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Massachusetts, Burma, and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era

Peter L. Fitzgerald*

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Introduction

Late Friday morning, the Assistant Clerk for Merits Briefing walked briskly down the white marble side-corridors, away from the tourists and school groups, to return to her mahogany desk in the windowless ground-floor anteroom to the Clerk's Offices in the U.S. Supreme Court building. Taking the list of decisions on the petitions considered during that morning's Conference, her immediate task was to ensure that the various orders were properly entered into the Court's electronic systems. On Monday morning, November 29, 1999, one of those orders would announce that the Commonwealth of Massachusetts's petition for a writ of certiorari in the "Burma law" case, *Crosby v. National Foreign Trade Council*, was granted.¹

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1. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *cert. granted*, 68 U.S.L.W. 3353 (U.S. Nov. 29, 1999) (No. 99-474). Stephen P. Crosby replaced Andrew S. Natsios as the Secretary of Administration and Finance of the Commonwealth of Massachusetts by the time the Supreme Court rendered its opinion. Natsios had replaced Charles D. Baker, the original defendant when the case was filed in 1998. See *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998), *aff'd sub nom. Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000).

That same weekend, Simon Billenness was preparing for “The Battle in Seattle.”² The Free Burma Coalition, in which he was a key figure, was part of an unusual gathering of diverse groups planning to protest the negative effects of international trade and globalization during four days of meetings by the World Trade Organization (WTO) beginning on November 30.³ Joining with anarchists, environmentalists, union members, and other activist organizations, these groups would seriously disrupt the Seattle meetings⁴ and do the same the following year to the International Monetary Fund (IMF) meetings in both Washington, D.C.,⁵ and Prague,⁶ as well as the European Union summit in Nice.⁷ The Seattle protests would become famous for the dichotomy embodied in images of environmentalists in sea-turtle costumes and unionists exchanging chants of “Turtles Love Teamsters” and “Teamsters Love Turtles,” while masked anarchists vandalized Seattle’s stores.⁸ Billenness’s involvement with both the globalization concerns and the Massachusetts case went back many years.

Seven years ago, Billenness, an analyst for an asset management firm specializing in socially responsible investments, attended a conference marking the end to the boycott of companies doing business in South Africa,⁹ following the demise of apartheid.¹⁰ Upon meeting Massachusetts Representative Byron Rushing, Billenness asked whether the state legislator would be interested in a new sanctions target, Burma.¹¹ Although Rushing initially did not know much about events in Burma, Billenness persuaded Rushing to adapt the Massachusetts anti-apartheid legislation to address Burma, literally substituting one country’s name for the other in a new bill.¹² The bill became law two years later, in 1996.¹³ It was the constitu-

2. David Postman, *Everyone has an Agenda Including the Turtles*, SEATTLE TIMES, Nov. 28, 1999, at E1, LEXIS, News Library, SEATTM File.

3. *Id.*

4. See generally Richard Lacayo, *Rage Against the Machine: Despite, and Because of, Violence, Anti-WTO Protestors were Heard*, TIME, Dec. 13, 1999, at 34.

5. See Patrice Hill, *IMF, World Bank Targets Again*, WASH. TIMES, Apr. 9, 2000, at C1, C6; see also *infra* notes 369-78 and accompanying text.

6. Walden Bello, *2000: The Year of Global Protest Against Globalization*, BUSINESS WORLD (Manila), Dec. 26, 2000, (Perspective), at 1, LEXIS, News Library, BWORLD File.

7. John-Thor Dahlburg, *Protestors Besiege the Opening of a Crucial EU Summit*, L.A. TIMES, Dec. 8, 2000, at A17; *European Union Leaders Reach Pact: Overhaul Agreement Clears Way for Expansion of Bloc*, CHI. TRIB., Dec. 11, 2000, at M5 [hereinafter *European Union Leaders Reach Pact*]; Andrew Nagorski, *Time to Put Up or Shut Up*, NEWSWEEK, Dec. 18, 2000, at 4.

8. William Greider, *Global Agenda*, NATION, Jan. 31, 2000, at 11.

9. The boycott against the apartheid regime in South Africa ended in 1991, although a number of U.S. and other sanctions remained in place until 1995. See Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT’L L. 1, 18 n.71 (1998).

10. Steven Mufson, *High Court Considers Mass. Anti-Burma Law*, WASH. POST, Mar. 23, 2000, at A2.

11. *Id.*

12. *Id.*

13. An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), 1996 Mass. Acts ch. 130 (codified at MASS. GEN. LAWS ch. 7, §§ 22G-M (2000)).

tionality of this bill that was at issue in the *National Foreign Trade Council* case.

Thus, at the same time the Free Burma Coalition and other organizations took to the streets demanding greater accountability from international institutions, such as the WTO and the IMF, and the end of an “era of trade negotiations conducted by sheltered elites balancing competing commercial interests behind closed doors,”¹⁴ the Supreme Court began wrestling with a similar problem of balancing governmental and popular interests. In trying to determine whether the Massachusetts Burma Law was such an irritant to foreign relations that it impinged upon the federal government’s foreign affairs powers or whether the state was simply exercising its rights to choose how to spend its citizens’ tax revenues in the marketplace, the Court, like the WTO and the IMF, grappled with a new balance between governmental interest and democracy—a new federalism in a global era. As the Chair of the AFL-CIO International Affairs Committee declared in the wake of the Seattle protests, “Globalization has reached a turning point. The future is a contested terrain of very public choices that will shape the world economy of the 21st century.”¹⁵

The new communication technologies embodied in the Internet are fueling the globalization of the world economy. The marketing hyperbole associated with the “global village” is now commonplace, as exemplified by IBM’s long-running “Solutions for a Small Planet” advertising campaign. From meditating Tibetan Monks spiritually communicating about the possibility of collaborating over computer networks, ecologists lost in the rain forests of Brazil using a laptop to find their way, ordinary Greek fishermen dreaming of expanding their business with online sales, or a small Texas company using the Internet to win a contract supplying parts to a Japanese multinational to the feel-good message of the “I am A Superman, I Can Do Anything” software ads, the message is one of individual empowerment in a marketplace that transcends national boundaries.¹⁶ Other examples of the seductive power of the Internet are everywhere; virtually no one in the business world is unaffected by the “e-revolution.”

Ironically, the same tools that create these worldwide opportunities for businesses are also revitalizing an old strain of anti-corporate and anti-colonial sentiment while providing the ability to present these concerns in new ways. For example, as Naomi Klein wrote in her book, *No Logo: Taking Aim at the Brand Bullies*:

More and more . . . we in the West have been catching glimpses of another kind of global village, where the economic divide is widening and cultural choices narrowing.

14. Jay Mazur, *Labor’s New Internationalism*, FOREIGN AFF., Jan.-Feb. 2000, at 79.

15. *Id.*

16. IBM, *IBM Solutions for a Small Planet* at <http://www.ibm.com/sfasp> (last visited May 22, 2000); AdCritic.com, *IBM - Domo Arigato Ad*, at <http://www.adcritic.com/content/ibm-e-commerce-domo-arigato.html> (last visited May 22, 2000); AdCritic.com, *IBM I am Superman Ad*, at <http://www.adcritic.com/content/ibm-lotus-domino-i-am-superman.html> (last visited May 22, 2000).

This is a village where some multinationals, far from leveling the global playing field with jobs and technology for all, are in the process of mining the planet's poorest back country for unimaginable profits. This is the village where Bill Gates lives, amassing a fortune of \$55 billion while a third of his workforce is classified as temporary workers This is the village where we are indeed connected to one another through a web of [various vendor's] brands, but the underside of that web reveals designer slums like the one I visited outside Jakarta. IBM claims that its technology spans the globe, and so it does, but often its international presence takes the form of cheap Third World labor producing the computer chips and power sources that drive our machines. On the outskirts of Manila, for instance, I met a seventeen-year-old girl who assembles CD-ROM drives for IBM. I told her I was impressed that someone so young could do such high-tech work. "We make computers," she told me, "but we don't know how to operate computers." Ours . . . is not such a small planet after all.¹⁷

The protests in Seattle highlighted this other view of globalization, which harkens back to the old debate between the "win-lose" view of trade—the notion that "First World" wealth is obtained at the expense of the "Third World"—as opposed to the "win-win" view of trade embodied in the theory of comparative advantage.¹⁸ The protests addressed a number of different issues, going well beyond human rights in Burma to encompass concerns ranging from the environment to labor issues. While pervasive distrust of corporate power and regulatory institutions in the global marketplace is a common and familiar theme, the extensive use of the Internet to mobilize and communicate the protesters' positions on the "contested terrain of very public choices" is entirely new.¹⁹ The Burma example illustrates how the power of the Internet gives these popular concerns new currency in the marketplace, consequently requiring adjustments in how governmental institutions respond to the issues.

I. Massachusetts Burma Law and Internet Advocacy

A. Legal Background

Massachusetts enacted the "Burma Law" in 1996 in response to Myanmar's military government²⁰ refusing to recognize the results of democratic elections held in 1990 and engaging in an ongoing pattern of human rights

17. NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES*, at xvii (1999).

18. The economic theory of comparative advantage is that trade is mutually profitable even when one country is more productive than the other in every commodity exchanged. It is traced to the nineteenth-century economist David Ricardo and his theory of "value," which considers how each country gains when it specializes in trade of goods where it has relatively lower costs or a "comparative advantage." If all countries specialize in those goods, then the general level of world prosperity increases. *See generally* DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY & TAXATION* (3d ed. 1821), available at McMaster University, <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/ricardo/prin>.

19. *See supra* note 15 and accompanying text.

20. In 1988, the State Law and Order Restoration Council (SLORC), a military junta, seized power from the military dictator who ruled Burma from 1962, General Ne Win. After cracking down on pro-democracy demonstrators, the SLORC seized power and renamed the country Myanmar. The SLORC renamed itself in late 1997 and is now

abuses.²¹ A typical selective purchasing measure, the law limited the ability of any State agency or authority, or the legislature, to purchase goods or services from persons or entities identified on a “restricted purchase list” due to their connections with Burma.²² The statute called for adding ten percent to the price bid by those businesses on the restricted list when evaluating the lowest bidder in a given procurement.²³ The law only exempted contracts for medical supplies²⁴ or contracts where the process eliminated an “essential” bid or offer.²⁵ The law otherwise applied equally to all suppliers, whether domiciled in Massachusetts or elsewhere. It did not, however, affect dealings among private parties or prohibit private parties from contracting with Burma. But failure to comply with the terms of the Burma Law when dealing with the government in Massachusetts rendered the contract void.²⁶

The Massachusetts Secretary of Administration and Finance compiled

also known as the State Peace and Development Council (SPDC). The United States does not recognize the Myanmar military regime.

Beginning in 1994, eighteen U.S. cities, one county, and one state—Massachusetts—enacted selective purchasing laws penalizing companies doing business with Burma. Additionally, on May 20, 1997, the U.S. Government imposed sanctions prohibiting new investments in Burma by U.S. persons or entities. U.S. EMBASSY, RANGOON, U.S. STATE DEP’T, COUNTRY COMMERCIAL GUIDES: FY 1999: BURMA chs. I-III (Sept. 1998), available at http://www.state.gov/www/about_state/business/com_guides/1999/eastasia/burma99.html.

21. The original sponsor of the Massachusetts Burma Law, State Representative Byron Rushing, declared that the goal of the measure was “free democratic elections in Burma.” Although the law contained no specific legislative purpose, Massachusetts stated in court that the law “expresses the Commonwealth’s own disapproval of the violations of human rights committed by the Burmese government” and “contributes to the growing effort . . . to apply indirect economic pressure against the Burma regime for reform.” *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 46-47 (1st Cir. 1999), *aff’d sub nom. Crosby v. Nat’l Foreign Trade Council*, 120 S. Ct. 2288 (2000). According to Amnesty International, the military regime in Burma has committed “widespread human rights violations against ethnic minorities, including extrajudicial executions, torture, ill-treatment during forced labour and portering, and forcible relocations.” AMNESTY INT’L, ANNUAL REPORT 1999: MYANMAR (1999), available at <http://www.amnesty.org/ailib/aireport/ar99/asa16.htm>; see also *EU and Japan Still Weighing Action On Mass. Burma Procurement Penalties*, 15 *Int’l Trade Rep. (BNA)* No. 2, at 44 (Jan. 14, 1998).

22. MASS. GEN. LAWS ch. 7, § 22H (2000). To appreciate the breadth of coverage in these procurement restrictions, see *id.* § 22G for the definitions of “state agency” and “state authority.”

23. *Id.* §§ 22G (defining “Comparable low bid or offer”), 22H(d).

24. *Id.* § 22I. This exemption worked both ways. Massachusetts could purchase supplies for which there is “no medical substitute” from persons or entities doing business in Burma without applying the 10% bid premium. Similarly, if a person’s or entity’s only dealings with Burma were the provision of medical supplies, then they were not subject to the 10% bid premium for state contractors. *Id.*

25. *Id.* § 22H(b). Massachusetts may procure goods or services from companies or individuals on the Burma Restriction List if (1) a certification is supplied to the head of the state department or agency, (2) stating that the procurement is necessary to avoid irreparable harm to the agency’s operations or mission, and (3) that compliance with the Burma law’s preferences would eliminate the only bid or otherwise result in inadequate competition. *Id.*

26. *Id.* § 22L.

a “restricted purchase list,”²⁷ intended to include the names of persons “doing business” in Burma.²⁸ The statute defined “doing business” to include not only Burmese business entities or those with a principal place of business in Burma but also those outside the country with “downstream” interests in Burma.²⁹ These downstream interests included, for example, Burmese majority-owned subsidiaries, franchises, distribution agreements, leases, operations, or “similar agreements.”³⁰ Moreover, the majority-owned subsidiary, franchisee, or licensee of “upstream” persons or entities that do business in Burma were within the definition’s scope.³¹ The statute further included those business entities outside Burma that simply provide goods or services to the Government of Burma or promote the importation or sale in other countries of items controlled by the Government of Burma, such as gems, timber, oil, gas, or related products.³² Finally, the statute broadly defined the Burmese Government to include any public or quasi-public entity on the municipal, provincial, or national level, as well as any national corporation in which the Government had a financial interest or for which it had operational responsibility.³³ Augmenting the Massachusetts list of restricted entities, the State required each bidder on a state contract to supply a declaration or affidavit, under penalty of perjury, detailing “the nature and extent to which the bidder is currently doing business with or in Burma” as defined in the statute.³⁴

Thus, Massachusetts drafted the law with a broad, sweeping reach. A subsidiary of a Japanese company, for example, may have no dealings with Burma or any real ability to influence its parent company’s actions. However, if the parent company imported Burmese oil products into Japan, the subsidiary would be disadvantaged in bidding on government procurements in Massachusetts because of its parent’s “upstream” activities. The statutory scheme mandated this result irrespective of whether the subsidiary was domiciled in Massachusetts, elsewhere in the United States, or abroad. The roster of companies on the Burma restriction list reflected this broad coverage. The blacklist included 44 U.S. and 281 foreign companies, but only four of the U.S. and fifty-three of the foreign companies listed had

27. The Secretary first promulgated the Burma Restriction List on December 9, 1996. Operational Servs. Div., Commonw. of Mass., *What’s New*, at <http://www.state.ma.us/new/new9612.htm> (last modified Jan. 1, 1997). Following the District Court’s decision in *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998), *aff’d sub nom.* Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *aff’d sub nom.* Crosby v. Nat’l Foreign Trade Council, 120 S. Ct. 2288 (2000), the List was removed on November 17, 1998. Harold Fisher, *Burma Statute Update*, OSDISCUSSIONS. . . , Winter 1999, at 1.

28. MASS. GEN. LAWS ch. 7, § 22J.

29. *Id.* § 22G.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (defining the “Government of Burma (Myanmar)”).

34. OPERATIONAL SERVS. DIV., COMMONW. OF MASS., PROCUREMENT POLICIES AND PROCEDURES HANDBOOK 40, app. at 186 (1998) [hereinafter MASS. PROCUREMENT HANDBOOK].

subsidiaries, affiliates, or branches operating in Massachusetts.³⁵

The Massachusetts Burma Law was not an isolated measure, or unprecedented. As of June 2000, when the Supreme Court issued its decision in the Massachusetts case, twenty-four municipal, county, or state governments had enacted selective purchasing laws specifically targeting Burma.³⁶ Similar measures were pending in a number of other jurisdictions.³⁷ Selective purchasing requirements have a long history, particularly in Massachusetts, tracing back to early colonial boycotts of English goods.³⁸ Moreover, the model for the Burma selective purchasing measure became well established with the state and local laws targeting apartheid in South Africa during the 1970s and 1980s.³⁹

In 1976, Madison, Wisconsin passed the first selective purchasing law aimed at those doing business with South Africa.⁴⁰ Two years later, Cotati, California became the first U.S. jurisdiction to prohibit investing its funds in companies doing business in South Africa, followed shortly by decisions in Berkeley and Oakland not to conduct business with banks that had South African ties.⁴¹ By the time Nelson Mandela called for the lifting of sanctions in September 1993, thirty-two states and 151 county or local governments in the United States had passed similar laws,⁴² of which seventy-three were selective purchasing measures.⁴³

U.S. direct investment in South Africa dropped from \$2.6 billion to less than \$700 million by the late 1980s, and more than 210 U.S. companies sold their South African operations during this period.⁴⁴ Although the sanctions on South Africa spanned the globe, President Clinton stated that "Americans had a lot to do with ending apartheid . . . by the sanctions . . . that swept cities and states across the country . . ."⁴⁵ The South African sanctions remain the preeminent example, cited by proponents of state and local sanctions, of the value of selective purchasing laws and similar mea-

35. Amicus Curiae Brief European Communities and Member States at app., *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998), available at USA*ENGAGE, <http://www.usaengage.org/resources/EU.html> (reprinting the Massachusetts Restricted Burma Purchase List).

36. USA*ENGAGE, *State and Local Sanctions Watch List*, at <http://www.usaengage.org/news/status.html> (last modified Mar. 2000).

37. *Id.*

38. See, e.g., CHARLES M. ANDREWS, *THE BOSTON MERCHANTS AND THE NON-IMPORTATION MOVEMENT 191-201, 212-14* (1917).

39. See Free Burma, *Selective Purchasing: A Brief History*, at http://www.ibiblio.org/freeburma/boycott/sp/bsp_history.html (last visited Dec. 2, 2000). The state and local anti-apartheid measures built upon local laws from the 1950s and 1960s that targeted those "doing business" with the Communist Block countries. See INVESTOR RESPONSIBILITY RESEARCH CTR., *STATE AND LOCAL SELECTIVE PURCHASING LAWS AS OF JULY 1998 1 & n.1* (1998) [hereinafter *SELECTIVE PURCHASING LAWS*].

40. PETER DESIMONE & WILLIAM F. MOSES, *INVESTOR RESPONSIBILITY RESEARCH CTR., A GUIDE TO AMERICAN STATE AND LOCAL LAWS ON SOUTH AFRICA 1* (1995).

41. *Id.*

42. *Id.* at 2.

43. *SELECTIVE PURCHASING LAWS*, *supra* note 39, app. B at 12.

