries” and was therefore unconstitutional.⁴¹ Likewise, in *Crosby v. National Forest Trade Council*, a Massachusetts law regulating business contracts with Myanmar due to human rights violations.⁴² The Supreme Court also found this regulation unconstitutional because it potentially conflicted with federal bill imposing sanctions.⁴³ 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.⁴⁴ The Court similarly found that the law intruded on federal powers because it had more than an incidental effect on foreign relations.⁴⁵

An MOU between California and the EU to strengthen environmental regulations would similarly 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 EU 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, we argue that 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. But since the US has refused to sign the Kyoto Protocol, California cannot promise to the full set of the Kyoto Protocol in an informal agreement. Rather, 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

³⁹ *Id.* at 1187-88.

⁴⁰ *Zchernig v. Miller*, 389 U.S. at 434-36.

⁴¹ *Id.*

⁴² *Crosby v. Nat’l Forest Trade Council*, 530 U.S. at 363.

⁴³ *Id.*

⁴⁴ *Amer. Ins. Ass’n v. Garamendi*, 539 U.S. at 396.

⁴⁵ *Id.*

“incidental effect” on foreign policy since the agreement non-binding and completely voluntary promise to strengthen environmental regulations.

For example, 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, but not exclusively, on the following priority areas of action: (a) Climate change; (b) Air quality; (c) Fuel quality standards; (d) Water resources, (e) Wildlife and habitat conservation; (f) Water quality; (g) Sustainable urban development, and housing; (h) Integrated management of waste in the border region; (i) Enforcement of their respective laws; and (j) Any other area agreed upon between the Parties.” 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 conferences.

Likewise, 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, *inter alia*, “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 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.” 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 US foreign policy.

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 will hopefully shed some light on the advantages and disadvantages of this type of international agreement.

Until very recently, the Bush administration had been skeptical about the science behind global warming predictions and leery of international agreements that might saddle US businesses with environmental costs that might create disadvantages in the global marketplace. Shortly after coming into office in 2000, President Bush announced that the US 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 gasses.

Opposition to the Bush administration's decision grew between the first and second terms within the US. 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 more support for the Kyoto protocols within the US. 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.⁴⁶ Al Gore's 2006 movie, *An Inconvenient Truth*, heightened public awareness of the issue further.

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 climate change and clean energy. Speaking at the signing ceremony, the Governor was quite explicit about diverging from the Bush administration's global warming policies: "California

⁴⁶ Eli Sanders, New York Times (May 14, 2005).

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.⁴⁷ 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.”⁴⁸ Two more agreements with Canadian provinces followed in the spring of 2007.

On May 30th 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.”⁴⁹

The next day Schwarzenegger signed a similar agreement with British Columbia. In his remarks, the Governor dwelled in greater detail on the business connections between green companies in California and British Columbia (citing for instance, a British Columbia company that makes natural gas truck engines that limit emissions and a California company that is building 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.”⁵⁰

The 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 US. And since the pledges are explicitly voluntary, there is no attempt to forge treaty like commitments against the will of the federal government. No doubt 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.

Most recently, California signed an agreement with Mexico in February 2008 to “coordinate efforts and promote collaboration for environmental management, scientific and

⁴⁷ Press Release, Office of the Governor, State of California, (July, 31, 2006).

⁴⁸ Press Release, Office of the Governor, State of California, (December 14, 2006).

⁴⁹ Press Release, Office of the Governor, State of California, (May, 30, 2007).

⁵⁰ Speech, Office of the Governor, State of California, (May 30, 2007).

technical investigations and capacity building.”⁵¹ Missing from this document was any specific pledge to enter into a regional cap and trade or to adopt specific tailpipe emission standards.

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 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 US federal government and to the international community as a whole. So, referring to the earlier discussion, 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. To further understand how this might play out, we will consider the formal steps and political considerations that surround the implementation of environmental regulations in California.

V. Regulation-Making Procedure in California

If California and the EU enter into an informal agreement, it seems likely that it would take the form of an MOU. The focus would then shift to implementation and California’s regulation-making process. The critical questions then become: (1) how difficult will it be for California to comply with such an informal agreement and (2) what are the steps that would need to be taken? The MOU would presumably pledge California and the EU to draft or amend certain environmental regulations⁵² in order to promote their mutual goals. To draft or amend a regulation in California, a state agency must initiate the process in compliance with the Administrative Procedure Act (the “APA” or the “Act”).⁵³ The entire regulation-making or amending process can take from six months to one year.⁵⁴

⁵¹ “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).

⁵² Under California law, “‘Regulation’ means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” *See* Cal. Gov. Code § 11342.600.

