

## Chapter 4, Problem III

Since publication of the textbook, a number of states have undertaken actions that implicate foreign affairs. Among other initiatives, California entered into an agreement with Quebec to link their respective “cap-and-trade” programs. The Trump Administration challenged this agreement as unconstitutional, arguing that the agreement facilitates cross-border mitigation strategies that the federal government had rejected when it left the Paris Agreement, and undermines the government’s ability to craft new international mitigation arrangements. A federal district court rejected this challenge, noting that conflict preemption requires that there be an existing federal policy; “an intent to negotiate a ‘better deal’ at some point in the future” is insufficient to preempt state law. The court also rejected the federal government’s “field preemption” arguments, noting that unlike *Crosby*, which involved “a state-wide prohibition on trade with an entire nation,” California’s cap-and-trade agreement addressed concerns “between sub-national actors.” In addition, unlike *Crosby*, there was no evidence that the President’s ability to negotiate with other states had in fact been circumscribed or compromised by California’s cap-and-trade program. *United States v. California*, 2020 WL4043034.

Another recent episode of state-federal-treaty interactions concerns the decision by the Governor of Michigan, Gretchen Whitmer, to order the closure of a section of a pipeline that runs under the Straits of Mackinac between the Upper and Lower Peninsulas of Michigan. The pipeline starts in Western Canada and, after passing through Minnesota, Wisconsin, and Michigan, ends in a refinery in Ontario. Whitmer ordered the closure of the 70-year old pipeline after environmental and indigenous peoples organizations asserted that the line was at risk of breaking and causing irreparable damage to the area.

Canada immediately protested, citing a 1977 treaty with the United States that limits the ability of sub-federal officials in either state to close down cross-border pipelines. (The treaty was originally negotiated at the behest of the United States to prevent Canadian provincial officials from closing down a pipeline – never built – that would have gone from Alaska through Canada to the northern United States.) While the Canadian company, Enbridge Energy, sued in Michigan and federal courts to prevent the closure, Canada invoked a clause in the treaty requiring negotiations between the parties. U.S. and Canadian officials have met to discuss this issue but have not reached agreement. The pipeline remains open.

Finally, Russia’s invasion of Ukraine in February 2022 prompted a number of sub-national actors in the United States to impose various forms of economic sanctions on Russia and Russian entities. For example, New York’s Governor signed an executive order banning state agencies from doing business with Russian companies; legislation was introduced in several states to require that state pension monies be divested from Russian firms; and officials in Alabama, Iowa, New Hampshire, North Carolina, Ohio, Pennsylvania, Utah, Vermont, Virginia, and West Virginia, all of which control the sale of alcohol, directed that alcohol from Russia be removed from store shelves. As of August 2022, it appears that no cases involving economic sanctions against Russia imposed by sub-national entities have been litigated in federal or state courts in the United States.

### *Notes and Questions:*

1. Some states are pursuing policies that oppose efforts to shift to clean fuels and technologies. For example, in August 2022, the treasurer of West Virginia, the nation's second largest coal producer, announced that the state would no longer enter into government contracts with several major banks, including Goldman Sachs, JPMorgan and Wells Fargo, which had publicly announced sharp reductions in financing for new coal projects. Other states gave withdrawn over \$700 million from BlackRock, a large investment manager that is divesting from coal companies, claiming that the firm is overly focused on environmental matters. And Texas enacted a law prohibiting state agencies from investing in companies that no longer do business with fossil fuel firms. Should a preemption analysis of these, and related, policies reach the same result as a preemption analysis of California's policies?

2. In August 2022, President Biden signed the Inflation Reduction Act into law. Among other provisions, the law provides billions of dollars in tax credits to incentivize the adoption of low-emission technologies, such as electric cars, and the manufacturing of clean energy technologies in the United States, rather than abroad. Experts predict that the bill will reduce U.S. greenhouse gas emissions to 40% below 2005 levels in 2030, which would move the U.S. closer to reaching its Paris Agreement commitment to reduce emissions by 50% below 2005 levels by 2030. Does enactment of this law change a preemption analysis of the state climate change initiatives discussed above and in the textbook?