44. DESIMONE & MOSES, *supra* note 40, at 3.

45. Free Burma, *supra* note 39, at http://www.ibiblio.org/freeburma/boycott/sp/bsp_history.html.

asures that essentially force businesses to decide who is the more important customer—the targeted country or the state and local government in the United States.⁴⁶

Berkeley, California passed the first Burma law in February 1995,⁴⁷ not long after Nelson Mandela was elected President of South Africa.⁴⁸ But the Burma laws are just one in a series of state and local sanctions measures that followed the anti-apartheid movement. For example, seventeen states and over forty local governments have selective purchasing laws aimed at promoting equal employment opportunities for Catholics and Protestants in Northern Ireland under the MacBride Principles.⁴⁹ Named after the Nobel Peace Prize-winning Chairman of Amnesty International, Sean MacBride, and established jointly by the New York City Comptroller's Office and the Irish National Caucus in 1984, the nine MacBride Principles call for nondiscrimination in employment and affirmative action to increase opportunities for religious minorities in Northern Ireland.⁵⁰ Like the Statement of Principles for South Africa, formulated in 1977 by the Reverend Leon Sullivan while he was serving on the Board of General Motors,⁵¹ the MacBride Principles represent a *voluntary* corporate code of conduct. However, in a manner similar to the tightening of the South African sanctions in the late 1970s and 1980s, these state and local government selective purchasing laws required that businesses with employees, affiliates, or franchisees in Northern Ireland comply with the voluntary MacBride Principles or be penalized when bidding on state and local government procurements.⁵² The MacBride Principles campaign, while generally opposed by the British Government, is nevertheless viewed as strengthening the Fair Employment Act in Northern Ireland and keeping

46. See, e.g., Free Burma, *Burma Purchasing Laws: Frequently Asked Questions*, at http://www.ibiblio.org/freeburma/boycott/sp/bsp_faq.html (last visited Dec. 2, 2000).

47. Berkeley, Cal., Ordinance 57,881-N.S. (Feb. 28, 1995), reprinted in SELECTIVE PURCHASING LAWS, *supra* note 39, at 28-32. Ann Arbor, Oakland, San Francisco, and Santa Monica also passed Burma laws prior to Massachusetts, although Massachusetts was the first state. USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html>.

48. Nelson Mandela was inaugurated as the first democratically elected President of South Africa on May 10, 1994. Afr. Nat'l Congress, *Biography of Nelson Mandela*, at <http://www.anc.org.za/people/mandela.html> (last visited Mar. 22, 2000); see also Free Burma, *supra* note 39, at http://www.ibiblio.org/freeburma/boycott/sp/bsp_history.html.

49. SELECTIVE PURCHASING LAWS, *supra* note 39, at 109-52; Press Release, Irish Nat'l Caucus, MacBride Principles Become Law in California (Sept. 15, 1999), available at <http://www.knight-hub.com/inc/RpressR.html>; Irish N. Aid Comm., *The MacBride Principles Campaign*, at <http://inac.org/ACTDIR/ACTMACB.HTML> (last visited Mar. 22, 2000).

50. SELECTIVE PURCHASING LAWS, *supra* note 39, at 7; see also Irish Nat'l Caucus, *The MacBride Principles* (Dec. 1997), at <http://www.knight-hub.com/inc/macbride.html>.

51. Leon Sullivan, *Statement of Principles for South Africa* (1992), available at Corporate Watch, <http://www.corpwatch.org/trac/feature/humanrts/resources/safrica-principles.html> (last visited Mar. 22, 2000). The Sullivan Principles established an aspirational corporate code of conduct for those doing business in South Africa, which antedated, but was incorporated into, the later state and local government anti-apartheid measures.

52. SELECTIVE PURCHASING LAWS, *supra* note 39, at 7.

the issue of equality on the table.⁵³

Also, state and local governments across the United States have passed various measures expressing opposition to Castro's government in Cuba,⁵⁴ ethnic strife and human rights violations in Nigeria,⁵⁵ the Chinese occupation of Tibet,⁵⁶ Indonesia's actions in East Timor,⁵⁷ and the Swiss banks' handling of Nazi loot and property from the victims of the Holocaust.⁵⁸ Proponents consider these measures "tools for democracy" because they are often intended to promote democratic reforms in the target country and because they reflect a local government response to grassroots concerns about conditions or actions in other countries.⁵⁹

As governments adopted these various measures over the last twenty-five years, the "model" for selective purchasing measures solidified, a model that the Massachusetts statute generally followed. Typically, each business that wishes to contract with a particular state or local government must be "evaluated" or "qualified" as able to do business with the government entity, either in advance of bidding⁶⁰ or as an integral part of the evaluation criteria for contract bids.⁶¹ It is not unusual for a government to: require a potential contractor to submit affidavits, certifications, or other documentary evidence of their—and their subcontractors'—ability to do the work required;⁶² provide references and financial statements;⁶³ meet applicable recordkeeping, minimum wage, security, bonding, liability, or insurance requirements;⁶⁴ accept standard terms and conditions;⁶⁵ or comply with any number of governmental policies or practices. In addition to selective purchasing requirements,⁶⁶ these policies or practices may include, for example, policies promoting the use of environmentally-sensitive products,⁶⁷ encouraging the participation of minority- or women-owned businesses in the procurement process,⁶⁸ complying with the gov-

53. *Id.*

54. USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing Dade County, Florida as imposing selective purchasing and investment restrictions directed at Cuba).

55. SELECTIVE PURCHASING LAWS, *supra* note 39, at 4-5.

56. *Id.* at 5-6.

57. USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing Cambridge, Massachusetts as imposing selective purchasing restrictions directed at Indonesia).

58. *U.S. Official Warns Against Swiss Sanctions*, REUTERS, July 23, 1998, available at USA*ENGAGE, <http://www.usaengage.org/news/980724swiss.html> (describing New York sanctions pending against Swiss banks).

59. See, e.g., Free Burma, *Selective Purchasing: A Tool for Democracy*, at <http://www.ibiblio.org/freeburma/boycott/sp> (last visited Dec. 2, 2000).

60. E.g., MASS. PROCUREMENT HANDBOOK, *supra* note 34, at 60-61.

61. E.g., *id.* at 37-42.

62. E.g., *id.* at 76-77.

63. E.g., *id.* at 78.

64. E.g., *id.* at 81-83.

65. E.g., *id.* at 89-92.

66. E.g., *id.* at 93.

67. E.g., *id.* at 83-84.

68. E.g., *id.* at 31-32.

ernment entity's affirmative action plan,⁶⁹ or disqualifying bidders who previously violated state or federal procurement laws.⁷⁰ Thus, compliance with the selective purchasing requirement is just one of a host of obligations and undertakings built into the normal governmental procurement process.

The standard selective purchasing mechanism employs a blacklist of businesses that fit within a statutory or regulatory definition of "doing business" with the sanctioned target. The government compiles this list on the basis of information submitted by the particular bidder as part of the procurement process or obtained from third-party advocacy groups, such as the Investor Responsibility Research Center (IRRC),⁷¹ or other governmental organizations, such as the California Public Employees' Retirement System (CalPERS).⁷² Persons or entities with a direct presence, investment, or employees in a targeted destination are universally defined as "doing business" with the target.⁷³ Some selective purchasing measures also define a variety of "non-equity ties" as "doing business" with the sanctioned country, such as arms-length licensing, distribution, or franchising agreements.⁷⁴ It is also fairly common to extend the blacklist to include the parent or subsidiary companies of business entities who do business with a sanctioned country whether or not they conduct business with the target themselves, thereby extending the coercive force of the sanctions or boycott to a secondary level.⁷⁵

Subsequently, when determining the lowest "evaluated" bid for any given procurement, the government penalizes the blacklisted bidders by increasing the evaluated, not actual, cost of their bid by five or ten percent; some selective purchasing measures even disqualify the blacklisted parties altogether.⁷⁶ Commonly, these laws provide exceptions for situations where no alternative supplier of comparable goods and services meets the terms of the selective purchasing requirement⁷⁷ or for essential procurements.⁷⁸ Sometimes governments also exempt specific types of businesses or organizations, such as news organizations or providers of medical or relief services, or particular industries, such as telecommunications.⁷⁹

69. *E.g., id.* at 92-93.

70. *E.g., id.* at 41.

71. IRRC, *Welcome to IRRC!*, at <http://www.irrc.org> (last visited Mar. 23, 2000).

72. Office of Govt. Affairs, CalPERS, *Legislation*, at <http://www.calpers.ca.gov/whatshap/legislat/legislat.htm> (last visited Mar. 23, 2000).

73. SELECTIVE PURCHASING LAWS, *supra* note 39, at 2.

74. *Id.*

75. Some selective purchasing laws go so far as to include affiliates, divisions, joint ventures, syndicates, and partnerships with such firms within the scope of their definition of "doing business" with a sanctioned destination. *Id.* This use of a secondary boycott in trade sanctions is increasingly suspect under emerging standards of international law. Fitzgerald, *supra* note 9, at 87-96.

76. SELECTIVE PURCHASING LAWS, *supra* note 39, at 1.

77. For example, San Francisco reportedly awarded contracts for construction of light rail projects despite the applicability of the city's Burma Law to each of the qualified bidders. *Id.* at 2.

78. *Id.*

79. *Id.*

B. Social and Political Background

These selective purchasing measures transform essentially private actions, the “ethical” purchasing decisions of individual consumers, into determinants of public behavior. Operating at a “distinctive intersection between civic life (ostensibly governed by principles of ‘public good’) and the corporate profit-making motive,”⁸⁰ these state and local sanctions reflect

a collective realization among many public, civic and religious institutions that having a multinational corporation as a guest in your house - whether as a supplier or a sponsor - presents an important political opportunity. With their huge buying power, public and non-profit institutions can exert real public-interest pressure on otherwise freewheeling private corporations.⁸¹

When individuals succeed in urging state and local public bodies to adopt these measures, they seek to influence the behavior of the blacklisted businesses and the targeted foreign government. Significantly, these movements occur at a level of government that more closely reflects local and popular concerns, than national policies. The obvious intent of these sanctions is to force businesses to decide which customers are more important: state and local governmental entities in the United States or the customers located in the sanctioned country. A number of companies, such as Apple Computer, Phillips Electronics, PepsiCo, and Texaco, decided to terminate operations in Burma, at least in part due to the economic impact of the various sanctions laws.⁸²

The “penalty” mechanism at the heart of selective purchasing measures would logically seem to result in local governments, and their taxpayers, paying more for goods and services than they otherwise might if companies do not withdraw. However, Massachusetts and some other jurisdictions assert that this has not been their experience in practice.⁸³ There might be a number of reasons for this non-intuitive result. Many state and local contractors have no foreign operations or connections and are unaffected by these laws. Moreover, companies that conduct business with sanctioned countries sometimes find that they face little or no competition when bidding on state and local government contracts, so that the evaluation “penalty” is inapplicable or inconsequential in the overall bidding process.⁸⁴

Additionally, the state and local government experience administering these laws has been quite mixed. Governments, particularly smaller jurisdictions and governmental bodies, do not always apply selective purchasing laws rigorously and uniformly. Moreover, establishing and administering a blacklist adds time and expense to the procurement process. Some jurisdictions lack adequate funding to research and support

80. KLEIN, *supra* note 17, at 400.

81. *Id.* at 401.

82. SELECTIVE PURCHASING LAWS, *supra* note 39, at 2.

83. *Id.* at 2-3.

84. *Id.*

blacklisting, and others find themselves spending an inordinate amount of time and money addressing whether or not their blacklists are properly applied.⁸⁵ Thus, state and local sanctions measures, like many governmental policy measures, are recognized as imperfect tools.

There have been dramatic changes since the first sanctions directed at the apartheid regime in South Africa. Each of the players, government, business, consumers, and advocacy groups, learned from their experiences over the last quarter century, and new players concerned with international sanctions, such as the WTO, now join them. The proponents of state and local sanctions, within and without government, shifted to placing increased emphasis on selective purchasing laws rather than alternatives such as disinvestment measures.⁸⁶ Disinvestment measures only indirectly impact the behavior of blacklisted corporations and, as a practical matter, eliminate a government's ability to engage corporate entities in a continuing dialogue on the issues motivating the sanctions.⁸⁷ Accordingly, divestment measures are now considered more symbolic than effective.⁸⁸ On the other side, companies that respond to state and local divestment or selective purchasing measures by withdrawing from targeted markets sometimes find themselves unable to effectively reenter those markets once governments lift the sanctions. Eastman Kodak and PepsiCo, for example, faced stiff competition when they tried to reenter the South African market, and Pepsi was ultimately unsuccessful in reestablishing operations in South Africa.⁸⁹

Moreover, the proliferation of different sanctions campaigns impacts the ability of some jurisdictions to find "acceptable" bidders for its procurements. International construction companies, petroleum companies, and telecommunications contractors, for example, might be able to comply with some selective purchasing laws but not others. Consequently, state or local governments sometimes found they must waive their selective purchasing measures or run an insufficiently-competitive procurement.⁹⁰ Berkeley, California City Councilor Polly Armstrong, for example, report-

85. The IIRC reported, for example, that Takoma Park, Maryland has no budget allocated to administer and support its Burma Law. Oakland, California and Massachusetts more aggressively supported their respective Burma laws' allocated resources for researching who should be blacklisted and for supporting the logistics necessary to apply their laws. However, they found that even though most companies identified in their respective Burma blacklists are not currently conducting business with the government, these companies nevertheless vigorously opposed being blacklisted, resulting in a time-consuming and costly administrative process. *Id.* at 3.

86. *Id.* at 12-13.

87. The debate over "engagement" versus "sanctions" commonly arises where governments use trade to pursue policy goals. For example, consider the Clinton administration's efforts to get Congress to establish permanent normal trade relations with China. *E.g.*, Joseph Kahn, *Last-Ditch Effort by 2 Sides to Win China Trade Vote*, N.Y. TIMES, May 23, 2000, at A1; China Trade Relations Working Group, *The Clinton Administration Statement on Permanent Normal Trade Relations for China: A Strong Deal in the Best Interests of America*, at <http://www.chinapntr.gov/statement.htm> (last visited May 23, 2000).

88. SELECTIVE PURCHASING LAWS, *supra* note 39, at 12-13.

89. *Id.* at 14.

90. *Id.* at 13.

edly quipped, "Pretty soon we'll have to do our own offshore drilling," following the city's vote to discontinue municipal gasoline purchases from the major oil companies.⁹¹ The proliferation of state and local sanctions also prompted the opponents of these measures to become increasingly organized and active, establishing industry groups such as USA*ENGAGE, to lobby against sanctions in the name of free trade.⁹²

All the parties have embraced technology to great effect. In the case of Burma, the organizations opposing the SLORC/SPDC mounted an extensive online campaign to coordinate their efforts through e-mail, the online BurmaNet,⁹³ and similar Internet sites.⁹⁴ On the other side, USA*ENGAGE, with more than 600 major businesses as members, used its web site and e-mail lists to coordinate support for the suit by its parent organization, the National Foreign Trade Council, against the Massachusetts Burma law.⁹⁵ The Free Burma campaign directed against Pepsi illustrated the growing importance and impact of technology on these issues over the past decade. The campaign progressed from an unheralded grassroots boycott to a catalyst for passage of state and local selective purchasing laws around the country.

Pepsi opened a bottling plant in Rangoon in late 1991 as a joint venture with a prominent business figure associated with the SLORC.⁹⁶ Burmese dissidents immediately denounced Pepsi's new plant as providing tax monies and support for the military junta.⁹⁷ At roughly the same time, Pepsi, like other companies, was trying to capture the youth market by expanding its presence at schools and universities.⁹⁸ Students at Carleton University in Ottawa, Canada, the location of one of Pepsi's earliest exclusive vending deals, became concerned about the company's business in Burma and distributed a flyer in early 1993 detailing the situation in Burma and linking Pepsi's joint venture to the SLORC and that govern-

91. KLEIN, *supra* note 17, at 397.

92. SELECTIVE PURCHASING LAWS, *supra* note 39, at 13.

93. *Id.* at 12-13; see also FreeBurma.org, *Mailing Lists*, at <http://freeburma.org/lists.html> (last visited Mar. 22, 2000); Free Burma Coalition, *Welcome to the Free Burma Coalition*, at <http://www.freeburmacoalition.org> (last visited Mar. 22, 2000).

94. *Infra* notes 100-13, 172-97 and accompanying text.

95. SELECTIVE PURCHASING LAWS, *supra* note 39, at 13; see also USA*ENGAGE, USA*ENGAGE, at <http://www.usaengage.org> (last visited Mar. 22, 2000).

96. Reid Cooper, *A Historical Look at the Pepsico/Burma Boycott*, BOYCOTT Q., Summer 1997, available at Third World Traveler, http://www.thirdworldtraveler.com/Boycotts/Hx_PepsiBurmaBoy.html (last visited May 25, 2000).

97. Just prior to the Pepsi plant's opening, Thaung Htun of the All Burma Students Democratic Front (ABSDF) declared, "We have long protested foreign investment in Burma. The tax that Pepsi pays the junta will be used to buy arms and ammunition to oppress the Burmese people," and he "strongly urge[d] all democratic-minded people and all human rights advocates to stop drinking Pepsi." Pepsi's Press Relations Manager responded by stating, "[W]e don't invest in governments or political systems. We invest in people and people are consumers." *Boycott Pepsi, Burmese Dissidents Urge as Rangoon Plant Opens*, AGENCE FR. PRESSE, Nov. 22, 1991, LEXIS, News Library, AFP File.

98. KLEIN, *supra* note 17, at 91 (noting the establishment of the "Pepsi Achievement Awards," various exclusive vending contracts, and marketing efforts aimed at naming Pepsi the "Official" soft drink of various schools). See generally *id.* at 87-105 (discussing "The Branding of Learning: Ads in Schools and Universities").

ment's abuse of human rights.⁹⁹ Students posted the flyer to various Usenet newsgroups.¹⁰⁰ This flyer prompted increased interest at other universities where Pepsi was the "official" soft-drink, and a special newsgroup was created to discuss the situation in Burma.¹⁰¹ Students also established the BurmaNet e-mail newsletter.¹⁰²

These tools played a significant role in spreading the emerging Pepsi boycott campaign and distributing campus "info pak" action kits to several hundred groups around the world by late 1995.¹⁰³ These kits contained background information on Burma and Pepsi's involvement, as well as stickers parodying Pepsi's slogans as "Pepsi: The Choice of a New Genocide."¹⁰⁴ The kits urged students to "[p]ressure schools to terminate food or beverage contracts selling PepsiCo products until it leaves Burma."¹⁰⁵ Additionally, the Free Burma Coalition¹⁰⁶ was one of the first activist groups to take full advantage of the World Wide Web when it established its web site in 1995¹⁰⁷ with the support of the Soros Foundation and the Open Society Institute.¹⁰⁸ This site later became the basis for the current

99. Terry Cottam, the coordinator of the Carleton University Public Interest Research Group Southeast Asia Working Group, produced the original flyer. Reid Cooper noted:

Three things were noteworthy about that first flyer. One, the information-rich flyer provided footnotes for its claims. In addition to helping people find more information on their own, it documented its claims, which gave the flyer a vital element of credibility. Two, more than simply a flyer on Pepsi, it served as a general introduction to Burma's struggle. Three, the flyer subverted PepsiCo's contrived image of fun and freedom by turning its own slogans against it. Future updates of that first flyer, despite often radical revisions, always kept those three virtues.

