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SYMPOSIUM STATES' RIGHTS VS. INTERNATIONAL TRADE: THE MASSACHUSETTS BURMA LAW

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SYMPOSIUM

STATES' RIGHTS VS. INTERNATIONAL TRADE: THE MASSACHUSETTS BURMA LAW

MR. REED*: If everyone is ready, we might as well begin.

Good evening, ladies and gentlemen, my name is Patrick Reed, and it is my pleasure to welcome you to this symposium on the States Rights versus International Trade in light of the Massachusetts Burma Law.¹

This symposium is sponsored jointly by the Committee on International Trade of the Association of Bar of the City of New York, of which I am the chairman. A second sponsor is the Customs and International Trade Bar Association, and I am here as a director of that Association as well. Our third sponsor is the Center for International Law at New York Law School.

Since we have an extremely interesting topic and very distinguished and stimulating speakers, I will turn the program over directly to Professor Terry Cone, who is the Director of the Center for International Law at New York Law School.

MR. CONE**: Thank you very much. This is actually the second symposium that we've jointly sponsored with the Committee, and it's a very happy relationship, and I want to thank you. Maybe we can do more of this. But let's get to the business at hand.

Now, I've had a very limited role here, but I've already managed to make it slightly controversial, because it seemed to me since we have two speakers who come down from Boston, that tonight of all nights, they should

* Patrick C. Reed is Chair of the Committee on International Trade of the Association of the Bar of the City of New York.

1. The symposium was held at the Association of the Bar of the City of New York on October 13, 1999. The law that inspired the case discussed in this symposium is the Act of June 25, 1996, ch. 130, 1, 1996 Mass. Acts 210. The case in question is *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. Mass. 1999), *aff'g sub nom. National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass., 1998), *cert. granted*, 120 S. Ct. 525 (1999).

** Sydney M. Cone, III is the C.V. Starr Professor of Law and Director of the Center for International Law at New York Law School.

be up first.² So whether that's the very best arrangement, I don't know, but that's my contribution to this.

The first speaker will be Tom Barnico, the second Joel Trachtman, the third Peter Spiro and the fourth Paul Dubinsky. You have the program and the issues and know, therefore, that this deals with the problem of a state or municipality in the United States adopting a statute or ordinance that restricts imports into the United States because of some local policy determination that those imports should be restricted. One can understand why a state or a municipality might feel strongly about a particular source of products and want to stop the importation. There is, however, the awkwardness of the federal Constitution which some people would say entrusts that sort of prerogative to the federal government.

Then there is the further awkwardness of the fact that the United States signed the agreement creating the World Trade Organization and the agreements incorporated therein by reference, and that's a lot of agreements, it turns out. And they have something to say on the matter of restricting or permitting exports and imports.

With that very hasty and superficial introduction, I will let the visiting team talk to us now. I will turn the microphone over to Tom .

MR. BARNICO*: Thank you very much, I am happy to bat first. I'm also getting used to being an appellant in the case, so we'll be first for the foreseeable future. If the case reaches the World Series, we'll be first at bat again.

Thank you very much for the opportunity to talk about this very interesting case and the very interesting larger problem that arises when state governments take action that affect foreign matters.

My job tonight, I think, is to explain a little bit about the claims and defenses that are involved in the Constitutional case that's been brought against the Massachusetts Burma Law, and I will do that for you. I'll then tell you what the basis for our petition for certiorari is. That petition is pending in the U.S. Supreme Court. I will explain a little bit about what we would like a Supreme Court decision to say in this area in the event that certiorari is granted and then I would like to close with a few comments on this new era of international trade and the issues that it presents for state governments.

2. This symposium was held on the eve of the 1999 baseball playoffs between the New York Yankees and Boston Red Sox. The Yankees triumphed in the series 4 games to 1.

* Thomas A. Barnico is an Assistant Attorney General of the Commonwealth of Massachusetts.

Some of you are familiar, no doubt, with the claims in the case. They are familiar to those who followed this issue through the 1980's regarding South Africa. They fall into three general categories. The first is a claim that action that Congress took as to Burma in 1996, three months after the enactment of our law, preempts Massachusetts and other states and cities from enacting this type of selective purchasing law.

The second general category of claims arise under the Foreign Commerce Clause: the claim that by enacting a selective purchasing law with these foreign resonances the state has hindered the ability of the United States to speak with one voice on foreign matters and also discriminated against foreign commerce in the application of this law.

The third general category of claims arises under the Foreign Affairs Clauses of the United States Constitution, and the claim here is that Massachusetts' selective purchasing law unduly interferes with the ability of the federal government to conduct foreign affairs. Now, looking first to the preemption claim, of course, the position Massachusetts has advanced in the case is that when the United States enacted its own sanctions as to Burma in 1996, it was at least constructively aware of the state and local laws as to Burma, and took no express action to preempt Massachusetts or anyone else from enacting laws on the same subject. So you have on the first claim the question arising, as we put it in the certiorari petition. Does federal law preempt or implicitly permit state and local activity of this sort?

The latter portion of that question, as I put it, whether federal government has implicitly permitted this law, arises from a U.S. Supreme Court case called the *Barclays*³ case that concerned state taxation of companies involved in foreign and domestic commerce and the suggestion there of the Court as we read it is in this area of foreign affairs, Congress can implicitly permit state action and thereby insulate a state action from challenges under the Foreign Commerce Clause.

As to the Foreign Commerce Clause itself and claims arising thereunder, if we're right about the significance of the action that Congress took in 1996, that should indeed insulate us from any claims under the Foreign Commerce Clause.

We have an additional point to make, though, which we've made in the courts below regarding claims under the Foreign Commerce Clause, and that defense has to do with the nature of the state action. This is a procurement law. Companies that want to sell us computers or paper clips are judged by whether or not they do business with Burma. The law has no application to private purchases. It doesn't govern private conduct. It solely addresses the terms on which the state will make purchases for goods and services.

3. *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994).

What that means, we think, is that the case has to be considered in light of the market participant doctrine. That doctrine developed by the Supreme Court—particularly in the 1970's—insulates at least from domestic commerce clause claims certain kinds of state activity, sometimes known as market participation. So the question arises in our case, is the restriction on procurement made by the Massachusetts law the type of market participation that the Supreme Court believes to be insulated from commerce clause review? The further question presented is whether the market participation doctrine applies to the Foreign Commerce Clause at all. That question has been reserved by the Supreme Court, as our certiorari petition points out, and we don't have the Court's answer to that.

But Massachusetts knows its position, which is that whatever you can say about foreign matters here, it's important to keep in mind the nature of the state restriction, and that is one that governs procurement, the purchase of paper clips and other supplies, and not a restriction on the conduct of any private citizen or private corporation as they might wish to trade with those who do business with Burma or as they may wish to trade with Burma directly.

That is similar to issues presented under what I referred to as the Foreign Affairs Clauses in the U.S. Constitution. We know that under the Constitution, the federal government has authority to conduct the foreign affairs of the United States, and we also know from that document that states are forbidden to take certain enumerated actions listed in Article 1, Section 10. So the claim arose in this case, just as it was cited in debates over South Africa laws in the 1980's, whether this type of law unduly disturbs the conduct of foreign affairs by the United States. There is no claim here that we are facially inconsistent with some clause of the Constitution; rather, we're talking about something that resembles a dormant power of the federal government to conduct an effective foreign policy for the United States.

The claim is that this type of selective purchasing law interferes with the ability of the United States to conduct its foreign policy regarding Burma. That power, the foreign affairs power, has been applied to invalidate a state law only once by the United States Supreme Court. That case you may hear more about from Professor Spiro, the *Zschernig* case,⁴ arising from Oregon. We have argued in the Courts below that our law is different in many respects from the Oregon law. One of the arguments we're also advancing by way of the certiorari petition is that the Court ought to recognize a market participation exception to that foreign affairs problem as well.