⁵³ In accordance with Government Code Section 11340, *et. seq.*, California government agencies must comply with the procedures prescribed in the APA when drafting and adopting regulations. The purpose of the Act is to “provide information to the public regarding regulations that are proposed” by government agencies. California Department of Insurance, Description of the Rule Making Process, *available at* www.insurance.ca.gov. The Act also “sets up a formal process designed to ensure regulations are clear and consistent, and public comments are addressed.” California Department of Pesticide Regulation brochure, “What You Need to Know about the Rulemaking Process: How You Can Get Involved in Regulation Decisionmaking,” (copy on file with author).

⁵⁴ *See* California Department of Pesticide Regulation brochure, “What You Need to Know about the Rulemaking Process: How You Can Get Involved in Regulation Decisionmaking,” (copy on file with author).

In California, once an executive agency – in this case the California Environmental Protection Agency⁵⁵ (“California EPA” or the “agency”) – decides to pass a regulation, it must propose its regulation through the formal rule making process. In this case, the California EPA, will likely draft and put forth the regulations based on an MOU with the EU. But to develop these regulations or amendments, the agency must take certain steps to ensure public involvement.

A. The California EPA must provide notice to the Office of Administrative Law that it aims to draft or amend an environmental regulation

The process by which regulations are drafted or amended begins when the state agency researches and drafts the proposed regulation. The agency then must notify the Office of Administrative Law (“OAL”) that it aims to draft or amend a regulation by issuing a notice of regulatory activity.⁵⁶ This notice includes a basic outline on the regulation and must include: (1) a reference to the legal authority for adopting the change; (2) an informative digest that includes a “concise and clear summary” of what the effects of the regulation change; (3) the deadline for submitting comments on the proposed change; (4) the location and time for any public hearing on the matter; and (5) the departmental contact person.⁵⁷ The California EPA will have to notify the OAL using these channels to initiate the regulation-making process to promote the aims of the MOU.

B. The Agency must prepare a publicly available regulation package and rulemaking file

Once the California EPA has provided this notification, it must prepare a regulation package and a rulemaking file which should include a check list composed of each reviewing department.⁵⁸ This file must be made available to the public for inspection and copying during regular business hours.⁵⁹ The rulemaking file must include background on and changes made to the regulation. Agencies are required to include in this file, *inter alia*, (1) copies of any petitions from “interested persons” proposing adoption, amendment, or repeal of a regulation; (2) all published notices on the regulation, updated informative digest, initial statement of reasons, and the final statement of reasons; (3) the agencies determination; (4) the cost estimate; (5) all data, factual information, studies/reports, written comments submitted by the agency in connection with the regulation; (6) the date that the agency made the full text of the proposed regulation

⁵⁵ California EPA website, *available at* <http://www.calepa.ca.gov/>.

⁵⁶ For an example of such a notice see Notice of Proposed Regulatory Action, California Department of Corrections and Rehabilitation, *available at* www.cdcr.ca.gov/budget/4141_NOPA.html.

⁵⁷ California Department of Pesticide Regulation brochure, “What You Need to Know about the Rulemaking Process: How You Can Get Involved in Regulation Decisionmaking,” (copy on file with author).

⁵⁸ Cal.Gov.Code § 11347.3.

⁵⁹ Cal.Gov.Code § 11347.3(a).

available for public comment; (7) the text of the regulations as originally proposed and modified; and (8) any other relevant information, statement, report, or data.⁶⁰

C. The Agency must assess the economic impact of the new regulation

The proper departments must then sign off on the amendment, and during this process, the department must assess the economic impact of the new regulation or amendment on the state of California. In proposing to adopt, amend, or repeal any regulations, the California EPA will be required to assess the “potential adverse economic impact on California business enterprises and individuals” to avoid imposing unnecessary or unreasonable regulations or “reporting, recordkeeping, or compliance requirements.”⁶¹ When proposing to adopt, amend, or repeal a regulation, agencies must: (1) base the change on “adequate information” regarding the need for and consequences of the regulation, and (2) consider the proposal’s impact on business.⁶² The EPA will also be required to consider whether and to what extent the regulations change will affect (A) the creation or elimination of jobs in California, (B) the creation or elimination of business within California, (C) the expansion of business currently doing business in California.⁶³

The economic assessment requirement might pose a problem in the regulation-making process because these more stringent regulations may result in significant costs for individuals, businesses, and state and local government. On the other hand, with the growing economic boom in the Green industry and Presidential-elect Barack Obama’s pledge to create five million “green collar” jobs,⁶⁴ the regulations resulting from an MOU with the EU might open-up new business and employment opportunities in California.⁶⁵ In fact, California companies may gain an advantage as a result of more stringent environmental regulations because the companies would be able to compete with European and Asian companies developing alternative fuel technologies. For example, had there been more stringent regulations on car emissions in the US, automobile manufacturers, like General Motors, would have developed their versions of

⁶⁰ *Id.*

⁶¹ Cal.Gov.Code § 11346.3(a).