Cooper, *supra* note 96.

100. The Usenet is a collection of e-mail-like notes posted to online bulletin boards on various subjects, known as "newsgroups." There are thousands of newsgroups, which are hosted or distributed over various computer servers. Although most Usenet newsgroups are available through Internet servers, the Usenet predates the current Internet infrastructure. See *whatis?com, whatis?com*, at <http://whatis.techtarget.com> (last visited May 25, 2000) (search for "Usenet" or "newsgroup").

101. *Deja.com, Forum: soc.culture.burma*, at <http://www.deja.com/group/soc.culture.burma> (last visited May 25, 2000).

102. See *FreeBurma.org, supra* note 93, at <http://freeburma.org/lists.html> (providing subscription information for BurmaNet News).

103. KLEIN, *supra* note 17, at 402; Cooper, *supra* note 96.

104. Jay Mathews, *Pepsi to Sell Burma Plant, Citing Protests*, WASH. POST, Apr. 24, 1996, at F3 [hereinafter Mathews, *Pepsi to Sell*]; Jay Mathews, *Student Critics of Burma Trying to Put Pepsi on Ice: Company's Presence in Nation Protested*, WASH. POST, Apr. 4, 1996, at D9 [hereinafter Mathews, *Student Critics*].

105. KLEIN, *supra* note 17, at 402.

106. Free Burma Coalition, *supra* note 93, at <http://www.freeburmacoalition.org>.

107. Zarni, a principal figure in the Free Burma Coalition, indicated that "[i]n seven weeks," following the establishment of the web site, "this campaign . . . pretty much exploded" and that "[w]ithout the Internet, this would have been impossible." Ann Scott Tyson, *Political Activism on Campus Takes on a Cyberspace Twist*, CHRISTIAN SCI. MONITOR, Oct. 31, 1995, at 3; see also A. Lin Neumann, *The Resistance Network*, WIRED, Jan. 1996, at 109.

108. Neumann, *supra* note 107, at 109; see also Open Soc'y Inst., *Open Society Institute*, at <http://www.soros.org/osi.html> (last visited May 25, 2000).

BurmaNet web site.¹⁰⁹ The use of these various tools prompted Mike Jendrzeczk, the Washington Director of Human Rights Watch/Asia, to comment, "Cyberspace spawned the movement to restore human rights to Burma."¹¹⁰

Proponents of reform in Burma used Internet communications to proceed simultaneously on a variety of fronts: uniting and spreading the campus boycott, seeking sanctions legislation at the federal and state level, and prompting and supporting shareholder action against Pepsi. The Internet made it possible for a relatively small number of activists to have a greater impact in part because electronic communications bypass the editing that occurs in the traditional media and the filtering that naturally occurs when relying upon third parties such as international nongovernmental organizations.¹¹¹ With the Internet, those concerned with a particular issue can avoid the sporadic coverage afforded by other media; supply almost daily reports, commentary, and analysis to their supporters; and maintain an effective and relatively inexpensive means of coordinating responsive action.¹¹² As Simon Billenness declared, the Burma effort was "one of the first cyber-campaigns If something happens in Rangoon, I'm going to know about it the next day by reading my e-mail The Internet has proved to be an invaluable tool for organization."¹¹³

By 1996, the campus boycott had gained sufficient momentum that Harvard rejected a \$1 million vending contract with Pepsi, after students raised concerns regarding Pepsi's dealings with Burma.¹¹⁴ Similarly, students blocked the construction of a Pepsi-owned Taco Bell restaurant at Stanford after two thousand students signed a petition opposing the contract, worth an estimated \$800,000.¹¹⁵ Later that year, the campaign picked up further momentum when the Third World First organization,¹¹⁶ with chapters on forty percent of university campuses in the United Kingdom, made the Pepsi boycott a major issue.¹¹⁷ The National Union of Students coordinated university soft-drink contracts in Britain, and with Pepsi being sold in over 800 student unions at the time, the company faced a

109. See Burma Project, Open Soc'y Inst., *The Burma Project: Broadening the Debate on Burma*, at <http://www.soros.org/burma/index.html> (last visited Dec. 2, 2000); Free Burma, *Welcome to Free Burma*, at <http://www.ibiblio.org/freeburma> (last visited Dec. 2, 2000).

110. Nigel Holloway, *Caught in the Net: U.S. Sanctions Debate Moves to Cyberspace*, *FAR E. ECON. REV.*, Nov. 28, 1996, at 28.

111. Jamie F. Metzl, *Information Technology and Human Rights*, 18 *HUM. RTS. Q.* 705, 713 (1996).

112. *Id.* at 712-13.

113. Joe Urschel, *Activists Make Inroads with U.S. Companies*, *USA TODAY*, Apr. 29, 1996, at 1A.

114. KLEIN, *supra* note 17, at 402; Cooper, *supra* note 96.

115. KLEIN, *supra* note 17, at 402.

116. Established in 1969 as the student arm of Oxfam to raise money for overseas aid, Third World First soon became the largest student activist network in the United Kingdom. The organization is now independent of Oxfam and known as People & Planet. People & Planet, *Who are People & Planet?*, at <http://www.peopleandplanet.org/aboutus/index.htm> (last visited May 29, 2000).

117. KLEIN, *supra* note 17, at 402-03; Cooper, *supra* note 96.

rapidly growing international boycott.¹¹⁸ This increasing pressure, at least in part, led to Pepsi's announcement in late April 1996 that it was selling its interest in the Burmese bottling plant.¹¹⁹ But the story and the Pepsi protests were not finished.

While the student protests were growing in the mid-1990s, substantial support was also building through the Internet for various national "Burma laws," including the McConnell-Moynihan bill,¹²⁰ which sought to impose mandatory federal sanctions on Burma for its human rights abuses.¹²¹ Ultimately, however, traditional lobbying by the petroleum companies combined with the Clinton administration's demand for greater diplomatic flexibility than permitted by mandatory sanctions resulted in the imposition of the conditional, and more limited, federal sanctions embodied in then-Senator William Cohen's amendments¹²² to the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997.¹²³ Senator Cohen's measure passed on September 30, 1996,¹²⁴ three months after the Massachusetts Burma Law,¹²⁵ reflecting the cumulative effect of the Burma campaign on legislators at all levels. At the time the federal sanctions passed, in addition to Massachusetts, local governments in Berkeley,¹²⁶ Oakland,¹²⁷ San Francisco,¹²⁸ and Santa Monica, California,¹²⁹

118. KLEIN, *supra* note 17, at 402-03.

119. Mathews, *Pepsi to Sell*, *supra* note 104, at F3.

120. Free Burma Act of 1995, S. 1092, 104th Cong. (1995).

121. Holloway, *supra* note 110, at 30. The McConnell-Moynihan bill would have limited new investment in Burma by U.S. citizens, prohibited the use of U.S. passports for travel to Burma, required the President to negotiate with other countries regarding multilateral sanctions, and required the imposition of trade sanctions on those countries that failed to sanction Burma. S. 1092.

122. H.R. 3540, 104th Cong. (1996); Holloway, *supra* note 110, at 30.

123. Pub. L. No. 104-208, § 570, 110 Stat. 3009, 3009-166 to 3009-167 [hereinafter Federal Burma Sanctions Act]. This law, along with the International Emergency Economic Powers Act of 1977, Pub. L. No. 95-223, §§ 202-207, 91 Stat. 1625 (codified as amended at 50 U.S.C. §§ 1701-1706 (1994)), set the stage for the sanctions imposed by Executive Order, Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 20, 1997). At that time, President Clinton prohibited any new investments or facilitating new investments by others in Burma by U.S. persons, but permitted sales and purchase transactions. *Id.*; Burmese Sanctions Regulations, 31 C.F.R. § 537.101-901 (1999); *infra* notes 238-46 and accompanying text.

124. Federal Burma Sanctions Act, *supra* note 123.

125. See *supra* note 13 and accompanying text.

126. Berkeley's measure was the first Burma law, passed in March 1995. Berkeley, Cal., Ordinance 57,881-N.S. (Feb. 28, 1995), reprinted in SELECTIVE PURCHASING LAWS, *supra* note 39, at 28-32; USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing Berkeley, California).

127. Oakland, Cal., SP Law 11,885 (May 7, 1996), reprinted in SELECTIVE PURCHASING LAWS, *supra* note 39, at 49-56; USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing Oakland, California).

128. S.F., Cal., Ordinance 159-96 (Apr. 22, 1996), reprinted in SELECTIVE PURCHASING LAWS, *supra* note 39, at 59-64; USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing San Francisco, California).

129. Santa Monica, Cal., Resolution 9866 (Nov. 28, 1995), reprinted in SELECTIVE PURCHASING LAWS, *supra* note 39, at 71-72; USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing Santa Monica, California).

Ann Arbor, Michigan;¹³⁰ and Madison, Wisconsin¹³¹ had already passed measures opposing government purchasing from those engaged in business in Burma. Similar measures passed in Alameda County, California;¹³² Bolder, Colorado;¹³³ Takoma Park, Maryland;¹³⁴ and Carrboro, North Carolina¹³⁵ by the time President Clinton implemented federal sanctions by Executive Order in May 1997.¹³⁶ But it was the combination of the campus boycott, legislation, and the third prong of the campaign—shareholder resolutions—that finally pushed Pepsi to terminate its business relationships with Burma.

Franklin Research and Development Corporation, a socially responsible investment firm now known as Trillium Asset Management,¹³⁷ helped form the Coalition for Corporate Withdrawal from Burma in August 1993, after the call for economic and investment sanctions made by ten Nobel Peace Prize laureates.¹³⁸ Archbishop Desmond Tutu, who was among the group calling for sanctions on Burma, declared that “[t]ough sanctions, not constructive engagement, finally brought the release of Nelson Mandela and the dawn of a new era in my country. This is the language that must be spoken with tyrants – for, sadly, it is the only language they understand.”¹³⁹ Accordingly, as an analyst with Franklin Research and director of the Coalition for Corporate Withdrawal, Simon Billenness adapted the techniques used in the anti-apartheid campaign and drafted shareholder resolutions calling for businesses to withdraw from Burma, beginning with

130. Ann Arbor, Mich., Resolution Barring Purchases from Businesses in Burma and from Those Doing Business with Burma (Apr. 15, 1996), reprinted in *SELECTIVE PURCHASING LAWS*, *supra* note 39, at 27; USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing Ann Arbor, Michigan).

131. Madison, Wis., Resolution 52,471 (Aug. 16, 1995), reprinted in *SELECTIVE PURCHASING LAWS*, *supra* note 39, at 39-40; USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing Madison, Wisconsin).

132. Alameda County, Cal., Ordinance (Dec. 12, 1996), reprinted in *SELECTIVE PURCHASING LAWS*, *supra* note 39, at 19-26; USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing Alameda County, California).

133. Boulder, Colo., Ordinance 5855 (Dec. 18, 1996), reprinted in *SELECTIVE PURCHASING LAWS*, *supra* note 39, at 33-35; USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing Boulder, Colorado).

134. Takoma Park, Md., Ordinance 1996-33 (Oct. 28, 1996), reprinted in *SELECTIVE PURCHASING LAWS*, *supra* note 39, at 74-80; USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing Takoma Park, Maryland).

135. Carrboro, N.C., Ordinance 18/96-97 (Oct. 8, 1996), reprinted in *SELECTIVE PURCHASING LAWS*, *supra* note 39, at 37; USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html> (listing Carrboro, North Carolina).

136. Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 20, 1997). Nine other local jurisdictions have passed selective purchasing measures aimed at Burma since the federal sanctions became effective. *SELECTIVE PURCHASING LAWS*, *supra* note 39, at 15-81; USA*ENGAGE, *supra* note 36, at <http://www.usaengage.org/news/status.html>.

137. Trillium Asset Management Corporation is the oldest and largest independent, “socially responsible” investment firm. Trillium Asset Mgmt., *Trillium Asset Management Corporation - Socially Responsible Investing*, at <http://www.trilliuminvest.com/index.html> (last visited May 30, 2000).

138. John N. Maclean, *Abuses in Burma Stir Questions of Conscience*, CHI. TRIB., Oct. 25, 1993, (Business), at 3.

139. Desmond Tutu, *Burma as South Africa*, Far E. Econ. Rev., Sept. 16, 1993, at 23.

Amoco. The aim of this effort, according to Billenness, was not to have investors sell their shares, but to motivate “institutional investors—especially large public pension funds and universities—to vote their shares in favor of resolutions filed by Coalition supporters.”¹⁴⁰ Although the Amoco shareholder proposals failed to pass, Amoco did announce their withdrawal from Burma within two years of the beginning of this effort.¹⁴¹

Billenness also submitted shareholder resolutions to Pepsi, Texaco, and Unocal in 1994 and expanded the effort in subsequent years.¹⁴² The successive submission of these shareholder resolutions in coordination with the other activities in the Burma campaign prompted a prolonged dialogue between Pepsi’s management and shareholder activists,¹⁴³ as well as Pepsi’s business clients.¹⁴⁴ By 1996, when student groups on seventy-five U.S. campuses were busy plastering anti-Pepsi stickers on vending machines¹⁴⁵ and seven local jurisdictions had passed selective purchasing measures,¹⁴⁶ Pepsi’s general counsel and corporate secretary met with shareholder activists, who were proposing a new “code of conduct” for the company,¹⁴⁷ to announce a change in direction.¹⁴⁸ Although the company

140. *Coalition Opposes Burma Business Ties*, 33 CHRISTIAN CENTURY 1152, 1153 (1993).

141. After failing to win approval of the 1993 Amoco shareholder proposal, Billenness resubmitted it for the 1994 annual meeting. Shortly before announcing its withdrawal from Burma “for economic reasons,” Amoco succeeded in having the Security and Exchange Commission exclude the renewed proposal. Although Amoco said they were leaving Burma for economic reasons, Billenness noted that “the negative public relations and the potential negative economic impact of our boycott also were included in [Amoco’s] decision-making.” John N. Maclean, *Amoco Calls Pullout from Burma an Economic Move*, CHI. TRIB., Mar. 4, 1994, (Business), at 1.

142. Aaron Freeman, *Burma-Human Rights: Burma the Target of New Divestment Calls*, INTER PRESS SERVICE, June 14, 1995, LEXIS, News Library, INPRES File; *Ruling on Burma Proposal a Bad Omen for Shareholders*, S. CHINA MORNING POST, Feb. 27, 1994, at 11, LEXIS, News Library, SCHINA File. More recently, shareholder activists targeted ARCO and Baker Hughes for shareholder proposal efforts. Only Unocal still does business in Burma. Trillium Asset Mgmt., *Burma as South Africa: An Issue for Investors*, at http://www.trilliuminvest.com/pages/social/social_05.html (last visited May 30, 2000); Free Burma Coalition, *Free Burma Coalition: Selective Purchasing Update*, at <http://www.freeburmacoalition.org/victories/corporatepullout/cwupdate.html> (last visited May 30, 2000).

143. This dialogue was not always free from contention. Pepsi’s then-Chairman and CEO, Wayne Calloway, reportedly accused the Burma activists of “dealing in coercion and strong-arm tactics.” Freeman, *supra* note 142.

144. For example, Starbucks allegedly refused to let a new coffee drink that it marketed jointly with Pepsi be produced or sold in Burma. *Id.*

145. Mathews, *Pepsi to Sell*, *supra* note 104, at F3; Mathews, *Student Critics*, *supra* note 104, at D13.

146. Simon Billenness and Franklin Research also organized the New England Burma Round Table, helped formulate the Massachusetts Burma law and secure its passage, and assisted groups seeking passage of similar measures elsewhere within the United States and abroad. Trillium Asset Mgmt., *supra* note 142, at http://www.trilliuminvest.com/pages/social/social_05.html.

147. Franklin Research, and the Roman Catholic missionary group the Maryknoll Fathers and Brothers, submitted the shareholder resolution endorsing a code of conduct with regard to Burma in 1995. Although not adopted, it did receive enough votes to be included on the ballot for the May 1996 annual meeting. Mathews, *Student Critics*, *supra* note 104, at D13.

had previously insisted that “free trade leads to free societies,” in April 1996, it decided to sell its minority interest in the Burma bottling plant, citing the sentiment expressed by the shareholder activists about investing in Burma.¹⁴⁹

However, Pepsi only sold its equity interest in the bottling plant. Its franchise, licensing, and supply agreements remained.¹⁵⁰ The protest campaign and the shareholder proposals therefore continued largely unabated because, in Billenness’s words, the partial withdrawal “didn’t appease anyone.”¹⁵¹ Nine months later, in January 1997, Pepsi announced that it had had enough; it cancelled its contracts and terminated its business relationships with Burma. Pepsi explained that it was terminating its contracts “[b]ased on [its] assessment of the spirit of current U.S. government policy,”¹⁵² although the federal sanctions had yet to take full effect.¹⁵³ The campaign against Pepsi was over.

In the long run, the “last thing a company like Pepsi wants is to alienate college students. Especially since it’s positioned as the soft drink . . . of the young generation.”¹⁵⁴ The campus consumer boycott produced results in Pepsi’s case. Ultimately, however, for Pepsi and the broader Free Burma campaign, it was the combination of tactics, the boycott, lobbying for legislation, and shareholder proposals, that had real impact and led to the withdrawal of nearly forty companies from Burma.¹⁵⁵ Although each prong of the Pepsi campaign was important, the Massachusetts Burma law and similar selective purchasing measures were key to the success of the effort and “the tactic of choice.”¹⁵⁶ As Simon Billenness reportedly declared, “[S]elective purchasing laws [are] ‘boycotts on steroids. . . . [T]hey can hit companies that aren’t consumer oriented, like construction firms. With regular boycotts, you’re limited to companies with brand-name recognition. These [laws] target everything, and you can affect companies that aren’t based in the U.S.’”¹⁵⁷

148. Mathews, *Pepsi to Sell*, *supra* note 104, at F3.

149. *Id.*

150. *Id.* The sale did contribute, however, to the defeat of the 1996 shareholder resolution seeking a complete withdrawal from Burma at the annual meeting, which took place the following month. Sarah Jackson-Han, *Burma Critics Suffer Setback But Plan to Continue Campaign*, AGENCE FR. PRESSE, May 1, 1996, LEXIS, News Library, AFP File.

151. *PepsiCo is Ending its Business Relations with Myanmar Firm*, FORT WORTH STAR-TELEGRAM, Jan. 28, 1997, (Business), at 4.

152. *Id.*

153. *Supra* note 136 and accompanying text; *infra* notes 239-45 and accompanying text.

154. Urschel, *supra* note 113, at 2A (quoting Al Ries, New York marketing consultant).

155. Burma Project, Open Soc’y Inst., *Corporate Investment/Corporate Withdrawal*, at <http://www.soros.org/burma/burmainvestors.html> (last visited May 30, 2000). More than seventy companies still doing business in Burma remain targets of the Burma campaign. *Id.*

156. Dan Orzech, *We Beat Pepsi—What Now? The Battle for Burma Shifts Gears*, BOYCOTT Q., Summer 1997, at Third World Traveler, http://www.thirdworldtraveler.com/Boycotts/PepsiBurma_BQ.html (last visited May 30, 2000).