4. *Zschernig v. Miller*, 389 U.S. 429 (1968).

So not only should the Court apply a market-participation exception in the way of protecting a state's prerogative of that type, but it should extend that analysis to the foreign affairs power claim that's been made in this case.

I refer to the familiarity of these claims to some, because they were very much presented in debate at least in the commentary in the 1980s when cities, towns, states and Congress itself debated the question of what should be the proper steps to take as to the events in South Africa. And Professor Spiro wrote a very interesting article on all of these matters some time ago during those days when these questions were debated, but not finally litigated. I think it's important for everyone to understand that there was no definitive ruling at the time as to the validity of these laws under our Constitution.

I found as I worked on the case that some people come to the case asking me the question well, all these laws are constitutional, I assume, since they were enacted all around the United States in the 1980's, and I have reminded them that the Supreme Court never spoke on the issue, that this is still open ground and our certiorari petition makes that same point.

And that is a leading point of the petition, which is that the Supreme Court has not but ought to settle the question of whether states can enact selective purchasing laws or act in the related way of a divestment law, which some of you are familiar with, perhaps the related problem of mere resolutions enacted by state legislatures concerning foreign affairs.

We cite in the certiorari petition the fact that there has been a great rise in the number of international trade agreements reached, as Professor Cone has mentioned, and we think that adds to the importance of the question at this juncture. It's inevitable, we think, in this day and age, that state and local governments will be claimed to be disturbing foreign matters, when foreign firms or foreign countries are not pleased with particular regulations of the state and local governments.

We question whether it is a proper constitutional rule to have these complaints serve as evidence that we're disturbing foreign affairs to such a degree as to render our laws unconstitutional.

This case we think presents a good opportunity for the Court to pull together some lines that need to be sorted out. There is, as I said, the fact that only once in our history, in the *Zschernig* case, did the Court strike down a state law on these foreign affairs grounds. We need to know more about the *Barclays* case, that is, we need to know more about what the role of Congress will be as to this state activity affecting foreign affairs.

Will the rule be that the Courts ought not to intervene, but rather leave the question of the wisdom of these laws to Congress, and if so, does Congress only have to give implicit permission to allow states to continue to enact this type of law.

The third line I think that needs to be pulled together here is the market-participation doctrine itself. We say it could have good application to claims under the Foreign Commerce Clause and claims under the foreign affairs power. And the proper case of course, we say, is one involving procurement.

And so we think in light of the widespread use of these laws regarding Burma, and other countries at this time, and the open questions that I described, I think it's a good time for the Supreme Court to take the case and address some of these rules.

Naturally, as you've already inferred, I'm sure, we'd like them to adopt the rule that says that procurement laws are market participation that insulates our claims from both the Foreign Commerce Clause and the foreign affairs power; that *Barclay's* is a useful analysis for deciding these claims that arise under the Foreign Affairs Clauses as well; and that when Congress gives what the Court deems to be implicit permission, that should be the end of the matter as to these constitutional clauses, and of course, as you would infer, we would say in this case, not only is there no express preemption involved here, but we say implicit permission based largely on the point that Congress knew well when it acted in fall 1996 that many cities and Massachusetts have already acted as to Burma.

If I could have a few more minutes, I will simply repeat my earlier point, which you well know more than I, that the United States has entered into significant trade agreements in the last decade, and you know that foreign countries have targeted a number of state and local laws for challenge under those agreements. Massachusetts leads the nation in many ways, and this is just another area where we are out front. But the implications are pretty clear. This is a threat to traditional state law making. We are talking about laws that generally speaking satisfy things like our Commerce Clause. I am not talking just about Burma here; I am talking about other state laws that may be subject in the future to complaints under the GATT or NAFTA and so forth. The threat is that they will come under increasingly common review by international agencies or bodies, and further, that they will come under additional constitutional attack, such as this case, in which those claiming that state law is unconstitutional cite the fact of the trade complaints as evidence that we are roiling the foreign waters.

So what you should see I think, and Professor Trachtman can speak to this, is an intersection here between a new era of trade complaints on the one hand, and constitutional law and federalism on the other. At some point these effects may clash with our understanding of sovereignty of the states in the American federal system, the sovereignty that has been reaffirmed in numerous recent decisions in the U.S. Supreme Court. Perhaps these effects on state laws will remain a policy question for those debating whether to enter new trade agreements, or maybe they'll become cognizable

constitutional problems coming before the Supreme Court in this or another case.

On that last point, I will just say, stay tuned. Thank you.

MR. CONE: Thank you. I can appreciate that you spent a lot of time on the issue of why the Supreme Court should take the case, because unless they do, you will not have a chance to win it, but I am also sure you have your reasons why you think you should win it, and now let's go forward. Professor Trachtman, are you ready to proceed?

MR. TRACHTMAN*: What Tom Barnico said about the intersection between international trade obligations and Constitutional provisions in the United States is quite interesting, and these problems have grown greater as the number of our international trade commitments have grown. And so what we've got is a conflict between our desire to speak with one voice on international trade and our desire to have a federal system, and that conflict is exacerbated by the increasing need to engage in international relations, to cover more areas in international trade.

These are not differences between state values and federal values. Our federal value of speaking with one voice is balanced by our federal value in having live states, and this is part of the new federalism. These cases that we're talking about, the *Zschernig* case, the Burma Law case and some of these others, the *Barclay's* case as well, are instances of this conflict being worked out.

I have to confess a certain ambivalence about acceptance by the Supreme Court of the certiorari petition. On the one hand, we as lawyers always want greater clarity. On the other hand, there's a kind of creative ambiguity in the system as it now stands. It may be that we've passed the point where we can enjoy that creative ambiguity.

MR. CONE: That would prevent us from having a symposium like this.

MR. TRACHTMAN: Thank you for pointing that out. The ambiguity will always come back.

So the question is, of these two values, can either of them prevail automatically? I think the idea that one-voice values, foreign-affairs values, can prevail automatically is deficient, especially given the fact that there are more things going on in foreign affairs, and if we allow foreign-affairs, one-voice values to prevail automatically, we'll soon find ourselves with states that don't mean very much.

* Joel P. Trachtman is a Professor at the Fletcher School of Law and Diplomacy.

And this all relates to the market-participant doctrine. The market-participant doctrine has so far been largely confined to domestic Commerce Clause circumstance, but this market-participant doctrine has to do with the lives of the states, as independent actors, and has been a way in which we've preserved the ability of the states to speak as persons in domestic commerce and, if we see an extension of it, in international relations.

Before I talk about the WTO and the Government Procurement Agreement, I want to just locate it in the federal system, and the quick answer to this topic is that it really is not located within the federal system in a very powerful way. We've got the Supremacy Clause, the Commerce Clause and the foreign affairs clauses, which seem to allocate a good deal of power to the federal government to make federal law. We have a number of cases before the federal Courts regarding preemption, but there's little question that the federal government can make supreme federal law, so what I want to refer to at the outset is how this supreme federal law is made in this particular context: the Uruguay Round Agreement—the WTO.

Those agreements were accepted by the United States through the fast-track process, through federal legislation. While people will differ on this, I think there's a very strong argument that those agreements have direct effect within the United States constitutional system. However, as Tom Barnico pointed out, there's only one permitted plaintiff in this kind of a context, and that one plaintiff is the federal government itself, so the direct applicability—the self-executing effect—of these agreements is rather limited in this context.

The Uruguay Round Agreements Act made this law that we're talking about the federal law that implements the Uruguay Round Agreements. There was no formal state role in that legislation. Interestingly, in the context of the Government Procurement Agreement, the agreement under which the Massachusetts Burma Law has been challenged by the European Union and by Japan, the federal government polled the states. It asked the states if they wanted to be covered by that agreement, and Massachusetts, of course, answered yes. If it had answered no, we wouldn't have a WTO law issue in this case.