⁶² Cal.Gov.Code § 11346.3(a)(1)-(2).

⁶³ Cal.Gov.Code § 11346.3(b)(1)(A)-(C).

⁶⁴ See The Telegraph, *Inside Barack’s White House*, Alex Spillius (Oct. 26, 2008), available at <http://www.telegraph.co.uk/news/newsttopics/uselection2008/barackobama/3264566/Inside-Barack-Obamas-White-House.html>.

⁶⁵ See Popular Science, *Green Collar Jobs: In California Saving the Environment is Generating Employment*, Rachael Dufree, (Oct. 23, 2008), available at <http://www.popsci.com/environment/article/2008-10/green-collar-jobs?page=>; see also The Green Blog, *Why Green Jobs are our Future*, David Beard (Oct. 21, 2008), available at http://www.boston.com/lifestyle/green/greenblog/2008/10/why_green_jobs_are_our_future.html (stating that based on a study conducted by the University of California at Berkeley, “[s]ince the 1970s, California’s energy-efficiency programs have created 1.5 million jobs, increased payrolls by \$45 billion, and yielded \$56 billion in energy savings that went toward other consumer spending”).

hybrid vehicles and thus have been able to compete in the industry rather than being bailed out by the federal government.⁶⁶

D. The Office of Administrative Law must publish the Initial Statement of Reasons and, in some cases, allow for public comment

The OAL must then publish the agency's Initial Statement of Reasons for amending the Regulation. OAL must provide notice to the public regarding the suggested change and make available a copy of the proposed regulation, initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation during a forty-five day public comment period.⁶⁷

The notice of the proposed adoption, amendment, or repeal of a regulation shall include the (1) time, place, and nature of the proceedings, (2) reference to the authority under which the regulation is proposed, and (3) an informative digest.⁶⁸ This digest should include (A) a summary of existing laws and regulations that affect the regulation in question, (B) an example of the differences to the current regulation, (C) a policy statement overview explaining the objectives of the regulation.⁶⁹ Although public hearings are generally optional, interested parties may compel a government agency to hold a hearing by requesting a hearing on a regulation change in writing no later than fifteen days prior to the close of the designated period for written comment.⁷⁰

E. The Agency must summarize the public comment(s) and address the concerns; if there is a substantive change, the agency must re-issue the notice for fifteen-day period

Both oral and written statements are permitted at the public hearing regarding the regulation.⁷¹ Agencies may not adopt, amend, or repeal a regulation which has been changed from what was originally made available to the public unless the change is not substantial or the public was put on notice.⁷² If a substantive change is made, the new text should be made available to public for at least fifteen days before the agency adopts, amends or repeals the regulation.⁷³

⁶⁶ Doron Levin and Jeff Green, *GM's 'Time Is Very Short' for U.S. Aid, Altman Says*, http://www.bloomberg.com/apps/news?pid=20601109&sid=a3VYXICU5_MM&refer=home.

⁶⁷ Cal.Gov.Code § 11346.2(a)-(b).

⁶⁸ Cal.Gov.Code § 11346.5(a)(1)-(3).

⁶⁹ Cal.Gov.Code § 11346.5(a)(3)(A)-(C).

⁷⁰ Cal. Gov. Code § 11346.8(a).

⁷¹ Cal.Gov.Code § 11346.8(a).

⁷² Cal.Gov.Code § 11346.8(c).

⁷³ *Id.*

F. The Agency must issue a Final Statement of Reasons

The agency must then summarize any written or oral public comments and address any substantive concerns in its Final Statement of Reasons for amending the Regulation. Agencies must prepare and submit a final statement of reasons regarding the regulation which must include, *inter alia*, (1) updated information from the initial statement of reasons, (2) a summary of each objection or recommendation made, (3) a determination with supporting information that no alternative considered by the agency would be more effective in carrying out the regulation's purpose, (4) an explanation outlining reasons for rejecting any proposed alternatives that would lessen adverse economic impact, and (5) an updated digest.⁷⁴ If a substantive change is made to the regulation, the agency and OAL must re-issue the notice for a fifteen-day period.