157. Sarah Ferguson, *Boycotts ‘R’ Us*, VILLAGE VOICE, July 8, 1997, at 44, 46.

Interestingly, much of the Burma campaign against Pepsi went largely unnoticed by the traditional media. Prior to 1995, the press took relatively little notice of the Pepsi boycott.¹⁵⁸ As the boycott spread during 1995, seventeen articles mentioned it,¹⁵⁹ and after the successes in 1996, coverage in the traditional press exploded to include seventy-four articles that addressed, at least in part, the Pepsi boycott.¹⁶⁰ Even so, over the nearly five-year period from the boycott's inception until Pepsi's sale of its Burmese bottling venture in April 1996, only thirteen articles appeared in "major" papers, such as the *Christian Science Monitor*,¹⁶¹ the *International Herald Tribune*,¹⁶² the *Los Angeles Times*,¹⁶³ the *New York Times*,¹⁶⁴ the *San Francisco Chronicle*,¹⁶⁵ the *San Francisco Examiner*,¹⁶⁶ the *Toronto Star*,¹⁶⁷ *USA Today*,¹⁶⁸ the *Washington Post*,¹⁶⁹ or the *Washington Times*.¹⁷⁰ In essence,

a tiny campus protest movement, taking place almost entirely outside the media glare . . . engaged in a '60s-style revolt that [had] universities, corporations and international political groups snapping to attention. . . .

158. From the first mention of the boycott, Richard Ehrlich, *Burma Captive a Nobel Favorite*, WASH. TIMES, Oct. 10, 1991, at A8, LEXIS lists only eleven articles mentioning the Pepsi and Burma boycott through the end of 1994. Search of LEXIS, News Library, ALLNWS File through 1994.

159. Search of LEXIS, News Library, ALLNWS File for 1995 (representing a 155% increase over the total coverage from 1991 through 1994).

160. Search of LEXIS, News Library, ALLNWS File for 1996 (representing nearly a 435% increase over coverage in 1995 and nearly a 677% increase over the period through 1994). However, fifty-eight, or 78%, of these articles appeared after Pepsi announced it was selling its interest in the Rangoon bottling venture in April 1996. *Id.* More explosive growth in coverage can be seen if the search is confined to the "major" news media, which shows only four articles mentioning the boycott prior to 1995, six in 1995 itself, and thirty-three in 1996—twenty-five of which followed Pepsi's announced sale of its interest in its Burmese venture. Search of LEXIS, News Library, MAJPAP File.

161. Tyson, *supra* note 107, at 3.

162. Eric Ellis, *Consumer Stirrings Visible in Burma; Foreigners Are Flocking In*, INT'L HERALD TRIB., Feb. 20, 1995, LEXIS, News Library, IHT File; Jay Mathews, *Youth Protest Shakes Up Pepsi; Campus Boycott Grows Over Burma Business*, INT'L HERALD TRIB., Apr. 6, 1996, LEXIS, News Library, IHT File; Seth Mydans, *If Burma Beckons, What's a Multinational to Do?*, INT'L HERALD TRIB., Feb. 23, 1996, LEXIS, News Library, IHT File.

163. Susan G. Hauser, *Just Say No; It Had to Happen. In an Era of Heightened Consumer Awareness, Wary Shoppers Can Turn to Boycott Quarterly*, L.A. TIMES, May 5, 1995, at E2.

164. Seth Mydans, *Pepsi Courts Myanmar, Preferring Sales to Politics*, N.Y. TIMES, Feb. 22, 1996, at D6.

165. Jonathan Marshall, *Bay Area May Join Boycott Of Burma*, S.F. CHRON., Apr. 19, 1996, at B1.

166. Tanya Schevitz, *Berkeley Boycotts Burma; It's Mostly Symbolic, Co-sponsor Admits*, S.F. EXAMINER, Mar. 1, 1995, at A7, LEXIS, News Library, SFEXAM File; Diana Walsh, *S.F. Supervisors*, S.F. EXAMINER, Apr. 16, 1996, at A4, LEXIS, News Library, SFEXAM File.

167. Ellie Teshler, *Join Fight for Freedom in Burma*, TORONTO STAR, June 23, 1995, at A2.

168. Edna Gundersen, *Leaflets to Rain on Woodstock Parade*, USA TODAY, Aug. 5, 1994, at 1D.

169. Mathews, *Student Critics*, *supra* note 104, at D9.

170. Ehrlich, *supra* note 158, at A8.

Using the interconnectedness of the modern cyber-university . . . and the business savvy of socially conscious investor groups, protestors [brought] worldwide pressure on the insular and brutally repressive nation of Myanmar — formerly known as Burma.¹⁷¹

Internet advocacy and cyberspace communications are equally important to those seeking selective purchasing measures aimed at other targets. For their online advocacy, Nigerian groups use the Friends of Nigeria Network¹⁷² and the Kudirat Initiative for Democracy (KIND) web site, named for Kudirat Abiola, the murdered wife of the late democratically elected President of Nigeria, Moshood Abilola.¹⁷³ Other groups with concerns regarding events in Tibet,¹⁷⁴ East Timor,¹⁷⁵ and Cuba¹⁷⁶ are similarly resorting to the Internet.

Moreover, the use of the Internet and e-mail is integral to the broader protests against the machinery of international trade generally, as illustrated by the “Battle in Seattle” against the WTO in November 1999¹⁷⁷ and the demonstrations against the World Bank and IMF in Washington, D.C. in April 2000.¹⁷⁸ A large number of groups with incredibly diverse agendas were involved in those protests and have used the Internet to continue their efforts. These groups range from self-proclaimed anarchist groups,¹⁷⁹ such as the Direct Action Network,¹⁸⁰ NO2WTO,¹⁸¹ or the Ruckus Society,¹⁸²

171. Urschel, *supra* note 113, at 1A.

172. Friends of Nig., *Friends of Nigeria*, at <http://www.igc.org/kind/fon5.htm> (last visited Mar. 22, 2000); see also Essential Action, *Boycott Shell/Free Nigeria Campaign*, at <http://www.essentialaction.org/shell/index.html> (last visited Mar. 22, 2000).

173. Kudirat Initiative for Democracy, *KIND - Kudirat Initiative for Democracy*, at <http://www.igc.org/kind/home.html> (last visited Mar. 22, 2000).

174. Int'l Campaign for Tibet, *International Campaign for Tibet - Save Tibet*, at <http://www.savetibet.org> (last visited Mar. 22, 2000).

175. E. Timor Action Network, *East Timor Action Network*, at <http://etan.org> (last visited Mar. 22, 2000); Foreign Policy Watchdog, *East Timor Action Network's Campaign to Bring the East Timorese Refugees Home*, at <http://www.execpc.com/-forpolcy/Timrhome.html> (last visited Mar. 22, 2000).

176. Ctr. for Cuban Studies, *Center for Cuban Studies Welcome*, at <http://www.cubaupdate.org> (last visited Mar. 22, 2000).

177. *Supra* notes 2-4 and accompanying text.

178. *Supra* note 5 and accompanying text.

179. For information on a variety of anarchist groups and campaigns, see *An Anarchist FAQ Webpage: Version 8.5*, at <http://www.geocities.com/CapitolHill/1931> (last updated Oct. 27, 2000); *infoshop.org*, *infoshop.org - Your Guide to Online Anarchy*, at <http://www.infoshop.org> (last visited June 2, 2000). Those anarchist groups involved in the recent protests include the Industrial Workers of the World, or wobblies, which was involved in the Seattle general strike of 1919, and more recent groups, such as the Black Army Faction and the Anarchist Action Collective based in Eugene, Oregon. Ruth Teichroeb, *Fringe Anarchists in Middle of Violent Demonstrations*, SEATTLE POST-INTELLIGENCER, Dec. 1, 1999, at A15, available at <http://www.seattle-pi.com/local/anar01.shtml> (last visited June 2, 2000); see also Kim Murphy, *A Revolutionary Movement Hits Small-Town America*, L.A. TIMES, Aug. 3, 1999, at A1.

180. Direct Action Network, *Direct Action Network Home*, at <http://www.agitprop.org/artandrevolution/index.html> (last visited Apr. 9, 2000).

181. NO2WTO, *Mid-Atlantic Infoshop - NO 2 WTO*, at <http://www.infoshop.org/no2wto.html> (last visited June 2, 2000).

182. Ruckus Society, *The Ruckus Society*, at <http://www.ruckus.org> (last visited Apr. 9, 2000).

to consumer groups, such as Public Citizen;¹⁸³ environmental groups;¹⁸⁴ labor unions;¹⁸⁵ groups opposing foreign "sweatshop" labor or more generally promoting indigenous or human rights;¹⁸⁶ think tanks;¹⁸⁷ and international financial reformers and others seeking debt relief for third world countries,¹⁸⁸ as well as numerous others concerned about globalization

183. Global Trade Watch, Public Citizen, *Global Trade Watch Home Page*, at <http://www.tradewatch.org> (last visited Apr. 9, 2000).

184. E.g., Action for Solidarity, Equal., Env't, and Dev., *A SEED Europe*, at <http://www.antenna.nl/aseed> (last visited June 2, 2000); Earthjustice Legal Def. Fund, *International*, at http://www.earthjustice.org/work/intl_index.html (last visited June 2, 2000); Friends of the Earth, *Trade, Investment and the Environment: Promoting Trade Rules that Protect the Environment*, at <http://www.foe.org/international/trade> (last visited Apr. 9, 2000); Greenpeace Int'l, *Political Issues*, at <http://www.greenpeace.org/politics> (last visited June 2, 2000); Rainforest Action Network, *Mobilization Against Globalization*, at http://www.ran.org/ran_campaigns/wto/index.html (last visited June 2, 2000); Sierra Club, *Trade and the Environment*, at <http://www.sierraclub.org/trade> (last visited June 2, 2000).

185. E.g., AFL-CIO, *Make the Global Economy Work for Working Families*, at <http://www.aflcio.org/globaleconomy> (last visited Apr. 9, 2000); Int'l Ass'n of Machinists & Aerospace Workers, *International Affairs*, at http://www.iamaw.org/departments/international_new.html (last visited June 2, 2000); Int'l Confederation of Free Trade Unions, *International Trade Secretariats (ITS) Campaigns on Multinational Enterprises*, at <http://www.ictu.org> (last visited June 2, 2000); Teamsters Online, *Government Affairs*, at <http://www.teamster.org/governmt/govt.htm> (last visited June 2, 2000); United Auto Workers, *Trade Policy*, at <http://uaw.org/cap/2000/issues/issue17.html> (last visited June 2, 2000); United Steelworkers, *Trade Policy & The WTO: Fix It . . . or Nix It!*, at <http://www.fixitornixit.com> (last visited Apr. 9, 2000).

186. E.g., Abya Yala Fund, *Abya Yala Fund for Indigenous Self-Development in South & Meso America*, at <http://ayf.nativeweb.org/contents.htm> (last visited June 2, 2000); Clean Clothes Campaign, *Clean Clothes Campaign, Nike Main*, at <http://www.cleanclothes.org/companies/nike.htm> (last visited June 25, 2000); Comm. in Solidarity with the People of El Sal., *CISPES*, at <http://www.cispes.org> (last visited June 2, 2000); Community Aid Abroad: Australia, *NikeWatch: Are Nike Factories Sweatshops Which Exploit Workers?*, at <http://www.caa.org.au/campaigns/nike/index.html> (last visited June 25, 2000); Confederation Paysanne, *Confederation Paysanne*, at <http://www.confederationpaysanne.fr> (last visited June 2, 2000); Global Exchange, *Global Economy*, at <http://www.globalexchange.org/economy> (last visited Apr. 9, 2000); Indigenous Envtl. Network, *Indigenous Environmental Network*, at <http://www.alphacdc.com/ien> (last visited June 2, 2000); Just Do It! Boycott Nike!, *Just Do It! Boycott Nike!*, at <http://www.geocities.com/Athens/Acropolis/5232> (last visited June 25, 2000); Nat'l Labor Comm., *National Labor Committee: In Support of Human and Worker Rights*, at <http://www.nlcnet.org> (last visited June 2, 2000); NUKE Radioactivewear, *NUKE Radioactivewear*, at <http://www.cybold.com/nuke/index.html> (last visited June 25, 2000); Union of Needletrades, Indus. and Textile Employees, *UNITE! Stop Sweatshops Campaign*, at <http://www.uniteunion.org/sweatshops/index.htm> (last visited June 2, 2000); Vietnam Labor Watch, *Boycott Nike*, at <http://www.saigon.com/~nike> (last visited June 25, 2000).

187. E.g., Ctr. for Econ. and Policy Research, *Center for Economic and Policy Research*, at <http://www.cepr.net> (last visited Apr. 9, 2000); Inst. for Policy Studies, *The Institute for Policy Studies*, at <http://www.ips-dc.org> (last visited Apr. 9, 2000).

188. E.g., 50 Years Is Enough, *50 Years Is Enough: U.S. Network for Global Economic Justice*, at <http://www.50years.org/index.html> (last visited Apr. 9, 2000); Alternative Info. & Dev. Ctr., *Alternative Information & Development Centre*, at <http://www.aidc.org.za> (last visited Apr. 9, 2000); Ctr. for Econ. Justice, *Center for Economic Justice*, at <http://www.econjustice.net> (last visited Apr. 9, 2000); Comm. for the Abolition of the Third World Debt, *Committee for the Abolition of the Third World Debt*, at <http://users.skynet.be/sky74032/y.htm> (last visited Apr. 9, 2000); Dev. Group for Alternative Poli-

and multinational corporate activity generally.¹⁸⁹

Some tactics associated with these protests, such as “organized coincidences,”¹⁹⁰ “culture jamming,”¹⁹¹ “cyberjamming,”¹⁹² or outright vandal-

cies, *The Development Gap*, at <http://www.developmentgap.org> (last visited Apr. 9, 2000); Focus on the Global S., *Focus on the Global South*, at <http://www.focusweb.org> (last visited Apr. 9, 2000); Jubilee S., *Jubilee South*, at <http://jubileesouth.net> (last visited Apr. 9, 2000); Jubilee 2000/USA, *Jubilee 2000/USA*, at <http://www.j2000usa.org> (last visited Apr. 9, 2000); Mobilization for Global Justice, *Mobilization for Global Justice*, at <http://www.a16.org> (last visited Apr. 9, 2000); Oxfam Int'l, *Human Face of Debt*, at http://www.oxfam.org/advocacy/human_f.htm (last visited June 2, 2000); ZNet, *Global Economic Crisis*, at <http://www.zmag.org/CrisesCurEvts/Globalism/GlobalEcon.htm> (last visited Apr. 9, 2000).

189. E.g., Alliance for Global Justice, *Alliance for Global Justice*, at <http://www.afgj.org> (last visited Apr. 9, 2000); Corporate Watch, *Corporate Watch: The Watchdog on the Web*, at <http://www.corpwatch.org> (last visited Apr. 9, 2000); Humane Soc'y of the U.S., *The WTO: Have We Traded Away Our Right to Protect Animals*, at <http://www.hsus.org/wto/index.html> (last visited June 2, 2000); Inst. for Agric. and Trade Policy, *Welcome to WTO WATCH*, at <http://www.wtowatch.org> (last visited Apr. 9, 2000); Int'l Forum on Globalization, *International Forum on Globalization*, at <http://www.ifg.org> (last visited Mar. 22, 2000); Peoples' Global Action, *Welcome to AGP.org*, at <http://www.agp.org/agp/index.html> (last visited Apr. 9, 2000); Third World Network, *Trade Issues, Rules and WTO*, at <http://www.twinside.org.sg/trade.htm> (last visited Apr. 9, 2000); Turning Point Project, *Economic Globalization Series*, at <http://www.turnpoint.org/global.html> (last visited Mar. 22, 2000); World Dev. Movement, *Current Campaigns*, at <http://www.oneworld.net/wdm/campaign/index.htm> (last visited June 1, 2000).

190. The “Critical Mass” movement uses the term “organized coincidences” to describe their monthly events, where large groups of bicyclists simply “materialize” en masse to overwhelm and take over city streets at different locations. There are, intentionally, no particular leaders or organizational sponsorships; thus, no one need take responsibility, but everyone can take credit. Bicycling Community Page, *Critical Mass*, at <http://danenet.wicip.org/bcp/cm.html> (last visited June 2, 2000); see also *We're Sorry!*, at <http://www.sflandmark.com/cm/wesorry.htm> (last visited June 2, 2000).

191. Culture jamming refers to “the practice of parodying advertisements and hijacking billboards in order to drastically alter their messages.” KLEIN, *supra* note 17, at 280. The term derives from “jamming,” CB radio slang for interrupting others’ transmissions. The band Negativland coined the term to describe various forms of media sabotage during Jamcon '84. MARK DERY, *CULTURE JAMMING: HACKING, SLASHING AND SNIPING IN THE EMPIRE OF SIGNS* (Open Mag., Pamphlet Series, 1993), available at <http://www.levity.com/markdery/culturjam.html> (last visited Dec. 2, 2000). The practice extends to more than simply defacing ads, however, including any variety of online or off-line means to disrupt an advertiser’s message “by altering their ads, manipulating their slogans, exposing their hidden weaknesses, and creating imaginative and effective parodies and spoofs of their advertisements.” Brendan DeMelle, *A Critical Analysis of Culture Jamming: ADBUSTERS and Related Anti-Ad Campaigns*, Conclusion, at <http://it.slawu.edu/~advertiz/jamer/conclusi.html> (last visited June 5, 2000).

According to Mark Dery,

culture jamming accommodates a multitude of subcultural practices. Outlaw computer hacking with the intent of exposing institutional or corporate wrongdoing is one example; “slashing,” or textual poaching, is another. (The term “slashing” derives from the pornographic “K/S”—short for “Kirk/Spock”—stories written by female Star Trek fans and published in underground fanzines. Spun from the perceived homoerotic subtext in Star Trek narratives, K/S, or “slash,” tales are often animated by feminist impulses. I have appropriated the term for general use, applying it to any form of jamming in which tales told for mass consumption are perversely reworked.) Transmission jamming; pirate TV and radio broadcasting; and camcorder countersurveillance (in which low-cost consumer technologies are used by DIY muckrakers to document police brutal-

ism,¹⁹³ may have surprised many who were unaware of the rising anti-corporate movement. However, these tactics nevertheless reflect a culture of “direct action” that has been fostered by and spread over the Internet in the 1990s through nonviolent movements, such as Critical Mass¹⁹⁴ and

ity or governmental corruption) are potential modus operandi for the culture jammer. So, too, is media activism such as the cheery immolation of a mound of television sets in front of CBS's Manhattan offices—part of a protest against media bias staged by FAIR (Fairness and Accuracy In Reporting) during the Gulf War—and “media-wrenching” such as ACT UP's disruption of The MacNeil/Lehrer Newshour in protest of infrequent AIDS coverage. A somewhat more conventional strain of culture jamming is mediawatch projects such as Paper Tiger Television, an independent production collective that produces segments critiquing the information industry; Deep Dish TV, a grassroots satellite network that distributes free-thinking programming to public access cable channels nationwide; and Not Channel Zero, a collective of young African-American “camcorder activists” whose motto is “The Revolution, Televised.” And then there is academy hacking—cultural studies, conducted outside university walls, by insurgent intellectuals.