There is consultation, but there is no direct state role, no direct legal state role. We can contrast this with the European Union, which is in many respects our interlocutor in international trade. There the member states do have a direct role in making international agreements and we might compare their role in context of the one-voice arguments. How is it that the European Union can manage to allow Italy and France and the other member states to have some voice and the United States cannot allow its state a voice?

The Uruguay Round Agreements Act, as I said, provides a limited role for these treaties. There was special concern expressed in testimony by

Professor Laurence Tribe of Harvard Law School about what would happen in dispute settlement. Of course, he didn't anticipate this particular case back in 1994. When you have the federal government, the United States trade representative, acting as the litigator, it would represent the interests of the Commonwealth of Massachusetts. And Section 102(b)(1)(B) of the Uruguay Round Agreements Act says that the USTR must consult with the states as to implementation of our obligations and the following provision says the USTR has to consult with the states regarding the defense and this the USTR did. It talks to representatives of Massachusetts, but there's still a sense that in Geneva, things are happening that are outside the control of the states.

That may be as it should be in this international relations context. So the states have access but not control over the operation of these laws.

Then as I said, under Section 102(b)(2)(A), the Uruguay Round Agreements Act provides that no state law may be declared invalid except in a suit by the federal government. The outcome of any WTO dispute resolution would be accorded no deference: Congress reserves rights of auto interpretation in the domestic sphere as to what happens in the domestic United States legal system. That doesn't affect the obligations in the international context. Those go on independently of what Congress and our Courts think. Of course as you read the District Court decision and the Circuit Court decision you will notice that there is no argument brought by the NFTC that the Massachusetts Burma Law violates the WTO Government Procurement Agreement. The reason is that they do not have standing to bring that argument. The Commonwealth of Massachusetts has argued that they shouldn't even refer to the violation as a basis for foreign affairs and commerce clause attack.

Let's turn to the international law itself, the WTO Government Procurement Agreement. In the European Union's request for a panel, or complaint, and the Japanese complaint is similar, they raised three issues. This gets fairly technical, but I think it's worthwhile to go through it, just to see how the arguments come out, and actually to see how ambiguous the WTO law is in this area. There are three main arguments. One is that under Article 8(b), there are constraints on the ability to disqualify bidders in the context of Government Procurement and Massachusetts violated those constraints.

Second, under Article 13(4)(B), the bid has to be awarded to the person who comes up with the best price and the best compliance with non-price factors. The European Union argued here that Massachusetts wasn't doing that. In both of these contexts, the European Union representatives say you're not allowed to consider political factors, you're not allowed to consider non-economic factors.

Just a footnote here, the federal government has procurement laws that do consider non-economic factors, that limit the ability to deal with the government of Iran, for example, green procurement. The federal government has some concerns about these arguments, just as Massachusetts does.

The third argument and the one that gets most complex and where the law is most vague is in the nondiscrimination provisions of the Government Procurement Agreement, Article 3. Here the problem is in determining what is discrimination. I'll come back to all of these.

The last argument that the European Union made was based on a concept in international trade law, a kind of catch-all provision, if you will, the concept of non-violation, nullification or impairment, and here the argument is that even if all of this is legal, it nullifies or impairs the concessions that the United States did make in this agreement, so it's a non-textual, non-positive-law argument.

The main purpose of the Government Procurement Agreement is to limit the ability for nations to have buy local laws, to discriminate on the basis of nationality in the context of procurement. Procurement is an increasing part of international commerce and it was seen as important in the Tokyo Round in 1979 and the Uruguay Round in 1994, to start to address this area of commerce and to start to liberalize it to avoid discrimination.

The Government Procurement Agreement separates procurement into three main categories. First is open tender, everybody can come and make a bid. Second is pre-qualification-based tender where the bidder must be qualified, and the third is negotiated tender where you as the procuring entity go to a particular person and say give me a bid on this. This becomes important.

The first provision I'll talk about is Article 8(b). Here I've got the operative language, the language that the European Union and Japan are relying on here in the first point, which we have to parse just a little bit. "Any conditions for participation shall be limited to those which are essential to insure the firm's capabilities to fulfill the contract."

My first argument on Article 8(b) is that it doesn't apply to the Massachusetts Burma Law, because it applies when you're establishing a selective tender, when you're pre-qualifying bidders, and the Massachusetts Burma Law doesn't disqualify bidders. It is simply a 10 percent negative-preference law. So Article 8(b) dealing with pre-qualification just isn't relevant.

The second argument, even if you don't like my first argument, is that it refers to conditions for participation and it gives some examples, but the examples are things like providing a bid bond, things like providing financial guarantees, things that you would imagine as necessary prerequisites for the

right to bid, and we have to distinguish that term, conditions for participation, from what you might call the actual factors that you look at to decide who gets the business. In Article 13, paragraph 4 of the Government Procurement Agreement, they talk about those things separately.

So here, my argument, just to summarize, is that while this talks about conditions for participation being limited, qualification is different from the things you evaluate to determine whether this is the best bid, and if we think about the Burma Law as a way of determining whether this is the best bid, it just doesn't come under this provision at all.

And remember, that seems to make some sense, because the Government Procurement Agreement is designed to limit discrimination against bidders that come from particular states.

So let's move quickly to the lowest-tender requirement in Article 13(4)(b). There you have a requirement that the business be given to the best bid. We have two things that are included in the best bid. Either the lowest price or the one that is most advantageous in terms of the evaluation process. Here again the argument is that the Burma Law is seen as an evaluation criteria that expresses Massachusetts' concern about what's going on in Burma in terms of a 10 percent negative preference. And in order to deal with the argument that the factors being addressed in Article 13(4)(b) are really economic factors, I point to Article 12(h), which specifically contemplates non-price factors that are separate from price-affecting cost factors. So it's not just the cost and the price that you look at, but it can be other factors.

Here I need to promote a footnote about the style of decision making in the WTO dispute resolution context.

In many contexts, the WTO panels and the Appellate Body are fairly positivist. They look for clear treaty obligations. They also try to promote liberal trade, and so here they've got a difficult conundrum because the positive law does seem to favor Massachusetts, but they'll have some concerns about these types of preferences, reducing the value of the Government Procurement Agreement.

So we don't know how a WTO dispute resolution panel will solve that problem.

Now on to the most difficult issue and that is the national treatment and most favored nation nondiscrimination laws that are articulated in Article 3 of the Government Procurement Agreement.

And here the question is, what are the right parameters to look at in determining whether there's discrimination. Massachusetts takes the position that they're not discriminating at all. They're treating local Massachusetts firms the same way that they treat European Union or Japanese firms; if they do business with Burma they're subjected to this 10 percent negative

preference. So the question is why do we have an argument about discrimination.

It relates to the language prohibiting discrimination with respect to products or suppliers. Here we have a question. If we're looking at suppliers differently, if we're changing the way that we view suppliers based on whether they do business with Burma, can we also discriminate against their products? In other words, if we're allowed to treat suppliers differently, let's say that the Burma Law says we treat suppliers differently, can we also treat their products differently, is it also permitted in this context? I won't belabor this, if you want we'll come back to it during questions, but I think the best argument is that you look at a law that deals with suppliers alone and look at whether it discriminates among different suppliers from different states or from foreign states and in the United States, and there, if you look at it that way, there's no discrimination.

Article 8(b) and Articles 10 and 12 specifically do permit this distinction among suppliers based on the identity of the supplier. Nullification or impairment is a catch-all ground for attack. It relates to the balance of benefits. The idea is that, in GATT-WTO dispute resolution we try to make sure that parties get the benefit of their bargain even if it wasn't expressed specifically in their treaties themselves.