G. Once finalized, the Agency must submit the regulation to OAL which may then forward the rulemaking file to the Secretary of State, who must sign-off on the regulation

After the conclusion of this period, the California EPA must finalize the regulation package and submit it to OAL to ensure that the regulation is in compliance with the APA. When considering a regulation, the OAL considers (1) legal authority, (2) clarity in the regulatory language, (3) need for the change, (4) consistency with other codes and provisions, and (5) whether proper notice was given to the public.⁷⁵ OAL must determine whether the regulation should be adopted within thirty-days of receiving the file and forward the file to the Secretary of State for approval.⁷⁶ Agencies "shall" provide a certified copy of every regulation adopted, amended, or repealed to the Secretary of State for filing.⁷⁷ The regulation becomes effective upon approval by the Secretary of State and is published in the California Code of Regulations. If OAL disapproves of a draft regulation or regulation change, the file is returned to the drafting government agency with a statement of the reasons for the denial.⁷⁸ The agency then has 120 days to correct the problems outlined by OAL and resubmit the regulation package.⁷⁹

⁷⁴ Cal.Gov.Code § 11346.9(a)(1)-(6).

⁷⁵ California Department of Pesticide Regulation brochure, "What You Need to Know about the Rulemaking Process: How You Can Get Involved in Regulation Decisionmaking," (copy on file with author).

⁷⁶ *Id.*

⁷⁷ Cal.Gov.Code § 11343(a)-(b).

⁷⁸ California Department of Pesticide Regulation brochure, "What You Need to Know about the Rulemaking Process: How You Can Get Involved in Regulation Decisionmaking," (copy on file with author).

⁷⁹ *Id.*

Regulation Making/Amending Procedure Chart
A state agency must initiate the process in compliance with the Administrative Procedure Act.
To implement an MOU with the Commission on environmental regulations, California EPA would have to provide notice to the Office of Administrative Law that it aims to draft or amend an environmental regulation.
The Agency would then prepare a publicly available regulation package and rulemaking file.
The Agency is required assess the economic impact of the new regulation.
The Office of Administrative Law must publish the Initial Statement of Reasons and, in some cases, allow for public comment on the regulation proposal or amendment.
The Agency must summarize the public comment(s) and address the concerns. If there is a substantive change, the Agency must re-issue the notice for fifteen-day period.
The Agency must issue a Final Statement of Reasons for the regulation proposal or change.
Once finalized, the Agency must submit the regulation to OAL which may then forward the rulemaking file to the Secretary of State, who must sign-off on the regulation.

VI. Conclusion

The election of Barack Obama seemingly changes the political context of any California-EU agreement dramatically, but does it undercut the value of an EU-California agreement. Based on the promises made on Barack Obama's website⁸⁰ and other statements during the campaign, the Obama-Biden administration intends to reduce greenhouse gas emissions to eighty percent below 1990 levels by 2050 and 1990 levels by 2020. The administration plans to accomplish this through an economy wide cap and trade system, with pollution credits auctioned off and the proceeds used in clean energy investments, habitat protection and rebates/relief for disadvantaged consumers. The administration also proposes to invest 150 billion dollars in clean energy technologies, and have sets the goal of providing ten percent of electricity by renewable sources by 2012.

On the face of it, this proposal substantially closes the gap between the EU and US on global warming issues. Still, upon close inspection, there are some uncertainties 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

⁸⁰ See <http://www.barackobama.com/issues/>.

numerical goals. Now, with the collapse of the financial markets and a long recession forecast, there is some question as to how quickly it 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 CHG emissions levels, deriving an inventory of historic emissions and establishing the 2020 emissions goal.⁸¹ The state's timetable calls for the approving a scoping plan in January 2009 to achieve the maximum feasible and cost effective CHG reductions by 2020, having enforceable regulations by January 1, 2010 implementing the "early action measures;" and then putting the rest of the regulatory measures in place by 2012. The scoping plan, once approved, will have to be adopted through the normal rule-making process discussed above, with all the necessary comment and input.

Public support remains strong for these measures. 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 they will fairly credit them for measures they have previously taken to reduce pollution.⁸²

The implications of this are the following. First California is much further along the path to implementing its plan than the federal government. Secondly, 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. Thirdly, the California plan will likely serve as a model in any event, providing guidance to the federal government based on the problems and successes California faces. And lastly, there is no guarantee in the face of a recession and the need for Republican support in the Senate that 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 strong 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 conservative persuasion, and may be reluctant adopt measures that could be seen as imposing costs on business in a bad economy. Blue dogs pushed very hard for so called pay-go in the last session of Congress so the support cannot be taken as a given.

In short, quite apart from the commercial benefits of an agreement between the EU and California, it might serve a stimulus to national action, and instruct the national effort if and when it occurs in the future. California and EU 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 US federal action.

⁸¹ See Climate Change Draft Scoping Plan, released June 2008.

⁸² "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