DERY, *supra*, at <http://www.levity.com/markdery/culturjam.html>.

For example, Adbusters Media Foundation publishes a magazine, maintains a web site, and operates the Culture Jammers Network in an effort to “topple existing power structures and forge a major shift in the way we will live in the 21st century.” Adbusters, *The Culture Jammers Network*, at <http://adbusters.org/information/network> (last visited June 5, 2000). Culture Jammers believe that their form of social activism

will alter the way we live and think. It will change the way information flows, the way institutions wield power, the way TV stations are run, the way the food, fashion, automobile, sports, music and culture industries set their agendas.

Above all, it will change the way meaning is produced in our society.

Id. However, other activists deride the jammers' guerilla art and claim that they are using fire to fight fire in combating multinational corporations. “Beat ‘em at their own game, I guess is the thinking,” wrote one critic. Carrie McLaren, *Culture Jamming (tm): Brought to you by Adbusters, STAY FREE!*, available at <http://www.ibiblio.org/stayfree/9/adbusters.htm> (last visited June 5, 2000). “But what comes out is no real alternative to our culture of consumption. Just a different brand.” *Id.* See generally KLEIN, *supra* note 17, ch. 12 (discussing culture jamming).

192. Cyberjamming simply applies culture jamming, *supra* note 191, to the Internet. Adbusters, *Cyberjamming with aXle*, at <http://www.adbusters.org/magazine/22/axle.html> (last visited June 5, 2000); Jennifer Berdock, *Counter-Advertising and Its Effect on Cyber-Media*, at <http://www.yorku.ca/faculty/academic/gerry/essays/berdock.html> (last visited June 5, 2000); Jam Room, *Cyberjamming*, at <http://206.45.16.36/vmc/swaweb/cal/lccult3.htm> (last visited June 5, 2000).

193. There were 631 arrests related to the “Battle in Seattle,” mostly for obstructing traffic, failure to move on, and other minor crimes. However, twenty-six individuals faced felony charges for malicious mischief and burglary. Property damage is estimated at \$3 million, primarily for damaged windows and window displays and graffiti, as well as some looting. A further \$15.3 million in direct costs was incurred for public expenses related to cleaning public spaces and overtime for the police and other personnel involved. Seattle Police Dep't, *WTO Conference Impacts*, at http://www.ci.seattle.wa.us/spd/SPDMainsite/wto/wto_conference_impacts.htm (last visited June 5, 2000).

194. Critical Mass (CM) defines itself as an “organized coincidence,” not an organization. www.critical-mass.org, *www.critical-mass.org*, at <http://www.critical-mass.org> (visited June 5, 2000); *supra* note 190. CM began in San Francisco as “Commuter Clot” in 1992. Chris Carlsson, *Critical Mass From the Inside Out*, at <http://www.sflandmark.com/cm/insideout.htm> (Aug. 1993). The term “critical mass” derives from a documentary film released that same year called Return of the Scorcher, Ted White, *Return of the Scorcher*, at <http://www.tedwhitegreenlight.com/Scorcher.htm> (last visited June 5, 2000), which examined the bicycle culture and lifestyles around the world and

Reclaim the Streets,¹⁹⁵ as well as more militant groups who question whether property damage should even be considered “violence.”¹⁹⁶ As one commentator noted:

Far from projecting an image of noble intentions, the protestors have seemed to some to be more intent on wrecking McDonald’s or Starbucks outlets, venting their rage at the perceived emblems of globalized business and subordinating private property rights to the dictates of direct action. One group, Friends of the Earth, routinely tears up fields of experimental genetically modified crops. Another, Greenpeace, developed the hallmark tactic of boarding vessels at sea to advertise its protests.¹⁹⁷

Whether seeking to influence governmental institutions on local, national, or international levels with traditional grassroots advocacy or bypassing governmental institutions entirely through “street politics,” the common element among all these disparate groups is their use of the Internet to communicate and coordinate their activities on a global scale.

described bikes waiting at intersections in China until a sufficiently large mass could push through and force cross-traffic to wait. Carlsson, *supra*. Although different for each of the several hundred cities to which it has spread, CM typically aims to conduct large exuberant monthly gatherings of bicycle riders to “take back” the streets and public areas in cities where the rides are held. Worldwide Critical Mass Hub, *Worldwide Critical Mass Hub*, at <http://criticalmasshub.com> (last visited Dec. 2, 2000).

195. Reclaim the Streets (RTS) is a “disorganization” of urban environmentalists and other activists seeking the rediscovery and liberation of the city streets. Reclaim the Streets, *On Disorganization*, at <http://www.gn.apc.org/rts/disorg.htm> (last updated Apr. 18, 2000). RTS originated in London in late 1991 around the anti-roads movement, a protest in favor of walking, cycling, and open public spaces and directed against automobiles and anything related to the promotion of cars. RTS protestors would suddenly overwhelm streets and traffic with a seemingly spontaneous “street party”—complete with music, banners, kites, and performers. As noted in RTS literature,

A carnival celebrates temporary liberation from the established order; it marks the suspension of all hierarchy, rank, privileges, norms and prohibitions. Crowds of people on the street seized by a sudden awareness of their power and unification through a celebration of their own ideas and creations. It follows then that carnivals and revolutions are not spectacles seen by other people, but the very opposite in that they involve the active participation of the crowd itself. Their very idea embraces all people, and the Street Party as an event has successfully harnessed this emotion.

Evolution of Reclaim the Streets, DO OR DIE, Summer 1997, available at <http://www.gn.apc.org/rts/evol.htm> (last visited June 5, 2000). RTS groups, singly or in conjunction with others, have conducted more than a hundred different protest events in countries around the world, sometimes simultaneously. “The Resistance will be as transnational as capital,” declares RTS material. Reclaim the Streets, *RTS Action Archive*, at <http://www.gn.apc.org/rts/archive.htm> (last visited June 5, 2000); see also KLEIN, *supra* note 17, ch. 13; Reclaim the Streets, *Reclaim the Streets!*, at <http://www.reclaimthestreets.net> (last visited June 5, 2000).

196. E.g., Teichroeb, *supra* note 179, at A15; Andrew Ward, *Damage to City’s Reputation Feared If Protests Turn Violent*, FIN. TIMES, Apr. 29, 2000, at 3.

197. Alan Cowell, *Advocates Gain Ground in a Globalized Era*, N.Y. TIMES, Dec. 18, 2000, at C19-20.

II. U.S. Constitutional Dimension

While "Internet advocacy" can be directed at influencing national policy, as well as the behavior of private businesses, much of the focus to date has been on influencing state and local governments to officially support particular campaigns. The U.S. Supreme Court's recent decision in *Crosby v. National Foreign Trade Council*,¹⁹⁸ however, calls into question the ongoing utility of state and local sanctions, like the selective purchasing measures that Simon Billenness prefers.¹⁹⁹ Accordingly, a detailed examination of that decision's effect and reach helps in understanding the degree to which state and local sanctions remain a viable tool and objective for these Internet advocacy campaigns.

Many in the U.S. business community strongly object to state and local sanctions. The National Foreign Trade Council (NFTC), which represents the majority of large U.S. exporters,²⁰⁰ filed suit in 1998 challenging the constitutionality of the Massachusetts Burma Law.²⁰¹ The NFTC suit raised basic questions regarding whether the Massachusetts law impermissibly interfered with the federal government's conduct of foreign affairs and its ability to regulate foreign commerce and whether the federal government's own sanctions directed at Burma preempted the state law.²⁰²

Ultimately, the Supreme Court declared that the federal government's sanctions did preempt the Massachusetts law.²⁰³ While the decision in *National Foreign Trade Council* clearly curtails the ability of state and local governments to use sanctions, it leaves a number of broader questions unanswered.²⁰⁴ In particular, it does little to clarify how local governments' legitimate concerns regarding the responsible use of their, and their taxpayers', monies may be accommodated when the federal government has not preempted such actions through national policy. As a review of the case history in *National Foreign Trade Council* illustrates, the constitutional ability of local governments to use sanctions absent actual federal preemption is not entirely clear.

198. 120 S. Ct. 2288 (2000).

199. *Supra* notes 156-57 and accompanying text.

200. Established in 1914, the NFTC is a non-profit organization, with a membership of over 550 U.S. firms, that advocates free and open international trade. Most of the largest U.S. manufacturing companies and banks are Council members. NFTC members account for at least 70% of U.S. non-agricultural exports and 70% of U.S. private foreign investment. USA*ENGAGE, *Profile of the National Foreign Trade Council*, at <http://usaengage.org/background/nftc.html> (last visited Apr. 10, 2000).

201. *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 289-90 (D. Mass. 1998), *aff'd sub nom. Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288.

202. *Id.* at 289. See generally David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175 (1997).

203. *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288.

204. The Court stated, "Because our conclusion that the state Act conflicts with federal law is sufficient . . . , we decline . . . to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause." *Id.* at 2294 n.8 (citation omitted).

In granting summary judgment for the NFTC, the District Court held that the Massachusetts law impinged upon the federal government's exclusive authority over foreign affairs.²⁰⁵ The court cited various constitutional provisions vesting "plenary power over foreign affairs" in the federal government, including Congress's authority to provide for the common defense and to regulate commerce;²⁰⁶ the President's authority as Commander in Chief and power to make treaties and appoint ambassadors;²⁰⁷ and the express prohibitions on states making treaties, entering into agreements with other countries, or imposing duties on imports and exports.²⁰⁸ According to the court, these provisions demonstrated that "one of the main objects of the Constitution [was] to make us, as far as regarded our foreign relations, one people, and one nation."²⁰⁹ However, the District Court opined that the NFTC failed to establish that the federal government had preempted state action by implication and declined to address whether the Massachusetts statute violated the Commerce Clause.²¹⁰ On appeal, the First Circuit affirmed the determination that the Massachusetts law impinged upon the federal government's foreign affairs powers, but also ruled in favor of the NFTC on the preemption and Commerce Clause arguments.²¹¹ Massachusetts appealed the First Circuit's decision, and the case was argued before the U.S. Supreme Court on March 22, 2000.²¹²

The argument regarding interference with the federal government's general powers in foreign affairs revolved around the scope of the U.S. Supreme Court's decision in *Zschernig v. Miller*.²¹³ *Zschernig* struck down a probate statute that essentially prohibited residents of Oregon from leaving their estate to heirs in communist countries.²¹⁴ The statute required non-resident aliens to demonstrate that their home country granted reciprocal rights to U.S. citizens and that the inherited property would not be confiscated.²¹⁵ Oregon's statutory scheme involved probate judges in a potentially embarrassing assessment of a foreign state's "democracy quotient,"²¹⁶ subtly impairing the conduct of the nation's foreign policy.²¹⁷ The Court concluded that state laws that have more than an "incidental or indirect effect" on foreign countries and that have "great potential for disruption [of] or embarrassment" in the conduct of U.S. foreign policy violate powers that "the Constitution entrusts solely to the Federal

205. *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d at 290-92.

206. *Id.*; e.g., U.S. CONST. art. I, § 8, cls. 1, 3, 4, 5, 10, 11.

207. U.S. CONST. art. II, § 2.

208. *Id.* art. I, § 10, cls. 1-3.

209. *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d at 290 (alteration in original) (quoting *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840)).

210. *Id.* at 293.

211. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 46-47 (1st Cir. 1999).

212. United States Supreme Court Official Transcript, *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474), 2000 WL 311140.

213. 389 U.S. 429 (1968).

214. *Id.*

215. *Id.* at 430-31.

216. *Id.* at 435.

217. *Id.* at 440.

Government.”²¹⁸ Thus, in *National Foreign Trade Council*, the opponents to the Massachusetts Burma Law asserted that *Zschernig* held that state measures that impinge upon an exclusive federal sphere violate the Constitution, even absent any pertinent federal action.²¹⁹

Massachusetts contended that selective purchasing measures are entirely “proprietary,” rather than “regulatory,” and reflect the state and local governments’ decisions as the “guardian and trustee for its people” in spending public revenues and prescribing the “conditions upon which it will permit public work to be done on its behalf”²²⁰ While these decisions may indirectly or incidentally affect foreign states, they do not transgress the distinction between legitimate local governmental action and the federal government’s conduct of foreign affairs.²²¹ Moreover, these “proprietary” decisions arguably pertain to actions taken by governmental bodies as participants in the flow of commerce, rather than as regulators. Accordingly, the “market participation” doctrine would exempt the decisions from constitutional review.²²²

However, while application of the market participation doctrine to the “dormant” Commerce Clause is well recognized, in *Reeves, Inc. v. Stake* the Court “reserved the question whether the exception applies to the Foreign Commerce Clause.”²²³ If the market participation exception did apply to the Foreign Commerce Clause, Massachusetts asserted that it similarly should apply to the federal government’s foreign affairs powers, based on the history and structure of the clauses—“a healthy regard for federalism and good government” that is “counseled by considerations of state sovereignty”²²⁴—and the Tenth Amendment’s reservation of powers to the states.²²⁵ The Supreme Court evaded these arguments by predicating its decision on the grounds of federal preemption and declaring the Massachusetts Burma law “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²²⁶ But interestingly, the lan-

218. *Id.* at 434-36. The Court reached this conclusion despite the U.S. Government’s submission of an amicus curiae brief asserting that the Oregon statute did not interfere with U.S. foreign policy. *Id.* at 434, 443.

219. *Id.* at 441.

220. *Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903).

221. Massachusetts noted that *Zschernig* did not overrule *Clark v. Allen*, 331 U.S. 503 (1947), which upheld a California statute similar to Oregon’s provision requiring probate reciprocity. *Allen* rejected a constitutional challenge to the California measure, emphasizing the peculiarly “state” nature of succession laws and holding that an incidental effect on foreign countries alone was insufficient to cross the “forbidden line.” Additionally, Massachusetts noted that *Zschernig* and *Allen* focus on the regulation of inheritances by foreign parties, not the exercise of public spending powers. Brief for Petitioners, *Crosby v. Nat’l Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474), 2000 WL 35850, at *39 (citing *Allen*, 331 U.S. at 517).

222. Brief for Petitioners, 2000 WL 35850, at *25-*26.

223. *Id.* at *26 (citing *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 n.9 (1980)). The *Reeves* Court upheld South Dakota’s ability to restrict the sale of state-produced cement to South Dakota residents.

224. *Reeves*, 447 U.S. at 438, 441.

225. Brief for Petitioners, 2000 WL 35850, at *25-*26, *28-*29.

226. *Crosby v. Nat’l Foreign Trade Council*, 120 S. Ct. at 2294 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

guage associated with the Court's preemption decision relied heavily on the federal government's need to "speak with one voice" in the foreign affairs arena.²²⁷

Massachusetts' Commerce Clause argument also focused on the market participation exception and a state's accountability to its citizens for the expenditure of their resources. The argument draws from a 1986 Opinion of the Office of Legal Counsel that supported the constitutionality of state and local government selective purchasing and divestiture laws directed at the apartheid regime in South Africa.²²⁸ This Justice Department Opinion endorsed application of the market participation exception to the foreign affairs and Commerce Clause claims where a state acts in a proprietary fashion.²²⁹ The Justice Department said that the historical record and the *Reeves* rationale apply equally to situations where the state action impacts foreign commerce as when it affects domestic commerce.²³⁰ The Opinion states,

The right of a trader or manufacturer to deal with whom he chooses is as great when his decision affects foreign as when it affects interstate commerce. Therefore, we believe that the rationale for the market participation doctrine ineluctably leads to the conclusion that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause, whether Foreign or Interstate.²³¹

This same argument won the day in one of the few cases addressing state and local sanctions prior to the Massachusetts Burma Law case, *Board of Trustees v. Baltimore City*, where the highest court in Maryland upheld the constitutionality of Baltimore's South African divestiture law.²³²

The First Circuit rejected the market participation argument in the Massachusetts Burma case. The court considered the Office of Legal Counsel's Opinion that since the "states, like any corporate entity, possessed proprietary powers at the time of the Constitution, these powers should not be displaced unless they are prohibited by a specific limitation imposed by the Constitution or federal legislation passed pursuant to a constitutional grant of power to the federal government."²³³ The court rejected that view as unsupported by the jurisprudence and contrary to the "necessary implication" of *Zschernig*.²³⁴

Additionally, the court rejected any notion that the Tenth Amendment would insulate state purchasing decisions from constitutional scrutiny.²³⁵ This assertion was not separate and distinct, according to the Court of Appeals, from the claim that expressing the state's "moral position on an

227. *Infra* notes 263-74 and accompanying text.

228. 10 Op. Off. Legal Counsel 49 (1986), 1986 WL 213238.

229. *Id.* at 50, 54-55.

230. *Id.*

231. *Id.* at 54-55.

232. 562 A.2d 720 (Md. 1989), *cert. denied*, 493 U.S. 1093 (1990).

233. 10 Op. Off. Legal Counsel at 64, 1986 WL 213238.

234. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 (1st Cir. 1999).

235. *Id.* at 60-61.

important issue of public policy” was an important and legitimate local government interest to be balanced against the federal government’s interests under the foreign affairs power. “Even where they exist,” the First Circuit stated, “strong state interests do not make an otherwise unconstitutional law constitutional.”²³⁶ The Supreme Court considered these arguments indirectly in its discussion of preemption.²³⁷

The complexity of the federal preemption question is not self-evident from the Supreme Court’s opinion. When the federal government imposed its Burma sanctions after Massachusetts had acted, the federal government knew similar measures existed or were under consideration in several other jurisdictions, but it nevertheless failed to expressly address preemption.²³⁸ In September 1996, three months after Massachusetts passed its selective purchasing law, Congress imposed limited sanctions on Burma because of the ongoing human rights abuses in that country.²³⁹

Congress directed that U.S. bilateral assistance to Burma be restricted to humanitarian aid and certain counter-narcotics programs,²⁴⁰ that the U.S. representatives to international financial institutions vote against any multilateral assistance to Burma,²⁴¹ that visas be denied to Burmese government officials except as required by treaty,²⁴² and that the President work with other nations to develop a multilateral strategy for promoting democracy and human rights in Burma.²⁴³ Congress also authorized the President to impose further restrictions on U.S. persons establishing or facilitating new investments in Burma if, in his determination, they proved necessary.²⁴⁴ President Clinton imposed these sanctions with Executive Order No. 13,047 on May 20, 1997, eight months after Congress delegated the authority.²⁴⁵ Thus, the federal sanctions and implementing regulations are not co-extensive with Massachusetts’ selective purchasing law.²⁴⁶

The question therefore became whether the federal scheme “occupied the field” or took a “reasonably comprehensive approach” that invoked the Supremacy Clause and preempted inconsistent state or local government

236. *Id.* at 61. Additionally, while Massachusetts did not specifically assert a First Amendment argument, the Court of Appeals noted that “a state entity[] itself has no First Amendment rights” and that even if it did, those rights would not affect the First Circuit’s reading of *Zschernig*. *Id.* (alteration in original) (quoting *Student Gov’t Ass’n v. Bd. of Trustees*, 868 F.2d 473, 481 (1st Cir. 1989)).