Here there's a case that was recently decided by a GATT-WTO panel, the *Kodak-Fuji* case⁵ which took a very limited view of what could be included here, and the way it operated was to try to determine whether there were legitimate expectations on the part of the complaining state that were being frustrated. Here I think that the positive law is so strong in not showing a specific constraint on these kinds of requirements that it would be hard to find a non-violation nullification or impairment case.

Again, this goes to the question of positivism and interpretive style and it's a little bit hard to predict how a WTO panel would come out on this, because of the concerns about a slippery slope of states and national governments using these kinds of criteria to reduce the value of the concessions that they made.

So where are we now in the WTO? The case was suspended as of February 1999. It was suspended specifically because the European Union and Japan felt that their water was being carried by the federal case in the United States. They felt that they didn't need to pursue this, and that, discretion would be the better part of valor in this context. So we have an interesting relationship between the domestic litigation and the international

5. WTO Dispute Settlement Proceeding Concerning Certain Japanese Measures Affecting Imported Consumer Photographic Film and Paper, 61 Fed. Reg. 52,835 (1996).

litigation. We may expect the international litigation to be restarted if the domestic litigation doesn't get our trading partners what they want.

Remember, there's an intent on the part of the Congress to protect the states from the domestic law implications of the Uruguay Round except in an action by the federal government. The federal government has been reluctant to attack Massachusetts in this case. It's notable that the federal government has not brought its own case here and we have these questions of supremacy and preemption. Supremacy is the right of the federal government to act to deny Massachusetts the right to have this law, and that doesn't seem to have been exercised and then we have these questions about preemption, whether Massachusetts has the right to engage in this activity, despite the fact that there's no clear federal legislation prohibiting it. The policy question for the United States as a federation is how to preserve its federalism while engaging its trade partners in international discussions.

Thank you.

MR. CONE: Could I ask a question? You had one of your overviews compare the tuna/dolphin and shrimp/turtle Article 11 equivalent cases. What briefly would you have said if you covered that?

MR. TRACHTMAN: The idea here is that in the shrimp/turtle and tuna/dolphin cases, these are cases attacking the United States environmental laws on the basis that they constrict international trade. I have to give you a quick thumbnail of those arguments.

Article 3 of GATT is the national treatment requirement. GATT jurisprudence says that if you are covering something under Article 3, under national treatment, it's not subject to the strict scrutiny of the rule against quotas and non-tariff barriers in Article 11, which would certainly invalidate the United States Pelly Amendment and the Marine Mammal Protection Act. So in the tuna/dolphin and shrimp/turtle cases, although it wasn't explicit in the shrimp/turtle case, the panel decided, the appellate body in the shrimp/turtle case, decided it wasn't covered by Article 3, it wasn't covered at all by the national treatment norm, and went to Article 11 and was invalidated, then had to go to the exceptional provisions about the protection of human, animal or plant life.

So here, the comparison is that in the Government Procurement Agreement there's no analog to Article 11; there's no analog to the provision that automatically invalidates the Massachusetts Burma Law, so from the standpoint of Massachusetts and the United States, we don't really care whether it's under Article 3 or not. If it's not under Article 3, we're not invalidated. We don't need to be under Article 3.

In the product-trade cases, the panels decided that they weren't under Article 3 because the United States was trying to regulate the process, the production process, and not a product. So here that distinction, that whole jurisprudence which arose for I think very good reasons in the goods context, just is inapplicable. And the implication for the Massachusetts Burma Law in the WTO, is that if you look at the Massachusetts Burma Law on the same basis, it can benefit from being a process distinction.

A process distinction isn't automatically invalidated in the procurement area as it might be in the goods area.

MR. CONE: Thank you for taking that up. I appreciate it. I will now go to Peter Spiro.

MR. SPIRO*: Thanks. I would like to take us back to the constitutional questions that are at issue here. What I would like to do is to make two arguments. First, I want to put forth a vigorous defense of the conventional rule of federal exclusivity over foreign relations, at least in a world in which nations have been legally responsible for the conduct of political subdivisions. In fact I want to argue that this rule has in the past been a structural imperative, one that has been quite strongly reflected in our constitutional doctrine.

But then, second, I want to advocate abandonment of the rule to the extent that the world is coming to hold political subdivisions directly accountable for violations of international obligations.

So the argument I am making is one of historical context and contingency. In the old world, the rule of federal exclusivity was a necessary one. As we move into a post-national era, however, the rule is neither necessary nor justifiable.

First, the defense of the traditional rule. I think there's really quite a compelling structural logic to the exclusivity principle. It has been embodied in the notion of being able to "speak with one voice" when it comes to the nation's foreign relations. As Alexander Hamilton said in the Federalist No. 80, the piece of the whole ought not to be left at the disposal of the part.

California should not be permitted to take independent action for which North Carolina suffers the consequences. The cartoon example would be that of engaging in warfare. You couldn't give Texas the capacity to invade Mexico, at least not in a world in which Mexico would then turn around and march troops into California. That would be the easy case. More plausibly, take the example of the *Zschernig* case, a watershed decision in the area. In that case, an Oregon probate law was being applied by state judges in such

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a way that discriminated against nationals from East Bloc countries. Not only was it being applied to discriminate, it was being applied in almost an insulting way, where judges were saying things like, "Over my dead body are we going to send any dollars over to the Commies." If you think about that in the Cold War context, you could not have state court judges acting in such a way that might conceivably start us on the path to World War III. It was so delicate a balance between the superpowers that you couldn't have independent sub-national actors being put in a position where they could upset that balance. And one could even make the same kind of argument today with respect to the Massachusetts Burma Law, insofar as you can't have Massachusetts acting in such a way that may rebound to the detriment of those of us who live in New York.

It doesn't matter whether it is on the question of procurement or whether it is in a traditional area like probate law or something that looks like a more direct regulation. To look at this from a slightly theoretical perspective, if you allow the states to act independently on such matters, you are going to get inefficient decision making, to the extent the acting state does not shoulder the repercussions of any given decision. It's easy for Massachusetts to take a decision that's going to hurt somebody in North Carolina. It is inefficient to allocate power to an actor that will not suffer decision-making consequences.

Another way to look at it is from a perspective of democratic process. Decision-making legitimacy is undermined where those affected by the decision have no say in it. If somebody in North Carolina is affected by the decision that is taken by the State government of Massachusetts, that suffers a democratic illegitimacy because the people of North Carolina are not participating in a decision under which they suffer.

I think that encapsulates the structural logic behind federal exclusivity. It is reflected in the Constitutional architecture, most notably in Article 1, Section 10, which prohibits the states from entering into treaties or alliances, from engaging in warfare, from granting letters of marque and reprisal (i.e. commissioning private parties to engage in warfare), and from imposing export and import taxes. These are all activities which would give rise to problems of democratic process and what are known in the economic literature as externalities, where actors don't have to take into account the consequences of their actions.

The exclusivity rule is also reflected in 19th century practice under which there was a steady ouster of state powers from other areas implicating foreign relations, including foreign commerce. You have very early on the articulation of the Dormant Foreign Commerce Clause in *Brown v.*

Maryland.⁶ The states were ousted from any role in extradition decisions in *Holmes v. Jennison*⁷ in 1840. In the immigration context, you find a powerful statement, and a clear predecessor to the *Zschernig* decision, in *Chy Lung v. Freeman*.⁸ In *Chy Lung*, the Court confronted a California immigration provision posing the risk that California state officials would offend foreign dignitaries. As the Court asked in striking down the law, if California did offend a foreign dignitary, who would be answerable to that offense? California alone? No. The entire nation. *Chy Lung* represents a strong statement of federal exclusivity.