237. *Crosby v. Nat’l Foreign Trade Council*, 120 S. Ct. 2288, 2301-02 (2000).

238. *Supra* notes 122-31 and accompanying text.

239. Federal Burma Sanctions Act, *supra* note 123.

240. *Id.* § 570(a)(1).

241. *Id.* § 570(a)(2).

242. *Id.* § 570(a)(3).

243. *Id.* § 570(c). The federal law also imposed certain reporting obligations on the Executive Branch and permitted limited waivers of reporting in the interests of national security. *Id.* § 570(d), (e).

244. *Id.* § 570(b).

245. Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 20, 1997); *see also* Burmese Sanctions Regulations, 31 C.F.R. § 537.101-.901 (1999) (implementing the Executive Order).

246. *Compare id.*, with MASS. GEN. LAWS ch. 7, §§ 22G-M (2000).

action.²⁴⁷ Traditionally, federal preemption is not presumed,²⁴⁸ as reflected in recent decisions addressing the delicate balance between state and federal interests.²⁴⁹ However, the First Circuit reversed this presumption and held that “[p]reemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs.”²⁵⁰ Based on a line of cases stemming from *Hines v. Davidowitz*,²⁵¹ the Court of Appeals stated that an “Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be *assumed* to preclude enforcement of state laws on the same subject.”²⁵² However, that analysis arguably begs the central question: how to determine precisely when the state has intruded upon the federal sphere?

The NFTC argued that state and local selective purchasing measures impermissibly intrude into foreign affairs, while Massachusetts and its supporters argued that their government procurements are intrinsically local—a classic example of an “area traditionally occupied by the states,” where the congressional intent to preempt must be “clear and manifest.”²⁵³ Moreover, Massachusetts argued that the federal Burma sanctions must be read against the extensive history of state and local sanctions over the last twenty-five years, including Congress’s decision *not* to preempt similar measures aimed at South Africa in the 1980s;²⁵⁴ the Office of Legal Counsel’s own conclusion that federal action did not preempt state and local South Africa sanctions;²⁵⁵ the failure of previous challenges to state and

247. U.S. CONST. art. VI, cl. 2.

248. See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938).

249. E.g., *Alden v. Maine*, 527 U.S. 706 (1999).

250. *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 73 (1st Cir. 1999).

251. 312 U.S. 52 (1941).

252. *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d at 74 (emphasis added) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

253. *Id.* at 73.

254. The President initially imposed sanctions on South Africa by Executive Order 12,532, 50 Fed. Reg. 36,861 (Sept. 10, 1985), under the authority of the International Emergency Economic Powers Act of 1977 (IEEPA), Pub. L. No. 95-223, §§ 202-207, 91 Stat. 1625 (codified as amended at 50 U.S.C. §§ 1701-1706 (1994)). Congress expanded these controls in the Comprehensive Anti-Apartheid Act of 1986 (CAAA), Pub. L. No. 99-440, 100 Stat. 1086. The legislative history and a contemporaneous memorandum prepared by Professor Laurence H. Tribe show that Congress considered and rejected preempting the various state and local government South Africa laws. Memorandum on the Nonpreemptive Effect of the Comprehensive Anti-Apartheid Act of 1986 upon State and Local Measures, 132 CONG. REC. S12534-01 (daily ed. Sept. 15, 1986) (memorandum submitted by Professor Tribe); see also *Bd. of Trustees v. Baltimore City*, 562 A.2d 720, 741-43 (Md. 1989), *cert. denied*, 493 U.S. 1093 (1990) (discussing the CAAA). Interestingly, even when Congress repealed the federal sanctions on South Africa, it refused to mandate any similar action on the part of state and local governments and rather chose to simply urge state and local governments to repeal their own sanctions. South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, § 4(c)(1), 107 Stat. 1503.

255. The 1986 Office of Legal Counsel’s Opinion examined and rejected the arguments that Executive Order 12,532 and the IEEPA-based sanctions preempted state and

local sanctions;²⁵⁶ and, perhaps most importantly in the State's view, Congress's specific consideration of the Massachusetts Burma Law prior to enacting federal sanctions without any express preemption provision.²⁵⁷

Ultimately, however, the Supreme Court rejected "the argument that a State's 'statutory scheme . . . escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power,'"²⁵⁸ and had no difficulty ruling that the federal government's Burma sanctions preempted the Massachusetts law. Notwithstanding the absence of a preemption provision, the State law impinged upon the federal sanctions in several ways. The Court stated:

[W]e see the state Burma law as an obstacle to the accomplishment of Congress's full objectives under the federal Act. We find that the state law undermines the intended purpose and "natural effect" of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma.²⁵⁹

Even so, the Court specifically avoided deciding whether there ought to be a presumption against preemption²⁶⁰ and dismissed references to the *Board of Trustees v. Baltimore City* case and the Office of Legal Counsel's Opinion, noting that "[s]ince we never ruled on whether state and local sanctions against South Africa in the 1980s were preempted or otherwise invalid, arguable parallels between the two sets of federal and state Acts do not tell us much about the validity of the latter."²⁶¹ The Court recognized that in theory there might be different types of preemption, for example, by express provisions in federal law, by virtue of a federal scheme "occupying the field," or to the degree that a state measure conflicts with or frustrates the federal scheme.²⁶² Yet the Court noted that these categories are not

local government South Africa laws. 10 Op. Off. Legal Counsel 49, 64-67 (1986), 1986 WL 213238.

256. *Bd. of Trustees v. Baltimore City*, 562 A.2d 720.

257. Seventy-eight members of Congress supported Massachusetts's contention that they did not intend to preempt state and local sanctions. Brief of Members of Congress as Amici Curiae, *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474), 2000 WL 27691, at *9, *23-24. Numerous other members of Congress took the opposing view and joined the NFIC in asserting that an express preemption provision was not necessary or constitutionally required. Brief of Amici Curiae Members of Congress, *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (No. 99-474), 2000 WL 177173, at *26-30. This split contributed to a lively concurring opinion by Justice Scalia, which derided the probative value of legislative histories. *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. at 2302-04 (Scalia, J., concurring).

258. *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. at 2294 n.7 (alteration in original) (quoting *Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 287 (1986)). In *Gould*, the Court struck down a state statute that was more onerous than federal law in disqualifying repeat violators of the National Labor Relations Act from bidding on state contracts.

259. *Id.* at 2294 (footnote omitted).

260. *Id.* at 2294 n.8.

261. *Id.* at 2302.

262. *Id.* at 2293-94.

“rigidly distinct” and that whether a state measure becomes a “sufficient obstacle” to federal law to trigger preemption is a matter of judgment.²⁶³ The Court also emphasized that it viewed the Massachusetts Burma law case as an example of clear conflict with federal law, not a broader problem of “field” preemption. “Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below,” the Court stated, “we decline to speak to field preemption as a separate issue”²⁶⁴

As an example of the Massachusetts law obstructing the federal Burma sanctions scheme, the Court cited the fact that the State law penalized those with preexisting investments or dealings in Burma and exempted only humanitarian transactions. In contrast, the federal sanctions only prohibited new investments and exempted a variety of other dealings—notably contracts for the sale or purchase of goods, services, or technology.²⁶⁵ The Court noted that “[s]anctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.”²⁶⁶

The broad, sweeping language in the opinion poses more trouble for future state and local sanctions programs than the inconsistencies between the respective Burma laws. The Court appears to conflate possible “field” or “conflict” preemption with the arguments concerning the federal government’s plenary foreign affairs powers. For example, noting the Executive’s discretion in the federal Burma law, the Court pointed to its decisions in *Youngstown Sheet & Tube Co. v. Sawyer*²⁶⁷ and *United States v. Curtiss-Wright Export Corp.*²⁶⁸ regarding the President’s foreign affairs powers and stated:

Within the sphere defined by Congress, . . . the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit. And it is just this plentitude of Executive authority that we think controls the issue of preemption here. . . . It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.

. . . .

[T]he state Act is at odds with the President’s intended authority to speak for the United States among the world’s nations in developing a “comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.” . . . As with Congress’s explicit delegation to the President of power over economic sanctions, Congress’s express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government This clear mandate and invoca-

263. *Id.*

264. *Id.* at 2294 n.8.

265. *Id.* at 2296-98.

266. *Id.* at 2298.

267. 343 U.S. 579 (1952).

268. 299 U.S. 304 (1936).

tion of exclusively national power belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action.

. . . [T]he President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.²⁶⁹

Given that federal sanctions legislation, as a general rule, commonly vest the President with broad discretion, rather than dictating specifics,²⁷⁰ this language is particularly striking—especially since the Court declared that it was *not* dealing with federal field preemption.²⁷¹

The potential impact of this analysis is even more notable when combined with the Court's rejection of any notion that congressional silence on preemption implied that the President's broad discretion was confined to matters of federal policy or that Congress approved the state and local measures.

The State makes arguments that could be read to suggest that Congress's objective of Presidential flexibility was limited to discretion solely over the sanctions in the federal Act, and that Congress implicitly left control over state sanctions to the State. We reject this cramped view of Congress's intent Congress made no explicit statement of such limited objectives. . . . We find it unlikely that Congress intended both to enable the President to protect national security by giving him the flexibility to suspend or terminate federal sanctions and simultaneously to allow Massachusetts to act at odds with the President's judgment of what national security requires.

. . . .

The State's remaining argument is unavailing. It contends that the failure of Congress to preempt the state Act demonstrates implicit permission. . . . The State would have us conclude that Congress's continuing failure to enact express preemption implies approval, particularly in light of occasional instances of express preemption of state sanctions in the past.

The argument is unconvincing A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.²⁷²

However, although the Court emphasized that *National Foreign Trade Council* focuses on conflict preemption, its impact on state and local sanctions will be more limited than some language might suggest. Even with regard to Burma, the proponents of state and local sanctions may still pursue measures that do not conflict with the congressional "calibration of

269. *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. at 2295-96, 2298-99 (citations omitted) (footnote omitted).

270. See Fitzgerald, *supra* note 9, at 11-48; Peter L. Fitzgerald, "If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This": Blacklisting and Due Process in U.S. Economic Sanctions Programs, 51 *HASTINGS L.J.* 73, 88-134 (1999).

271. *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. at 2293-94 & n.8.

272. *Id.* at 2296 n.10, 2301-02 (citations omitted) (footnotes omitted).

force.”²⁷³ While selective purchasing laws and the associated blacklists may no longer be the “tactic of choice” for advocacy groups after this decision,²⁷⁴ other tools such as disclosure provisions and divestment measures remain an option for state and local governments. Also, the ability of private parties to mount boycotts or organize shareholder resolution campaigns, as in the Pepsi campaign, remains unaffected.²⁷⁵

Ultimately, absent direct conflicts or inconsistencies with federal law, the constitutionality of state and local sanctions may depend on whether the Court characterizes the particular provision as within the scope of traditional local actions—proprietary in nature—such as government procurement, or whether it is viewed as a “foreign policy” measure—aimed at affecting another nation’s actions. Characterizing state and local sanctions as “foreign policy” measures, as occurred in *National Foreign Trade Council*, leaves them in a more exposed position than if they were characterized otherwise. But this balance is the essence of federalism, achieving the correct allocation and balance of governmental authority within a system of potentially overlapping responsibilities. As Justice Hugo Black wrote, federalism involves:

[A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.²⁷⁶

This description, in turn, reflects basic notions of representation in our republican form of government. As outlined in the *Federalist Papers*, various “factions” are represented in government, and:²⁷⁷

[t]he regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of the government.

....

The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.²⁷⁸

In a time of rapidly increasing globalization and the democratizing force of the Internet, the ability of “factions” or advocacy groups to effectively represent their positions at *all* levels of government is particularly interesting. This power potentially blurs the distinction between the “great

273. *Supra* note 266 and accompanying text.

274. *Supra* note 156 and accompanying text.

275. *Supra* notes 96-171 and accompanying text.

276. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

277. Factions are defined in the *Federalist Papers* as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” THE FEDERALIST NO. 10 (James Madison).

278. *Id.*

and aggregate” and the “local and particular” interest. In the coming months, the Free Burma Coalition will bring their organizing skills to bear, reemphasizing divestment measures on the state and local level and possibly building upon the sympathy of the seventy-eight members of Congress who supported Massachusetts’s use of sanctions²⁷⁹ to seek new legislation authorizing local selective purchasing measures. The *National Foreign Trade Council* decision established significant boundaries on the use of state and local sanctions measures, at least where federal preemption clearly occurs, but it does not preclude such sanctions altogether.

III. International Legal Dimension

Entirely apart from the constitutional issues these measures create, the General Agreement on Tariffs and Trade (GATT) and the United States’ membership in the World Trade Organization pose a number of interrelated problems for proponents of state and local sanctions. The GATT-WTO system of trade agreements are predicated on four basic pillars,²⁸⁰ consisting of basic “most favored nation”²⁸¹ and “national treatment”²⁸² obligations implemented through a series of “binding tariff concessions”²⁸³ and ongoing efforts to eliminate direct or indirect “quantitative restrictions”²⁸⁴ on trade. Taken together, these principles promote a global, nondiscriminatory trading system. The relationship of these rules to local government sanctions and to the issues at the heart of many of the recent Internet advocacy campaigns is complex and not always self-evident.

GATT generally requires that governments refrain from discriminating among goods or suppliers from different countries under the “most favored nation” principle and from discriminating between local and foreign goods or suppliers under the “national treatment” principle. These obligations are not unique to the GATT; Friendship, Commerce, and Navigation Treaties and their more recent counterpart, the Bilateral Investment Treaty, commonly include most favored nation and national treatment clauses.²⁸⁵ However, especially when conducting their own purchasing activities, governments frequently *want* to discriminate for a number of reasons. For example, since governments typically raise funds through local taxes, they naturally desire to spend those funds locally. Governments are reluctant to extend “national” treatment to “foreign” goods or suppliers in their procurement activities. Accordingly, a special exception for government procurements was inserted into the national treatment provisions of the

279. *Supra* note 257.

280. RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW* 59 (1998).

281. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

282. *Id.* art. III; see also General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1B, art. XVII, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1167 (1994) [hereinafter GATS].

283. GATT art. II.

284. *Id.* art. XI.

285. BHALA & KENNEDY, *supra* note 280, at 90.

original 1947 GATT Agreement.²⁸⁶

Yet, concerns developed regarding the potential for abuse of this exception, especially since government procurement typically accounts for ten to fifteen percent of a country's gross domestic product.²⁸⁷ Particularly troublesome are those situations where governments or government-controlled entities do not confine their purchases to traditional "governmental" purposes or activities, but rather compete with ordinary commercial enterprises in the marketplace. These concerns resulted in the 1979 Agreement on Government Procurement²⁸⁸ negotiated during the Tokyo Round of trade negotiations,²⁸⁹ which failed to gain widespread acceptance,²⁹⁰ and in the 1994 Uruguay Round Agreement on Government Procurement (GPA).²⁹¹ The "plurilateral" Uruguay Round Agreement replaced the Tokyo Round Agreement²⁹² and strives to bring government purchasing activities within the scope of the basic GATT obligations.²⁹³

In line with the other GATT-WTO agreements, the GPA obligates contracting parties²⁹⁴ to establish minimum procedural and substantive rights in their national laws and regulations.²⁹⁵ A key obligation is to follow the basic GATT "national treatment" and nondiscrimination principles.²⁹⁶

286. General Agreement on Tariffs and Trade, Sept. 14, 1948, T.I.A.S. 1890, 62 U.N.T.S. 80 (creating GATT art. III, ¶ 8(a)); see also GATS art. XIII.

287. WTO, *Overview of the Agreement on Government Procurement*, at http://www.wto.org/wto/english/tratop_e/gproc_e/over_e.htm (last visited Dec. 3, 2000).

288. Agreement on Government Procurement, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 33 (1980) (entered into force Jan. 1, 1981), amended by Protocol Amending the Agreement on Government Procurement, GATT B.I.S.D. (34th Supp.) at 12 (1988).

289. The "Tokyo Round" was conducted between 1974 and 1979 as the seventh of the eight GATT "rounds" of trade negotiations conducted since 1947. BHALA & KENNEDY, *supra* note 280, at 5-6.

290. As late as the beginning of 1994, only twelve nations had signed the Tokyo Round Government Procurement Code. *Id.* at 7.

291. Agreement on Government Procurement, Apr. 15, 1994, WTO Agreement, Annex 4(b), http://www.wto.org/English/docs_e/legal_e/gpr-94.pdf [hereinafter GPA].

292. Unlike the patchwork system of agreements and "codes" with different signatories under the old GATT regime, the WTO was envisioned as a single undertaking. That is, the WTO Agreement created a single framework that pulled together the GATT, a series of Understandings amending the GATT, and a variety of new Multilateral Trade Agreements and binds all WTO members equally. The legacy of the *a la carte* approach remains, however, in the so-called "plurilateral" agreements on government procurement, dairy products, and bovine meat found in Annex 4 of the WTO Agreement. These agreements represent updated versions of Tokyo Round agreements, binding only those WTO members that have specifically accepted them, and create no rights or obligations for other WTO members. BHALA & KENNEDY, *supra* note 280, at 12-15.

293. The GPA significantly expanded the scope of the government purchasing activity included within the GATT regime. The WTO estimates that the GPA covers ten times the activity covered under the older Tokyo Round agreement, addressing roughly \$300 billion in government procurement worldwide. WTO, *supra* note 287, at http://www.wto.org/wto/english/tratop_e/gproc_e/over_e.htm.

294. The United States and twenty-five other states, along with the European Union, are members of the GPA. Another eighteen states and three international organizations have "observer" status. WTO, *Committee on Government Procurement*, at http://www.wto.org/wto/english/tratop_e/gproc_e/memobs_e.htm (last visited Dec. 3, 2000).

295. GPA art. I.

296. *Id.* art. III.

Covered governments must give foreign suppliers, goods, and services “no less favourable” treatment than given domestically and must not discriminate among foreign suppliers, goods, or services.²⁹⁷ Moreover, the GPA prohibits covered governments from discriminating among domestic suppliers on the basis of foreign ownership or the provision of foreign goods or services.²⁹⁸

The GPA elaborates on these key obligations with a series of detailed provisions focused on providing greater transparency in the government bidding process;²⁹⁹ encouraging nondiscriminatory³⁰⁰ competitive bidding³⁰¹ based on technical specifications³⁰² and contract awards based on the lowest evaluated bid;³⁰³ and providing appropriate information, publication,³⁰⁴ and dispute resolution procedures for the disappointed bidders³⁰⁵ and the signatories to the agreement.³⁰⁶ The GPA provides exceptions, however, for general import requirements not specifically related to government procurement activities, such as import duties;³⁰⁷

297. *Id.* art. III(1).

298. *Id.* art. III(2).

299. *Id.* arts. VII-XVII (providing extensive detail on how a government procurement process should be handled).

300. *Id.* art. VII(1).