In the modern era, you have the first use of the one-voice label in the *Japan Line* case,⁹ which was a Foreign Commerce Clause case involving a California state tax against foreign transport containers. If California imposed a tax that offended Japan, the Court stressed, the rest of the nation could have faced a retaliatory tax by Japan in response to the state measure. Then you have *Zschernig* itself in which the Court found that the states lacked the constitutional capacity to engage in activity that posed anything more than an "incidental or indirect effect on foreign relations."

All these cases seem highly defensible in the context in which they were handed down. You could not have local officials upsetting what were very sensitive international diplomatic dynamics, both in the Cold War superpower and trade contexts. With respect to national security, the dangers of state-level discretion were self-evident. With respect to trade, you must remember a context before the GATT had real teeth and in which there was always the possibility of little spats turning into trade wars.

So I think the doctrine was justified in the context in which it was developed. Today I think it's more difficult to justify the rule of federal exclusivity. First of all, the stakes have diminished. We're no longer talking about the possibility of World War III. It's a much less sensitive international balance, and that characterization applies in the trade context as well as the security context. We now do have the WTO, which I think we can safely assume is a break against trade disputes spiraling out of control.

But I think you could still argue that even though the stakes have diminished they still may not have diminished to the point necessarily where we could accept a rule under which states could act as they please, because you still do have these decision-making inefficiencies that exist in a world in

6. 25 U.S. 419 (1827).

7. 39 U.S. 540 (1840).

8. 92 U.S. 275 (1875).

9. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

which those who make the decisions are not held to shoulder the their consequences. But I think that is changing now.

Here I would pose the emergence of what I call targeted retaliation and sub-national responsibility under international law.

There are a couple of interesting examples of targeted retaliation. One is in the *Barclays Bank* case itself, in which California had passed a corporate tax which did offend the United Kingdom and other foreign governments. The United Kingdom passed a retaliatory tax that was directed not at the United States as a whole, but only at California. Another example is emerging in the human rights context, involving various state-level practices, including most notably the use of the death penalty (especially against juvenile offenders) that are causing offense to other governments as violations of international human rights. Other countries as well as international NGO's are moving to target only those states that are engaging in the practices that are found to be offensive. When Texas executes juvenile offenders, other governments are now going directly to the Governor of Texas to protest the execution, as opposed to going to Washington, which on matters related to the death penalty is pretty much a waste of time.¹⁰

There is a recognition now in the international community that there are certain spheres over which the states will have exclusive authority, and that to the extent that the international community or other countries are interested in changing offensive practices, they know that this is the government of Massachusetts that's passing this procurement measure, and they understand our federal system in a way that was not true during much of the time that the constitutional rule of federal exclusivity was being developed.

In the past, one could not assume that foreign governments had any understanding of our federal system. Today that certainly isn't the case, especially when you're dealing with sophisticated actors such as the European Union and Japan. Armed with that understanding, it is more likely that other countries will respond directly against the acting sub-national actor, directly against the state, and then there's no problem. If Massachusetts shoulders the consequences for its action, then there's no reason why I as a New Yorker should care what Massachusetts is doing. That is, I think the direction that international society is moving is towards a world in which sub-national actors are recognized as having at least some limited form of international legal personality.

The doctrinal implications of this trend are clear. First of all, *Zschernig* and the Foreign Commerce Clause one-voice test should be abandoned. I

10. For an elaboration, see Peter J. Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567 (1997).

think the *Barclays Bank* decision is a significant one in this respect because there you did have other countries which took offense at a state level action; the Supreme Court nonetheless said we are going to leave this to Congress, we're not going to move in on the basis of a dormant power. The bottom line for the case we are focusing on today: Massachusetts should face no constitutional bar to its Burma Law.

But it may face an international bar. It is a treaty violation we are dealing with here (actually one that Massachusetts voluntarily entered into). And, if in fact it is a treaty violation, then Massachusetts should be held accountable for it. I do not think Massachusetts can have it both ways on this one; that is, argue that it should be entitled to engage in something that violates the treaty and then not face the responsibility for it.

The prescription here at the international level would be to allow this case to go forward in the WTO. If the Massachusetts procurement measure is found to be GATT illegal, then the WTO should fashion a remedy that targets Massachusetts entities. Then we will just leave it up to Massachusetts to decide if it wants to persist with the treaty violation in the face of any sanctions that it may face as a result of that violation. In other words, just leave it up to Massachusetts to decide and not have it necessarily be a concern to the rest of the country.

To conclude, I think we are in the middle of a momentous change here in how international relations works with respect to the participation of sub-national actors. The Massachusetts Burma case will I think emerge an important indicator of this change.

MR. CONE: Thank you. You certainly provoked some questions on my part, but I think we'll hold the questions for the moment and let Paul Dubinsky talk and then we'll go to questions.

MR. DUBINSKY*: Thank you, Terry. Since I'm cast in the role of respondent, I will first make some random responses to the remarks that have preceded mine. Then I want to take issue with some of Peter's statements, which are especially interesting and provocative. Finally, I promise to save time for your questions.

My hope is that the Supreme Court denies certiorari in this case for two main reasons. First, the current state of the law is not all that bad from the point of view of those who negotiate trade agreements. As we have heard, there is some ambiguity as to the extent of federal exclusivity in the area where international trade, state regulation, and international human rights meet. From the position of a negotiator at the U.S. Trade Representative's

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office, it can be nice when you're sitting at the negotiating table to have the specter of these crazy relatives—state and municipal governments—behind you who are unpredictable and willing to do mildly disruptive things out of a sense of moral outrage. In effect, this ambiguity allows our trade negotiators to say to our trading partners, "I'd like to work with you, but you need to understand my constraints and work with me on them."¹¹

There is a second, more fundamental reason. The problem of state legislation in matters that affect the foreign commerce or foreign policy of the United States is much larger than what we have been talking about thus far this evening. The problem includes not only procurement legislation, but also actions by state regulatory authorities, such as those taken by the New York State banking authorities this past summer on whether or not to approve a transatlantic merger, depending in part on what steps Swiss banks were willing to take in order to bring a resolution to those claims to assets in dormant accounts made by the survivors of Holocaust victims.

The problem also extends to billions of dollars of public pension funds that may be invested or disinvested from companies traded on markets all over the world. Do states lack the power to direct how such funds are invested?

The relationship between state lawmaking and the international commitments of the United States also has been brought to the foreground by an increasingly pointed academic debate over the status of customary international law in U.S. courts. The traditional view, supported by recent district and circuit court opinions, is that customary international law becomes part of U.S. law as federal common law. In the field of international human rights, the landmark *Filartiga*¹² case took that approach, and was followed by the *Karadzic*¹³ case and others. The recent writings of Curtis Bradley and Jack Goldsmith challenge this point of view and its corollary—that customary international law trumps conflicting state law.¹⁴ As Goldsmith and Bradley see it, absent express Congressional action, state legislatures have considerable powers to enact laws that are inconsistent with customary international law in the field of human rights.

11. By analogy, there has long been an ambiguity as to the ultimate power of Congress under the Constitution to restrict the jurisdiction of the Supreme Court and lower federal courts. This very ambiguity has tended to dissuade Congress from adopting especially reckless jurisdiction-stripping legislation. On the other hand, this ambiguity arguably has provided some democratic check on the actions of the federal courts.

12. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

13. *Kadic v Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied 116 S.Ct. 2524 (1996).

14. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

Finally, the intersection of international law and our conceptions of federalism are very much apparent in the area of law in which my current scholarship is focused. For the past few years there has been an effort under the auspices of the Hague Conference on Private International Law to create a multilateral treaty that would require state parties to recognize and enforce civil judgments entered by the courts of other countries who are parties to the convention. Up until now, the question of whether the prevailing party in a foreign court proceeding could use the foreign court's judgment as a basis for collecting against assets located in the United States was almost entirely governed by state common law and a uniform act that roughly half of the states have adopted in some form.¹⁵

Until now, this quite important area of law that often requires American courts to judge the procedural and substantive fairness of foreign legal systems, has essentially no federal treaties or legislation on the subject. This means that the state of Texas, for example, has been free to refuse to enforce foreign judgments entirely, or to condition enforcement on any number of factors, such as reciprocity. Talk about the ability of states to get enmeshed in foreign affairs! I can't imagine many judicial inquiries more sensitive than assessing the quality and fairness of a foreign country's legal system.

To return to my earlier point, the second reason why I fear the Supreme Court's granting certiorari is that a high court ruling at this time may actually add confusion rather than clarification. It is quite possible, for instance, that in answering the Burma law question, the Court's opinion may include language that puts in doubt the status of state law in recognizing foreign judgments or the proper role of state regulatory authorities. Clarification in this area of the law might require a willingness by the Court to visit these issues in several opinions over the course of a decade, and I'm not sure that the willingness is there.

The most hopeful scenario, from the point of view of guidance, might be for the Court to draw some clear distinction between what it considers to be traditional areas of state lawmaking (such as procedural law) and less traditional areas, such as economic boycotts. Nonetheless, from an intellectual perspective, such a neat distinction is likely to be unsatisfactory. In terms of our understandings of the relationship between international law and municipal law, such an approach might leave us adrift.

An earlier speaker said that the implications of the Massachusetts law are clear. I disagree. They are actually quite unclear, and it is very likely that if certiorari were granted, whatever the Supreme Court said about the Burma law would just be the beginning of a difficult series of cases necessary to parse out where the lines of federalism should be drawn in this area.

15. See UNIF. FOREIGN-MONEY JUDGMENTS RECOGNITION ACT, 13 U.L.A. 269 (1980).

That brings me to Peter Spiro's comments. Peter is too humble to refer you to his recent article in the *Colorado Law Review*¹⁶ in which he further develops some of the ideas that he has shared with us tonight. As I understand his thesis, it is that the extent of federal exclusivity is not forever fixed. Rather, federal exclusivity may change over time in response to historical circumstances. Secondly, he argues that federal exclusivity depends in part on whether or not states, such as Massachusetts in this case, are likely to be the subject of targeted retaliation by foreign countries or whether the foreign response will be diffuse. In the latter case, many Americans who were unrepresented when Massachusetts enacted its Burma law will suffer the economic and other consequences of foreign retaliation.

I admire Peter's scholarship but disagree with his conclusions on two levels. First, just as we are unable to eliminate the collateral effects of so-called "smart bombs", even more so economic retaliatory regimes rarely manage to be neatly targeted. Consider the economic sanctions against Iraq.

When it comes to the foreign response to measures taken by individual states of the United States, the ability for well-targeted retaliation is severely limited by the extent to which the economies of the states are fully interdependent. It is nearly impossible to impose sanctions or a boycott on a state of the United States without producing a substantial trickle-over effect on other states. People and businesses relocate all the time. A manufacturer in Massachusetts may purchase its raw materials elsewhere, and its stock may be owned not only by people all over the United States, but perhaps all over the world. If people in Massachusetts lose their jobs, they spend less money on goods and services emanating from other states.

In short, my first response to Peter is that, as Americans, we're in this together. That seems to have been the framers' design. As a result, each time a state or municipality takes action that is perceived to be hostile abroad, the foreign response will likely affect us all.

Second, resolving the issue of federal exclusivity does not turn solely on the likelihood of targeted retaliation. The traditional view of federal exclusivity in the realm of foreign relations also draws support from the way the United States is perceived abroad. If a law is passed by a particular state with the intention of punishing a foreign country or discriminating against it, rightly or wrongly, that hostile action is usually perceived from abroad as exemplifying "American arrogance" or other unfavorable characteristics. It may have been the banking authorities of New York that held up the efforts of a Swiss bank to acquire an American one, but many Swiss seem to have felt that this state regulatory action typified a more general American

16. Peter J. Spiro, *The Role of the States in Foreign Affairs: Foreign Affairs Federalism*, 70 U. COLO. L. REV. 1223 (1999).

aggressiveness toward jurisdiction and a tendency to oversimplify some of the issues concerning trade with Germany during the Second World War.

Finally, I would like to make a comment about preemption. I just don't see a standard preemption analysis as helpful in resolving cases like that of the Massachusetts Burma law. An inquiry into preemption usually focuses on whether the federal political branches have fully occupied a field so as to preclude action by states or whether federal authorities have acted in such a way as to cause a direct conflict with what a state is seeking to do. Such a preemption analysis fails to take into account that at times one of the most useful tools of diplomacy is to remain silent or to delay taking action while coordination with allies is sought. Viewed in this way, perhaps the most troublesome clash between state initiatives like the Massachusetts Burma law and effective federal pursuit of our national interest in foreign affairs, is that state and municipal initiatives tend to force the federal government to define its position before the most ideal time to do so. For example, in several instances Congress and the Administration have deferred enacting a sanctions regime against a foreign country, preferring first to attempt to gain concessions by the implicit threat of eventual sanctions.

By focusing largely on what concrete actions the federal government has actually taken, a standard preemption analysis largely overlooks this important tool of foreign policy.

That's all I have to say for now. I hope there are questions.

MR. CONE: Paul, thank you. Terrific. Sir?

VOICE: I think the panel seems to have not focused on one thing: for 200 years treaty obligations are the obligations of the United States, all of it. All of it, the whole country, and even Congress when it can't by implication repeal a treaty and it seems like the, while we can do it by implication argument, is sort of like Congress can sort of hang back and let Massachusetts do the dirty work which doesn't seem to jibe with 200 years of federal decisions on this issue.

I see that there's not a clear enough definition between treaty obligations which are essentially an executive function with the advice and consent of the Senate and internal federal legislation done by the whole Congress. I think they have different rules of exclusion. I think by going on issues of practicality, one loses sight of some very strong constitutional issues. I mean, the House of Representatives did not enact GATT. I'm sure everybody had input in terms of political process, but the Senate voted to approve an executive act, and that's what the framers had intended, and that's what I think is really not being questioned, since the inception of the country, and that's why I'm a little uncomfortable with actually almost all of

the arguments made both pro and con, because it's dealing on these practical issues.

MR. TRACHTMAN: I'm not sure that I understand the question. The Uruguay Round was accepted by federal legislation in both houses. The original GATT largely was authorized in advance by the Reciprocal Trade Agreements Act.

VOICE: That's enabling legislation, but the treaty obligation is separate from the federal legislation.

MR. TRACHTMAN: It wasn't approved under the treaty clause.

VOICE: I'm saying that we entered into various trade treaties. The trade treaties are at issue. If Congress enters into enabling legislation to effectuate its commitment under the treaty, that's a separate set of legislation, it's a separate set of obligations which from my reading of some of these things has not generally been perfectly in synch with the treaty.

MR. CONE: Maybe we have a question of fact. What Professor Trachtman was saying, the agreement established in the World Trade Organization was approved by both houses of Congress. I believe that the Senate put off the vote to the very last minute, in late November 1994. The House had acted earlier. That's just a question of fact.

MR. TRACHTMAN: That's the way fast track works. Maybe what you're trying to do is distinguish treaties from other legislation.

VOICE: That's what I'm trying.

MR. TRACHTMAN: In our constitutional system in terms of the weight of these laws, they're equal under the supremacy clause.

VOICE: I thought treaties were supreme federal law second only to the Constitution.

MR. TRACHTMAN: No, they're equal to federal legislation. There is the *Holland v. Missouri*¹⁷ doctrine that says that the federal government has a little more scope for its legislation power in the international relations context or treaty context, but aside from that, they are equal.

17. 341 U.S. 908 (1951).

MR. CONE: Yes, sir, in the back.

VOICE: I have one comment and one question, and I think they're both really directed at Professor Spiro. The comment relates to Dispute Settlement Understanding under the WTO, and the remedial provisions therein, how that then coincides with your idea of targeted retaliation. It occurs to me that under those provisions, retaliation is actually considered only a temporary measure quite clearly, and is second best to international responsibility. In other words, states who are members of the WTO bear a responsibility as a treaty obligation to bring the measures into compliance, and other states will look to international law and to the personality of those interlocutors as the basis for that responsibility.

So, for instance, the United States is in Geneva, Massachusetts is not. Were Massachusetts, or rather were this to be litigated and the United States to lose, the diplomatic pressure would be very difficult to be brought to bear, which is the first most remedial response to a loss in the WTO. So that's my comment.

The question is whether you would then see the sort of sub-century personality of sub-national units being echoed in other federal states around the world and how that would work. I guess I should state my own bias, since I'm a Canadian diplomat, and I'm just wondering what sort of responsibility we would bear in order to understand the constitutions of every state.

The one that jumps to mind is that Mexico recognizes the sovereignty of municipalities. How would that work?

MR. SPIRO: One way to do it is to use the national government really as sort of a messenger, a channel through which sub-national representation could be made. There is actually one case that involves Canada in a human rights context in which a Quebec law was asserted to be in violation of the International Covenant on Civil and Political Rights. In a hearing before the Human Rights Committee regarding the law, the federal Canadian government representative stepped aside and allowed a representative of the government of Quebec who then defended the law. There is another example of this involving Tasmania, a province of Australia.

Now, as for your comment, I think if you want to get rid of laws like Massachusetts' law, there are two ways of doing it. One is for the WTO to sanction powerful interests regardless of what state they are associated with who will then lobby Congress to preempt the law through federal legislation. On the other hand, you could go directly against Massachusetts entities, who would then muscle their state government to repeal the measure. I think the latter strategy is more likely to succeed.

This leads me to a point that Paul made about whether there are trickle-over effects. True, if you target Massachusetts, that may have an effect in New York. But it also has an effect in Canada these days; all these trickle-over effects are not just nationalized but globalized. At the same time, it is still clear that you could direct retaliation these days to make Massachusetts hurt more than anybody else. For instance, if a company like Mercedes is deciding where to put its multi-billion dollar factory, its decision not to put its factory in Massachusetts and in Tennessee or wherever instead would make Massachusetts hurt and could be a pretty effective way to get Massachusetts to change its policy.

MR. CONE: Yes?

VOICE: Two comments. First, I don't think there's any evidence to indicate that any country is enacting its retaliation in that way. In fact in the recent beef hormone dispute, the United States certainly didn't limit its considered retaliation to the states that were responsible for initiating that dispute.

Secondly, even more importantly from my point of view, I consider Massachusetts to be part of the United States. If a foreign state in effect decided to punish Massachusetts, I would expect the United States, which is my country, to come to its defense, because I think that sort of encouragement really is an encouragement for countries to single out any state in our union and attack it for whatever purposes, and I don't think we can really stand by and allow that to happen.

MR. CONE: I have a problem with it, too, because take the *Barclays* case. So you target banks headquartered in California. So one of those banks moves its headquarters to, you name it, Charlotte, North Carolina. It's happened. So the poor banks that remain in California are targeted. Targets move. The government of Iraq can teach you a lot about that.

So I really have a problem with this notion of targeting. Targets are very mobile.

MR. SPIRO: But of course California, once it sees all the banks leaving its state, is going to change its law. California in fact did repeal the law before the litigation in *Barclays*. That's an ideal world. California may or may not change its law. It will shoulder the consequences.

MR. CONE: The people who shoulder the consequences are the banks that don't move to Charlotte.

VOICE: I have a follow-up to the question from the Canadian diplomat in the bank. You pointed out that the first step in the WTO, assuming the WTO case goes forward, the WTO finds the Massachusetts statute in violation, then the United States has an obligation to bring its measures into conformity with those obligations, and then I think the ball goes back to Massachusetts, would Massachusetts continue to defend its case or would you be prepared to amend the statute?

MR. BARNICO: I think what's been suggested is it would depend on the nature of the sanction authorized by the WTO. I think we're past the point now, I think this targeted retaliation, I'll defer to Joel, but it may well be already authorized under the GATT, and so Professor Cone is simply suggesting that type of targeted retaliation, it's already authorized under the GATT, may be a sufficient political remedy, and removing any need for the judiciary to decide case by case whether a particular state law violates our Constitution. I think that is what he's saying, and the targeted retaliation may create other policy problems.

MR. CONE: WTO doesn't pick the target.

MR. TRACHTMAN: The target might be chosen with a particular state in mind. Pecorino cheese, in the European Union context in the hormone example.

MR. CONE: That wasn't picked by the WTO, that was my point.

MR. TRACHTMAN: Picked by the United States.

MR. CONE: It's not the WTO that picks the target.

MR. TRACHTMAN: It works in the opposite way. The United States could pick some product of Raytheon or some other product that may be painful to Massachusetts. Patrick and the Canadian diplomat were both right that the primary obligation is to bring your law into conformity, but it's an obligation that doesn't really have a strong sanction behind it. In other words, the United States can continue, Massachusetts can continue to have a law that doesn't conform and the retaliation can be authorized forever.

There is monitoring, it would come up in the dispute settlement body from time to time, but there's no additional sanction for failure to comply. This is a problem in compliance that we're seeing in hormones, in bananas, in other areas as well with the WTO system.

VOICE: But not in all cases, because up until hormones and bananas, all the losing parties did agree to amend their statutes. As far as I know.

MR. TRACHTMAN: I'm not sure that is completely correct. But my point is just the broader one, as I suggested earlier, that this law doesn't have a self-executing effect, it doesn't have direct effect, except in a case brought by the federal government, so the decision of the WTO dispute settlement body would not have any legal implications within the United States federal system.

MR. BARNICO: You're right to suggest in the event of WTO sanctions, Massachusetts all the while would have to make the calculation as to whether to continue the same law. There's no question about that. But also all the while, the United States political remedies remain under the 1994 round of the GATT. The United States could sue Massachusetts in federal Court seeking to enjoin the Massachusetts laws as inconsistent with GATT and all the while Congress could pass a law that could expressly preempt the Massachusetts law.

And in a way our point is simply that those political processes ought to be allowed to work, and that the judiciary ought not to become the arbiter of which laws violate our Constitution. And so our pitch to the United States Supreme Court is that the rule of decision in these areas ought to be to defer to the political branches to decide when it is that state or local action so disturbs foreign matters as to warrant express federal preemption. That's really the point.

I gave you the labels and the doctrines, but the bottom line is sort of an allocation of power. If the power is plenary, not exclusive, then the federal political branches that have the plenary power can act. But the Courts below, I admit, were uncomfortable arranging the table that way. They instead chose to act in a preemptive judicial fashion, not content to let Congress police the executive.

MR. DUBINSKY: But, Mr. Barnico, I think you would need somehow to square that with the Supreme Court's jurisprudence in Dormant Commerce Clause cases. In those cases, the Court has been quite active in policing constitutional boundaries. Why should it be less so when it comes to foreign commerce?

MR. BARNICO: Except as to market participation.

MR. DUBINSKY: True, but that is a limited exception that really does not diminish the more general point that the Supreme Court has not left it up

to Congress to police the Commerce Clause by affirmatively enacting legislation whenever action by the states threatens to interfere with interstate commerce. So why should the Court decide in effect that Congress must act affirmatively to curb state interference with foreign commerce?

MR. BARNICO: Only insofar as you think *Barclays* has some teeth. It's a decision that seems to depart from the way the Court looks at the Domestic Commerce Clause.