301. *Id.* arts. VII-XIV (describing the competitive bid process), XV (describing the circumstances when “limited tendering” or noncompetitive procurements are appropriate), XVI (prohibiting generally the use of “offsets” in evaluating who receives a government contract award). “Offsets . . . are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.” *Id.* art. XVI(1) n.7.

302. Performance-based technical specifications must be used in government procurements without regard to particular producers or products and must be based on international or other technical standards, whenever possible, to avoid “creating unnecessary obstacles to international trade.” *Id.* art. VI(1).

303. *Id.* art. XIII(4)(b).

Unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.

Id.

304. *Id.* arts. VII(2), IX, XVIII, XIX.

305. The GPA’s extensive bid challenge procedures are unique within the GATT-WTO system of agreements. The GPA mandates that each signatory state enact a challenge procedure, including a right of recourse to an impartial and independent review body or a right to judicial review by a court with the authority to correct any deficiencies in the procurement process through both interim and permanent measures. *Id.* art. XX.

306. In addition to the bid challenge process for disappointed bidders, the GPA provides for consultations and invocation of the general WTO Dispute Settlement Understanding in any disagreements between the signatories. *Id.* art. XXII. However, remedies such as retaliation against another party by withdrawing WTO “concessions” or benefits are limited to matters covered by the GPA, reflecting the GPA’s status as one of the few “plurilateral” WTO agreements. *E.g., id.* art. XXII(3), (5), (6).

307. *Id.* art. III(3).

requirements to promote public morals, safety, or health;³⁰⁸ measures necessitated by national security or national defense;³⁰⁹ and special treatment for developing countries.³¹⁰ Moreover, the GPA only applies to those procurements above a certain amount³¹¹ made by “central” and “subcentral” government entities specified in annexes to the Agreement.³¹²

The United States domestically implemented its obligations under the GPA with the Uruguay Round Agreements Act, and the GPA accordingly entered into force for the United States on January 1, 1996.³¹³ Additionally, Annex 2 listed thirty-seven states covered by the GPA, including Massachusetts.³¹⁴ The exact coverage within each state varies. In some instances, the GPA covers all procurements conducted by the state; in others, the GPA only covers procurements by particular agencies.³¹⁵ However, where states receive federal monies, for example on a mass transit or highway project, they may be required to comply with the federal statutory requirements that incorporate the GPA. Additionally, in a bilateral memorandum of understanding between the United States and the European Union, two additional states committed to providing nondiscriminatory treatment of suppliers, goods, and services from Europe in their procure-

308. The GPA permits measures taken to “protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour,” but restricts their application “in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.” *Id.* art. XXIII(2).

309. Unlike the other GPA exceptions to the basic obligations, the national defense exception is entirely unrestricted and “self-judging.” *Id.* art. XXIII(1).

310. *Id.* art. V.

311. *Id.* art. I(4) (“This agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.”). Each party specifies its own thresholds, which are subdivided into different appendices depending on whether a “central,” “subcentral,” or “other” governmental entity is involved. *Infra* note 312 and accompanying text. For the United States, the procurement thresholds for goods and services are 130,000 special drawing rights, or SDRs, (\$186,000) for “central” government entities; 355,000 SDRs (\$507,000) for “subcentral” government entities; and 400,000 SDRs (\$571,000) for other government entities. WTO Comm. on Gov’t Procurement, *The Thresholds in Appendix I of the Agreement as Expressed in National Currencies for 1998/1999; Addendum, United States*, GPA/W/66/Add.5 (July 15, 1998), available at <http://www.wto.org/wto/govt/thresnat.htm> (last visited Apr. 9, 2000).

312. The parties’ declarations in Appendix I refine the GPA’s coverage. Appendix I is broken down into five separate annexes. Annex 1 contains the list of covered central government entities. Annex 2 contains the list of covered subcentral government entities. Annex 3 contains all other covered entities. Annexes 4 and 5 specify certain services that are within or without the GPA’s scope. GPA art. I(1) n.1.

313. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended in scattered sections of 19 U.S.C.).

314. The states applying the GPA are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. GPA app. I, (United States), Annex 2, reprinted in 1 *LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION* 157 (Joseph F. Dennin et al. eds., 2000).

315. *Id.*

ments.³¹⁶ Similar agreements with Norway and Switzerland expanded non-discriminatory treatment at the subcentral government level.³¹⁷

Based on these obligations, the European Union³¹⁸ and Japan³¹⁹ invoked the state-to-state dispute resolution process under Article XXII of the GPA to challenge the United States over the Massachusetts Burma Law. Since Massachusetts was a covered subcentral government in the GPA Appendix, the European Union asserted that the restrictions imposed by the state's Burma Law violated several provisions of the Agreement. In particular, the EU claimed that preventing Massachusetts public authorities from contracting with businesses, foreign or domestic, that do business with Burma contravenes the Article III national treatment and nondiscrimination principles; the Article VIII(b) obligation to limit conditions on bidding to those that ensure the firm's ability to perform the contract; the Article X obligation to qualify bidders on fair and nondiscriminatory economic, rather than political, criteria; and the Article XIII obligation to award contracts to the lowest bidder on the basis of economic, rather than political, factors.³²⁰ The EU also argued that the Massachusetts restrictions nullified or impaired the GPA's benefits by limiting access to subcentral government procurements so as to "result in a de facto reduction of the US sub-federal offer" under Article XXII(2) of the Agreement.³²¹ After consultations failed to resolve the matter, a Dispute Settlement Panel was appointed to handle the combined cases.³²² However, the challenges were suspended³²³ and eventually lapsed³²⁴ after the U.S. courts' rulings that the Massachusetts Burma Law was unconstitutional.³²⁵

Interestingly, both the NFTC and Massachusetts argued before the U.S. Supreme Court that the World Trade Organization complaint sup-

316. Those states are North Dakota and West Virginia. WTO Trade Policy Review Body, *Trade Policy Review: United States-Report by the Secretariat*, WT/TPR/S/56 ¶ 277 (June 1, 1999).

317. *Id.*

318. WTO, *United States - Measure Affecting Government Procurement: Request for Consultations by the European Communities*, WT/DS88/1, GPA/D2/1 (June 26, 1997).

319. WTO, *United States - Measure Affecting Government Procurement: Request to Join Consultations: Communication from Japan*, WT/DS88/2 (July 2, 1997).

320. WTO, *United States - Measure Affecting Government Procurement: Request for Establishment of a Panel by the European Communities*, WT/DS88/3 (Sept. 9, 1998).

321. *Id.*

322. WTO, *United States - Measure Affecting Government Procurement: Constitution of the Panel Established at the Request of the European Communities and Japan*, WT/DS88/4, WT/DS95/4 (Jan. 11, 1999).

323. WTO, *United States - Measure Affecting Government Procurement: Communication from the Chairman of the Panel*, WT/DS88/5, WT/DS95/5 (Feb. 12, 1999).

324. WTO, *United States-Measure Affecting Government Procurement: Lapse of Authority for Establishment of the Panel: Note by the Secretariat*, WT/DS88/6, WT/DS95/6 (Feb. 14, 2000).

325. *Supra* Part II. The EU noted that permitting the WTO case to lapse did not reflect a lessened concern about the effects of the Massachusetts Burma Law, merely the fact that the law was not currently in effect; new proceedings would be instituted should the law become effective in the future. Brief for the European Communities and their Member States as Amici Curiae, *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474), 2000 WL 177175, at *7.

ported their respective positions. The European Union filed an amicus brief supporting the National Foreign Trade Council's challenge to the Massachusetts law.³²⁶ As would be expected after their WTO complaint, the EU expressed concern "that state and local laws such as the Massachusetts Burma Law interfere with the normal conduct of international relations and raise questions about the ability of the United States to honor its international commitments."³²⁷

The EU noted that its concerns extended beyond the specifics of the Massachusetts law, however, to encompass the proliferation of state and local government sanctions generally and the use of extraterritorial secondary boycotting irrespective of whether applied at the federal or local government level.³²⁸ In addition to the twenty-two local jurisdictions that passed Burma laws, the EU pointed to forty state and local government amicus briefs supporting Massachusetts as underscoring the potential for "even greater proliferation" of these measures in the future.³²⁹ Moreover, it noted:

At least eleven U.S. states and municipalities have enacted measures purporting to regulate business activities in Nigeria, Tibet, Indonesia, Switzerland, Northern Ireland, or Cuba, and at least 18 state and local governments have considered or are considering similar measures restricting business ties to Egypt, Saudi Arabia, Sudan, Pakistan, Turkey, Iran, North Korea, Iraq, Morocco, Laos, Vietnam, or China.

Thus while—as discussed above—the Massachusetts Burma Law standing alone certainly presents difficulties in the conduct of EU-U.S. relations, the EU's concern is much broader than simply the disruption caused by this particular law. State and local sanctions, and any proliferation thereof, greatly increase the difficulty of the U.S. Government to speak consistently and with one voice on matters of foreign affairs, thus exacerbating tensions in EU-U.S. relations.³³⁰

The use of extraterritorial secondary boycotts, affecting third parties beyond the direct political targets of these foreign policy measures, is another historical point of contention. The EU noted that prior to the injunction against the Massachusetts law, the restricted purchasing list included not only 53 foreign companies with Massachusetts affiliates but also 228 foreign companies with no connection to the state.³³¹ Many of these companies had European connections. Thus, European businesses, which may not even have had any business with Massachusetts, received unsolicited questionnaires seeking detailed information concerning their possible dealings in Burma. Massachusetts required regular updates to the information and used the information to compile the restricted purchase

326. Brief for the European Communities and their Member States as Amici Curiae, 2000 WL 177175.

327. *Id.* at *2.

328. *Id.*

329. *Id.* at *9.

330. *Id.* at *9-*10.

331. *Id.* at *8 n.9.

list.³³² Since Massachusetts published this blacklist on the Internet and other governments used similarly restrictive laws for dealings with Burma, the EU expressed concern about the “chilling effect” the blacklist would have on doing business with the United States or elsewhere.³³³

The EU has had similar disputes with the United States regarding the various U.S. economic sanctions employed at the federal level.³³⁴

The United States and the European Union have expended considerable effort seeking to resolve their differences over U.S. extraterritorial economic sanctions. This effort has not yielded progress on the issue of extraterritorial sanctions imposed by state and local governments, a shortcoming that is of considerable concern to the EU. In recognition of this danger of proliferation of sanctions measures, the EU and the U.S. agreed at the EU-U.S. Summit on May 18, 1998 on a set of principles covering the future use of sanctions in the context of the Transatlantic Partnership on Political Cooperation. This included agreeing that the EU and the U.S. “will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own economic operators” and that such sanctions will be targeted “directly and specifically against those responsible for the problem.” Crucially, it was also agreed that it is in the interests of both the EU and the U.S. “that the policies of governmental bodies at other levels should be consonant with these principles and avoid sending conflicting messages to countries engaged in unacceptable behavior.”³³⁵

The EU thus asserted that the proliferation of state and local sanctions undermines and contradicts these objectives.

While the NFTC pointed to the EU complaint as a demonstration of the problems caused when state and local government impermissibly impinge upon the exclusive national authority over foreign affairs,³³⁶ Massachusetts tried to use the same facts against the NFTC. Massachusetts argued that beyond Congress’s failure to specifically preempt state and local Burma laws, it implicitly approved of state and local government selective purchasing laws by specifically precluding a private right of action against any state law on the basis of the GATT in the Uruguay Round Agreements Act.³³⁷ Massachusetts asserted that rather than permitting private enforcement actions, Congress required that challenges to state laws alleging noncompliance with the U.S. government’s obligations under GATT must be brought by the United States itself,³³⁸ which it did not do in

332. *Id.* at *8.

333. *Id.*

334. See generally Fitzgerald, *supra* note 9.

335. Brief for the European Communities and their Member States as Amici Curiae, 2000 WL 177175, at *10 (footnote omitted).

336. E.g., Respondent’s Brief, 2000 WL 193325, at *29, *32.

337. Brief for Petitioners, 2000 WL 35850, at *19-*21, *43-*46; Reply Brief for Petitioners, 2000 WL 272027, at *19-*21; see 19 U.S.C. § 3512(b)(2)(A) (1999).

338. 19 U.S.C. § 3512(c)(1).

this case.³³⁹

This argument borrowed from *Barclays Bank PLC v. Franchise Tax Board*³⁴⁰ the notion that Congress knows how to preempt state law when it chooses to do so.³⁴¹ Moreover, Massachusetts argued:

Barclays rejected reliance on the “disapproval” of “many of our trading partners” for good reason: on the stage of international politics, the drama never ceases, and each season is full of conflicts, conspiracies, protests, and threats. None of these perennials, however, should influence a United States court to nullify the democratic action of the citizens of a State.³⁴²

Noting the proliferation of modern international trade agreements and the breadth of their coverage, Massachusetts argued that permitting the courts, by implication, to entertain a plethora of claims under these international agreements would “sap the lawmaking powers of the States.”³⁴³ The State advocated that courts should “reject this role and instead defer to the powers of Congress ‘to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.’”³⁴⁴

Despite Massachusetts’s creative reasoning that striking selective purchasing laws would vitiate a range of local measures addressing issues ranging from the environment to fair labor laws,³⁴⁵ the Supreme Court rejected the argument out of hand.

The State [argues] that we should ignore the evidence of the WTO dispute because under the federal law implementing the General Agreement on Tariffs and Trade (GATT), Congress foreclosed suits by private persons and foreign governments challenging a state law on the basis of GATT in federal or state courts, allowing only the National Government to raise such a challenge. . . . But the terms of § 102 of the [Uruguay Round Agreements Act] and of the [Executive Branch Statement of Administrative Action] simply does not support this argument. They refer to challenges to state law based on inconsistency with any of the “Uruguay Round Agreements.” The challenge here [in *National Foreign Trade Council*] is based on the federal Burma law. We reject the State’s argument that the National Government’s decisions to bar such WTO suits and to decline to bring its own suit against the

339. Massachusetts also noted that the President’s Statement of Administrative Action regarding implementation of the Uruguay Round Agreements Act, which Congress approved, 19 U.S.C. § 3511(a), 3512(d), showed that the preclusion of private claims extended to constitutional challenges, such as those predicated on the Commerce Clause. Brief for Petitioners, 2000 WL 35850, at *20.

340. 512 U.S. 298 (1994).

341. *Barclays* upheld California’s worldwide “unitary” tax on multinational corporations based on “implicit permission” from Congress when it failed to nullify the tax, notwithstanding opposition to the tax expressed by the Executive Branch and numerous foreign countries. *Id.* at 320-31.

342. Brief for Petitioners, 2000 WL 35850, at *44 (citing *Barclays*, 512 U.S. at 320, 324 n.22).

343. *Id.* at *46.

344. *Id.* (quoting *Perez v. Brownell*, 356 U.S. 44, 57 (1958), *overruled on other grounds by Afroyim v. Rusk* 387 U.S. 253 (1967)).

345. Brief of Nonprofit Organizations as Amici Curiae, *Crosby v. Nat’l Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474), 2000 WL 35838, at *21-*30.

Massachusetts Burma law evince its approval. These actions simply do not speak to the preemptive effect of the federal sanctions against Burma.³⁴⁶

In fact, the Court pointed to the Executive Branch's frustration with the WTO complaints as further evidence of the "obstacles" the Massachusetts law created to achieving the objectives of the federal sanctions. The Court quoted statements by the Assistant Secretary of State for Economic and Business Affairs, Alan P. Larson:

"[T]he EU's opposition to the Massachusetts law has meant that U.S. government high level discussions with EU officials often have focused not on what to do about Burma, but on what to do about the Massachusetts Burma law."

....

"[T]he state law "has hindered our ability to speak with one voice on the grave human rights situation in Burma, become a significant irritant in our relations with the EU and impeded our efforts to build a strong multilateral coalition on Burma where we, Massachusetts and the EU share a common goal."³⁴⁷

IV. Movement Toward A New International Federalism

Sharing and allocating authority across different levels of government, whether or not in pursuit of a common goal in a particular case as professed by Assistant Secretary Larson, is at the core of the traditional notion of "federalism."³⁴⁸ While *National Foreign Trade Council* reflects classic federalism—addressing where governmental authority lies within the U.S. political system—it also exemplifies a new and emerging trend in federalism *writ large*. The Court decided the narrow issue of whether U.S. federal law preempted the Massachusetts' Burma law, but the case also left unanswered questions regarding how authority should be allocated among diverse political and governmental systems in an era of globalization. What is the role of national, state, and local governments in the world marketplace? To what degree can local government action reflect the concerns raised in the streets and on the Internet regarding labor, environment, trade, and a host of other issues regulated by international institutions and agreements?

In a federal system of representative republican government,³⁴⁹ the

346. *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. at 2301 n.24 (citation omitted).

347. *Id.* at 2300 & n.21 (citing Alan P. Larson, *State and Local Sanctions: Remarks to the Council of State Governments* (Dec. 8, 1998)).

348. THE FEDERALIST NO. 10 (James Madison).

349. In the *Federalist Papers*, James Madison declared that only a republican form of government "would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government." He defined the criteria for a republican form of government:

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding

actions taken by various local governments form part of an ongoing dialogue with the national government because local and national government are both “agents and trustees of the people, [simply] constituted with different powers, and designed for different purposes.”³⁵⁰ By interacting within their respective spheres, the state and national governments refine what is in the “great and aggregate” national interest or the “local and particular” interest, a distinction that the Framers of the Constitution believed helped to minimize the pernicious influence of “factions” and promote the common good.³⁵¹

The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. . . . A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.

. . . [T]herefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans ought to be our zeal in cherishing the spirit and supporting the character of federalists.³⁵²

The increasing globalization of commerce and communications fueled by technologies like the Internet does not alter the fundamental need to distinguish between local and larger interests, but it does add another dimension. Globalization expands the dialogue to include new participants in defining the “great and aggregate” interest. International institutions, such as the WTO and the IMF, and supranational bodies, such as the EU, that traditionally interacted with the national representatives of member nations are now being drawn into a more direct dialogue with local and other governments.

The Massachusetts Burma Law, for example, prompted direct discussions between European and WTO officials and the Commonwealth of Massachusetts, as well as the U.S. government.³⁵³ While these discussions

their offices during pleasure for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic. It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character.

THE FEDERALIST NO. 39 (James Madison).

350. THE FEDERALIST NO. 46 (James Madison).

351. THE FEDERALIST NO. 10; *see also supra* notes 276-79 and accompanying text.

352. THE FEDERALIST NO. 10.

353. Brief for the European Communities and their Member States as *Amici Curiae*, *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474), 2000 WL 177175, at *5.

became problematic once the federal government determined that the nation should “speak with one voice” with regard to trade sanctions on Burma, *National Foreign Trade Council* does not foreclose the more general dialogue engendered by state and local government action, absent actual preemption. Yet, the appropriate scope and form for local government participation in this wider international dialogue remains to be determined. The answer may not actually lie in the formal legal structure of the relationships between international institutions, national governments, and local governments, but rather in the political sphere and the question of how “factions,” or advocacy groups like the Free Burma Coalition, influence the international institutions that affect trade.