MR. CONE: I would like just to clarify my own point. We talk about retaliation under the WTO as though it could be targeted. It's completely out of the control of the WTO and of the target. Now, what I would advise the European Union to do, if they were to win in a case against Massachusetts, would be to target New York because that's where the best lawyers are, and then New York would sue Massachusetts and bring Massachusetts into line.

MR. TRACHTMAN: As long as the best baseball players are in Massachusetts.

MR. CONE: That will be decided even before certiorari is granted.

(Laughter.)

VOICE: I guess I would describe myself as a liberal former resident of Massachusetts, and one that finds the SLORC government in Myanmar reprehensible. Still I find myself hoping if certiorari is granted, the Massachusetts law is struck down on two grounds and the reason for that is the following concern, and I'd like to know why this concern is not unfounded. It is not difficult for me to envision a situation in which a few years from now various state and local governments in the EU or in Japan or in other countries would impose 10 percent penalties, if you will, on procurement, in procurement situations applied, for example, to companies that come from countries that have failed to become a member of the comprehensive test ban treaty, or, for example, who are allowing international criminals to run free because they're not participating in the international criminal court, or because countries, for example, who fail to pay their dues to the UN are in violation of law.

I wonder how it is that all of our companies could not get harmed in these situations when all the state and local and provincial governments around the world impose these sorts of penalties?

MR. BARNICO: Well, the companies have been heard from, the ones that brought the lawsuit anyway, they couldn't agree more. As to retaliatory effects, if that's what you mean, I think again the type of uniformity and national interest that's committed to the federal political branches, and so the point of Massachusetts in defense of the case is that courts are not to act and Congress has not expressly acted given the nature of this law, the Burma Law. So I think your point is well-taken, as a matter of policy it's something that's considered, both at the state level and particularly at the national level as a legal matter and certainly the companies that brought the suit agree that the world would be better in their view without the sanctions. In our view, not only are these defenses available under our Constitution, we think we're in line with the ideals of our Constitution. The law, after all, speaks so broadly to human rights, so there's a larger dimension that I haven't cited, but if we're talking about constitutional law, there's a whole lot to be said for the ideals of the Constitution and individual rights.

MR. TRACHTMAN: Let me address what I think is your intended implication with that point, and that is that isn't the world a disorderly place if every state can engage in this kind of activity, and I accept that point, but I have a fairly positivist perspective which says that where we haven't agreed to restrict this disorder, where we haven't made international law, it is a disorderly place, subject to the political give and take between states about those kinds of things that you mentioned. So if what I suggested about the Government Procurement Agreement is right, then the United States has the right not to procure from companies that do business with Burma or Iraq and it bears the political consequences of that, until it agrees to constrain its ability to do that.

MR. CONE: Yes, sir.

VOICE: Certain issues have come to mind here. In New York, Mayor Dinkins effectively targeted South Africa, and although there was no law, New York City would not de facto purchase goods from South Africa. Now, obviously you could say that someone could have brought an action there, just as now you're talking about certiorari to the Supreme Court related to Massachusetts. Now, obviously, you know, it raises many questions not only as to federalism and states' rights, but to municipal rights and where do you step in or where does the Supreme Court step in to establish effectively national policy, trade policy and Constitutional policy with a large municipality, where there is no law, but effectively there is a sanction?

VOICE: There actually was New York City law.

MR. SPIRO: There were I think over a hundred cities and states that passed anti-apartheid laws. That's the model.

MR. CONE: They're mentioned in the materials that you got.

MR. SPIRO: It was a very effective strategy of mobilization for the anti-apartheid movement. Where it was getting nowhere in Washington, it found it was received very well in some very large states and large municipalities, so that's the model that activists are working from here, where they have trouble getting things done in Washington. That does go back to the question of how foreign policy has traditionally been structured. There are reasons why it is difficult to get things done out of Washington. In Washington, everything gets balanced. On the one hand there may be poor human rights regimes in foreign countries, but there are competing interests. If you look at it from the perspective of the Massachusetts State Legislature, it is just human rights. If you are a legislator in Massachusetts, you don't worry about votes in international institutions or other trade implications or what's going on in the WTO, that's why you would expect these inefficiencies in decision-making to the extent that you allow such decision-making to occur.

MR. CONE: Yes, sir?

VOICE: Is there a difference between selective purchasing and a divestment statute under the WTO? Is there a distinction drawn between a state deciding not to invest its money in stock, pension reserve funds in stocks that do business in a company as opposed to their purchasing power of actually goods or services from companies that do business in foreign countries?

MR. TRACHTMAN: I've never really looked at it, but my quick guess is that investment is not covered by the Government Procurement Agreement, and assuming that guess is right, there is no WTO law that would restrict selective investment policy.

MR. CONE: Efforts to come up with a world investment agreement or treaty have not succeeded, and were they to succeed, I doubt if they would cover the point that you just raised. That's speculation on speculation.

VOICE: So, would that then be almost the panacea of allowing state governments the stand-on rights where they could divest their pension

reserve money and make a statement while not endangering U.S. foreign policy?

MR. CONE: Sure.

MR. SPIRO: Except in this respect it is not a panacea, not very effective in getting companies to change their policy. If you're talking about procurement, you're talking about the huge amounts of money which are lost in the bottom line.

MR. CONE: You mean getting companies to change their practice?

MR. SPIRO: If Massachusetts wants companies to leave Burma, selective purchasing is a good way to do it, because there are huge contracts at stake. With divestiture you are talking about marginal changes in the stock price, not a difference in the bottom line. Selective purchasing is the most effective tool that states have available.

MR. BARNICO: What you're suggesting is some day the courts may draw a line of that type between divestment and selective purchasing and there was a case of that type, the most prominent case that came out of the South Africa laws was a case decided by the highest court in Maryland which upheld the divestment ordinance in Baltimore. So that's a distinction that's been in place.

MR. CONE: Yes?

VOICE: For Mr. Barnico. When you say it could possibly be more beneficial for the Burma Law if we don't ask, try to petition the Supreme Court for certiorari, so maybe if Congress knew about, in other words, wants to see how the Burma Law plays out, let the state handle it individually without the federal government trying to act. In other words, coming in and saying we will act on this matter, therefore creating that no states will have to deal with foreign affairs, it will be done by the federal government, do you want to take the hands off approach or better to stick with that route and not petition?

MR. BARNICO: It couldn't be better for our law to not petition. But I know what you mean about the balance and the Attorney General's basis about creating a national rule or not. And we went through that analysis and decided that this Supreme Court is protective of both the states and their sovereignty in many contexts. But your point is well-taken: if the case is

taken and decision is affirmed, then others have to live with a national rule rather than a citation to another circuit.

MR. CONE: Yes?

VOICE: This discussion I think sort of gets at a deeper issue, and that is the foreign agreements are out in front of the requirements of the states under domestic law, but there's a whole range of potential obligations most people don't understand. This is just being one of them, whereby the states can be held responsible for their actions on the international front. Then we pass muster under domestic laws and that's particularly the case, if the gentleman is still here, under the Beer II decision, where 42 states had their alcoholic beverage rules held GATT illegal, they've been fined for years under U.S. Domestic commerce laws clause and I think people don't understand that we just bought into a whole range of obligations that go way beyond the understanding of what states are obliged to do under the Constitution and that I think relates to how these agreements are approved.

They were not approved as treaties, they were approved under Fast Track. Maybe there would have been a little better discussion, maybe they wouldn't have been approved if the public understood what was going on. I know there was a recent case on that issue in July as to whether NAFTA was Constitutional. I don't know whether that's been appealed, I assume it was, that was a District Court decision in Alabama.

Anyway, so in a sense, this is the tip of the iceberg.

MR. CONE: Okay, well, thank you, I want to thank each one of the speakers. We're very grateful to you.