The confluence of issues raised by the Massachusetts Burma Law case, and the broader protests surrounding globalization, may lead to a new and enduring political sensitivity; one that gives human rights advocates, environmentalists, unionists, and others a platform for concerns ignored by bureaucrats and elected officials. To counter the image of “sheltered elites” operating behind closed doors, those promoting global trade will need to better explain their programs and more directly engage those who have particular concerns to be addressed. As President Clinton observed in Seattle, “If the WTO expects to have public support grow for our endeavors, the public must see and hear and, in a very real sense actually join in the deliberations.”³⁵⁴ In practical terms, the dynamics of the relationship between international institutions and individuals nominally represented by their member national governments is already changing—in large part due to the impact of Internet-based communications and advocacy.

To borrow from the terminology of business management and the study of corporate governance,³⁵⁵ the public and the advocacy groups are “stakeholders” in the institutions regulating international trade—parties who are affected by or who can affect an organization’s behavior.³⁵⁶ While

354. Lacayo, *supra* note 4, at 34.

355. Although corporate governance theory is most often associated with analyzing the relationship and responsibility of the firm to its providers of capital funding, [c]orporate governance also implicates how the various constituencies that define the business enterprise serve, and are served by, the corporation. Implicit and explicit relationships between the corporation and its employees, creditors, suppliers, customers, host communities—and relationships among these constituencies themselves—fall within the ambit of a relevant definition of corporate governance. As such, the phrase calls into scrutiny not only the definition of the corporate form, but also its purposes and its accountability to each of the relevant constituencies.

Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9, 11 (1999).

356. Stakeholder analysis has proven useful in analyzing how organizations, such as public corporations, address the concerns of different constituencies, which frequently are contradictory or in competition with one another. Stakeholder analysis attempts to explain how organizations decide which of the competing views will take precedence by examining and categorizing the relationships, interests, and impact of each stakeholder group. E.g., Max B.E. Clarkson, *A Stakeholder Framework for Analyzing and Evaluating*

nations are the primary actors in international institutions such as the WTO and the IMF and the general public and advocacy groups are traditionally represented only through their national governments, the Internet has begun to modify these relationships.³⁵⁷ Phrased in more classic international law terms, this situation exemplifies how individuals, not just states, can be both the “subjects” and “objects” of international economic law.³⁵⁸

As an example, Internet-based technology empowered what otherwise might have been a marginal campaign for the Free Burma Coalition. Using e-mail, the web, and related technologies, the Coalition was freed from any dependency on traditional media to communicate information about the conditions in Burma and to disseminate its positions.³⁵⁹ Technology enabled the Coalition to network with like-minded activists as well as monitor its opponents’ actions.³⁶⁰ Also, technology augmented the urgency and impact of the Coalition’s campaign by coordinating an effort to combine consumer boycotts, shareholder action, and legislative lobbying.³⁶¹ The aggregation of numerous activist groups pursuing their diverse interests with similar tactics³⁶² has increased awareness of the importance of these “secondary stakeholders” to the perceived legitimacy of the major international trade institutions.³⁶³ Consequently, the WTO and the IMF have sought to address themselves directly to the constituencies that member nations represent.

The WTO Director-General, Mike Moore, initially took the lead in responding to the concerns over globalization brought to the fore by the Seattle demonstrators. Even as the protestors were gathering, he initiated a series of steps aimed at better educating the general public about the role and operation of the WTO and making the operation of the WTO more transparent. Beginning with a strong speech to the nongovernmental orga-

Corporate Social Performance, 20 ACAD. MGMT. REV. 92 (1995); Ronald K. Mitchell et al., *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 ACAD. MGMT. REV. 853 (1997).

357. Stakeholder analysis distinguishes between “primary” stakeholders with a direct interest in the organization, such as a corporation’s shareholders, employees, or customers, and “secondary” stakeholders with a less direct influence on the organization, such as the corporation’s competitors, activists, or the media. Clarkson, *supra* note 356, at 106-07.

358. Stemming from Jeremy Bentham’s *An Introduction to the Principles of Morals and Legislation*, first published in 1789, nineteenth-century legal positivists asserted that only sovereign states were proper “subjects” of international law and that individuals were merely “objects” of international rules. This distinction contributed to lively theoretical debates that still persist, despite the decline of positivism, as international human rights law, economic law, criminal law, and conflicts of law rules continue to evolve. E.g., MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 227-40 (2d ed. 1993).

359. *Supra* notes 99-157 and accompanying text.

360. *Supra* notes 93-171 and accompanying text.

361. *Supra* notes 93-171 and accompanying text.

362. *Supra* notes 172-97 and accompanying text.

363. This result, however, also depends upon the perceived legitimacy of the activists’ complaints. If the Internet merely promotes an annoying cacophony, the same communications method that empowers the advocacy groups can undermine their impact.

nizations assembled at the opening of the Seattle Ministerial Conference, Moore hit several concerns head on:

A decade and a half ago the Uruguay Round was launched in the face of public apathy. No one can say that about Seattle . . . We have gone from apathy to anxiety and even anger, not just from the demonstrators in the streets, but from people around the world who feel that for too long they have been locked out of the benefits of growth, and from those who fear for their security in a time of uncertainty and change.

....

. . . [L]et's be clear about what the WTO does not do. The WTO is not a world government, a global policeman, or an agent for corporate interests. It has no authority to tell countries what trade policies - or any other policies - they should adopt. It does not overrule national laws. It does not force countries to kill turtles or lower wages or employ children in factories. Put simply the WTO is not a supranational government - and no one has any intention of making it one.

Our decisions must be made by our Member States, agreements ratified by Parliaments and every two years Ministers meet to supervise our work. There's a bit of a contradiction with people outside saying we are not democratic, when inside over 120 Ministers all elected by the people or appointed by elected Presidents, decide what we will do.

....

The real question we should ask ourselves is whether globalization is best left unfettered - dominated by the strongest and most powerful, the rule of the jungle - or managed by an agreed system of international rules, ratified by sovereign governments.³⁶⁴

At a separate meeting in Seattle with legislators and parliamentarians from member countries, Director-General Moore further emphasized the importance of the inter-governmental dialogue to the WTO's operations:

I get deeply offended when people say the WTO is not democratic. . . .

The WTO is member driven, thus driven by Governments, Congresses and Parliaments. Every two years our Ministers meet to give us guidance. Our agreements must be agreed and ratified by members and Parliaments.

....

Some of those who protest miss these fundamental steps by which we operate. We operate from and by consensus. Any nation can and does block progress. . . .

....

. . . We in the WTO are member driven, rules driven. Our member states direct our progress. And that's how it should be.

....

. . . [W]e and the other institutions in the global architecture were created to be owned by the people via their Governments.³⁶⁵

364. WTO, *The WTO Is Not a World Government and No One Has Any Intention of Making It One*, Moore Tells NGOs, PRESS/155 (Nov. 29, 1999) (transcribing speech by WTO Director-General Mike Moore), available at <http://www.wto.org/ddf/ep/D5/D5158e.doc> (last visited June 25, 2000).

365. WTO, *Moore Cites Role of Legislators in WTO*, PRESS/159 (Dec. 2, 1999) (transcribing speech by WTO Director-General Mike Moore), available at <http://www.wto.org/ddf/ep/D5/D5250e.doc> (last visited June 25, 2000).

Director-General Moore then repeated these sentiments in a statement before the European Parliament, using language that harkened back to James Madison's arguments in the *Federalist Papers*:

Our agreements must be agreed by governments and ratified by Parliaments. We all need to be more accountable. Parliaments and Congresses sustain governments. Public opinion sustains governments. Elected representatives are the main expression of civil society. Their support is measured, they are accountable, they need to be more involved. This is a real way in which we can counter some of the anxieties about globalization and public alienation. Elected representatives have a responsibility to become more involved, hold hearings, scrutinise where the taxpayer's money is going and ensure that the great international institutions created to manage global affairs have the moral authority that comes from the ownership and participation of Member governments.

....

How to ensure that people feel ownership in a real sense is the challenge of those who cherish the democratic principle and have a vision of a world managed by rules not force, agreements not power. How the representatives of the people face this challenge will be a key factor in providing a more peaceful, stable world. To do this the international institutions must be more open and accountable. . . .³⁶⁶

Thus, while emphasizing that the WTO is a representative organization where the delegates from member governments set and approve its agenda, Moore simultaneously tried to encourage greater discussion of globalization among other government officials, legislators, and even nongovernmental organizations and advocacy groups.

Recognizing that Internet-based tools can work both ways, the WTO reflected this outreach effort in a series of changes to its web site. Realizing that users from over 171 countries visited the WTO web site during the Seattle meeting—a rate 160% greater than the comparable period the prior year, the WTO revised its online image to promote “transparency and make it easier for the public to obtain correct information about the WTO.”³⁶⁷ The express purpose for these changes, which began with the “trade and environment” section—an area of concern to many Seattle protestors—“is to make the website more easily accessible to a public with little knowledge of WTO subjects, Agreements or activities, while at the same time containing sufficiently detailed information to meet the needs of users from WTO Member Governments, other intergovernmental organizations and more specialized members of the public.”³⁶⁸ Other web-based tools added to address the concerns Director-General Moore identified include the series of web pages created—in multiple languages—to correct the ten most com-

366. WTO, *Moore Calls for Closer Parliamentary Involvement in WTO Matters*, PRESS/169 (Feb. 21, 2000) (quoting WTO Director-General Mike Moore), available at <http://www.wto.org/ddf/ep/E6/E645e.doc> (last visited June 25, 2000).

367. WTO Comm. on Trade & the Env't, *Improving the Trade and Environment Pages of the WTO Website*, WT/CTE/W/131 (Feb. 2, 2000), available at <http://www.wto.org/ddf/ep/E4/E413e.doc> (last visited June 25, 2000).

368. *Id.*

mon misunderstandings about the WTO.³⁶⁹

None of these efforts are required for the WTO's immediate operations or to deal with the delegates from member countries. It is extremely useful, however, in continuing the ongoing discussion with the public and the constituencies represented by its member nations, in support of the WTO mission as determined by those member governments. As the recently out-going Chairman of the WTO General Council, Ali Mchumo, commented with regard to

the broader concern of how best to manage the world trading system in the light of the present configuration of its membership . . . , Seattle has provided a wake up call for all of us to reflect and re-examine how we need to evolve a more inclusive and participatory system of decision making even when consensus remains the basic principle of decision making. Indeed, the institutional reforms that need to be made to the multilateral trading system is one of the major concerns that will be addressed in the consultations that we have agreed to undertake in the immediate future.³⁷⁰

The IMF responded in a similar fashion, although less aggressively, to the protests surrounding its spring meeting in Washington, D.C. in April 2000. It noted that the World Bank and IMF policies were becoming the object of "a growing public debate" that had to be considered.³⁷¹ Earlier in the year, the retiring Managing Director of the IMF criticized the world community for not reforming international financial institutions more rapidly. Michel Camdessus declared, "We are in a dangerous period of twilight between when the principles [for reform] are agreed upon and when they are acted upon at the local level."³⁷² Just days before the Washington protests, at a conference entitled *Prompting Dialogue: Global Challenges and Global Institutions*, the IMF Acting-Managing Director, Stanley Fischer, warned that "we should not dismiss the concerns of those who feel threatened by globalization. We must ensure that the process is managed properly, and . . . [ask] what the international institutions - the Fund in particular - need to do to help ensure that happens."³⁷³ Fischer stated:

369. WTO, *10 Common Misunderstandings About The WTO*, at http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m00_e.htm (last visited June 25, 2000).

370. WTO Gen. Council, *Farewell Statement by H.E. Mr. Ali Mchumo, Chairman of the General Council*, WT/GC(00)/ST/1 (Feb. 10, 2000) (transcribing speech by WTO General Council Chairman Ali Mchumo), available at <http://www.wto.org/ddf/ep/E5/E500e.doc> (last visited June 25, 2000).

371. *A17 and Counting*, NATION, May 8, 2000, at 3.

372. Thomas Crampton, 'Alarm Bell' From Departing IMF Chief; Camdessus Sees Risk of New Financial Crisis if Efforts at Reform Falter, INT'L HERALD TRIB., Feb. 14, 2000, at 1. Ironically, an anti-globalization protestor splattered a pie in Camdessus's face shortly before he made his remarks at the Tenth Assembly of the United Nations Conference on Trade and Development in Bangkok in February 2000. The protestor claimed the pie was a "slight - and sweet - embarrassment, compared to the tremendous suffering the Fund has inflicted" on the world's poorer nations. *Id.*

373. Stanley Fischer, Lunch Address at the Conference on "Promoting Dialogue: Global Challenges and Global Institutions" at American University (Apr. 13, 2000), available at <http://www.imf.org/external/np/speeches/2000/041300.htm> (last visited June 25, 2000).

The Fund is now deeply engaged in a process of ongoing reform. We are making ourselves more transparent. . . .

. . . [T]he spring meetings give our 182 member countries the opportunity to say how they think we are doing and to tell us what they think we should be doing next. These meetings, together with the role of the Executive Board, are an essential element in the process by which we are held accountable to our shareholders.

We look forward to hearing what our shareholders, the governments that own us, will tell us, and how they will instruct us, as we move forward.³⁷⁴

While primarily concerned with the opinions of its member governments, the IMF, like the WTO, also used its web site to help explain its role and mission more fully to the general public. In addition to the usual web pages describing the role and function of the organization,³⁷⁵ just prior to the April meetings, the IMF staff posted sizable "issue briefs" on globalization,³⁷⁶ the environment,³⁷⁷ and the basic reforms being considered for the Fund.³⁷⁸

These public relations efforts did little to quell the anti-globalization campaign being fueled on the Internet. Thirty thousand people took to the streets of Washington to protest the actions of the IMF and the World Bank, institutions which were previously even less well known than the WTO.³⁷⁹ While the Washington protests were generally less disruptive to the organizations' meetings than those in Seattle, the protestors were reportedly pleased with their ability to parade the "Bretton Woods Twins" before the media as institutions contributing to the problems of third world poverty.³⁸⁰

The chain of protests against international institutions and policies continued with smaller demonstrations at the 33rd Annual Meeting of the Asian Development Bank in Thailand in May and the Asia-Pacific Summit of the World Economic Forum in Melbourne, Australia in September.³⁸¹ At the IMF's annual meeting in Prague later in September, however, the next significant demonstrations occurred. Over ten thousand protestors from around Europe seriously disrupted the meeting, and their actions effectively dominated the agenda and resulted in the early cancellation of the program.³⁸² Czech President Vaclav Havel even orchestrated a highly publicized, but largely unproductive, meeting at the Prague Castle among the

374. *Id.*

375. IMF, *About the IMF*, at <http://www.imf.org/external/about.htm> (last visited June 25, 2000).

376. IMF, *GLOBALIZATION: THREAT OR OPPORTUNITY?* (2000), available at <http://www.imf.org/external/np/exr/ib/2000/041200.htm> (Apr. 12, 2000).

377. IMF, *THE IMF AND ENVIRONMENTAL ISSUES* (2000), available at <http://www.imf.org/external/np/exr/ib/2000/041300.htm> (Apr. 13, 2000).

378. IMF, *IMF REFORM: CHANGE AND CONTINUITY* (2000), available at <http://www.imf.org/external/np/exr/ib/2000/041200a.htm> (Apr. 12, 2000).

379. Bello, *supra* note 6, at 1.

380. *Id.*

381. *Id.*

382. *Id.*

heads of the IMF, World Bank, and the "Civil Society" protestors.³⁸³ Then, in December, several thousand people again engaged in several days of violent protests at the European Union summit meeting in Nice, France. Ironically, at the same time the EU was considering how to operate in a more representative fashion as it expands its membership.³⁸⁴

The Internet played a crucial role in fueling and coordinating each of these protests, establishing an ongoing chain of events at which the anti-globalization concerns are raised and reiterated.³⁸⁵ Internet advocacy was also a key factor in making debt relief for the developing world a priority at both the IMF and the World Bank, as well as influencing congressional support for U.S. participation in the international global debt relief proposals.³⁸⁶ Thus, while international institutions and agreements may sometimes constrain national and local government action, advocacy groups are increasingly adept at using the Internet—and direct action—to voice their concerns at the international level as well.

Conclusion

Any federal system must maintain a balance. Many of the organizations that took to the streets to criticize international institutions for their lack of accountability are themselves unaccountable to any constituency. "What we saw in Seattle is the rise of a new kind of politics. Disparate groups, organized through the Internet and other easy means of communication, pursue at the supranational level what they cannot accomplish at the national level."³⁸⁷ As one commentator noted:

[L]inked by the Internet and a sense of shared objectives, [these] organizations are building networks of influence as the representatives of what they term the "civil society," acting essentially as self-appointed watchdogs on dubious . . . behavior.

. . . .

In using the term "civil society" to denote their purported following [these] organizations, as some see it, are assuming a mandate that has not been granted by any democratic or representative process of accountability.³⁸⁸

While more openness and cooperation among all levels of government in formulating rules of international trade are laudable, as Madison indicated in the *Federalist Papers*,³⁸⁹ narrow interest groups—lacking mainstream support—should not be permitted to entirely bypass democratic governmental processes, which depend upon the support of broad majorities.

383. *Id.*

384. Dahlburg, *supra* note 7, at A17; *European Union Leaders Reach Pact*, *supra* note 7, at M5; Nagorski, *supra* note 7, at 4.

385. E.g., James Cox, *Disparate Activists Remain United in WTO Opposition*, USA TODAY, Nov. 29, 2000, at 2B.

386. Joseph Kahn, *Leaders in Congress Agree to Debt Relief for Poor Nations*, N.Y. TIMES, Oct. 18, 2000, at A12.

387. Fareed Zakaria, *After the Storm Passes*, NEWSWEEK, Dec. 13, 1999, at 40.

388. Cowell, *supra* note 197, at C20.

389. *Supra* notes 277-78, 348-52, 366 and accompanying text.

Local governmental action provides one means of facilitating or maintaining a balance between democratic processes and social concerns, as illustrated by the use of state and local measures like the Massachusetts Burma Law and the divestment measures advocated by Simon Billenness. Rather than protectionism clothed as progressivism, these measures reflect a degree of “vetting” because their passage requires more than a modicum of local support, and they can help inform the larger debate in a classic federal manner. Moreover, on widely varying issues, from genetically modified food to human rights for example, it is sometimes difficult to determine which level of government should control—whether the issue deals with the “great and aggregate” interest or a purely local matter. Thus, the local input that these subcentral government measures provide should be encouraged, not discouraged.

In fact, there is great irony in this process. Part of the theory behind free trade is that commerce brings nations closer together. The activists who use the Internet to express their opposition to traditional mercantilism, multinational corporations, and globalization are in many respects as international as Pepsi or any other multinational corporation. However, they proffer a vision of globalization based on social activism, not commerce. If we recognize that “[d]ifficult issues that aren’t easily handled by the normal institutions of governance - whether local or global - sometimes require new forums in which to appeal to conscience and to reach consensus,”³⁹⁰ encouraging this emerging international “federal” dialogue will facilitate solutions that can be supported at all levels.

390. *Causes Without Borders*, CHRISTIAN SCI. MONITOR, Mar. 27, 2000, at 8.

