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Preemption & Human Rights: Local Options After *Crosby v. NFTC*

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PREEMPTION & HUMAN RIGHTS: LOCAL OPTIONS AFTER *CROSBY V. NFTC*

ROBERT STUMBERG*

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* Professor of Law and Clinical Director of the Harrison Institute for Public Law, Georgetown University Law Center. The author co-wrote a Supreme Court *amicus* brief on behalf of 78 members of Congress, Brief of Amici Curiae Members of Congress, *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474). The author appreciates the research contributions of Jonas Monast and Douglas Steele. Several colleagues provided valuable critiques of earlier drafts for which the author is most grateful. They include Matthew Porterfield, Thomas Barnico, Simon Billenness, Robert Dennis, Lucien Dhooge, Richard Herz, Sara Kay, and Carol Richards.

I. INTRODUCTION: BURMA, SOUTH AFRICA & CONSUMER SOVEREIGNTY

In June 2000, the Supreme Court held in *Crosby v. National Foreign Trade Council* (NFTC)¹ that federal sanctions against Burma preempted the Massachusetts Burma law. With its “Burma Law,” Massachusetts sought to replicate the anti-Apartheid boycott, one of the most successful human rights campaigns in history. Massachusetts’ Burma law authorized state agencies to exercise a strong purchasing preference in favor of companies that *do not* conduct business in Burma unless the preference would impair essential purchases or result in inadequate competition.²

In *Crosby*, the Court held that Congress preempted the Massachusetts Burma law when it adopted federal sanctions on Burma. While the state law applied to purchasing by state agencies, the federal law imposed a limited range of sanctions, including a ban on future private investment, and gave the President discretion regarding the imposition of some of these sanctions.³ However, the Court declined to rule that the Massachusetts Burma law was unconstitutional under the federal foreign affairs power or the dormant Commerce Clause, as the First Circuit Court of Appeals had in *National Foreign Trade Council v. Natsios*.⁴ The *Crosby* decision provides no fuel for a constitutional claim, but neither does it blunt the impact of the First Circuit’s holding that the state law is unconstitutional.⁵

As the First Circuit acknowledged, there are volumes of analysis, pro and con, regarding the constitutional theories that the First Circuit used to invalidate Massachusetts’ Burma law in *NFTC v.*

1. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000).

2. MASS. GEN. LAWS ANN. ch. 7, §§ 22 G-M (West 2000 Supp.).

3. 120 S. Ct. at 2289, 2302.

4. *Id.* at 2294 n.8. The lower court cases contain different names because the defendant Massachusetts office holders changed. The federal trial court decision of Judge Joseph Tauro is *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998). Judge Tauro ruled against Massachusetts on grounds of the federal foreign affairs power. *Id.* at 291-92. The appeals court decision of Judge Sandra Lynch is *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999). The First Circuit ruled against the Massachusetts Burma law on three separate grounds. It first ruled that the law conflicted with the federal foreign affairs power. *Id.* at 49-61. The court also relied on the dormant Commerce Clause. *Id.* at 61-71. Finally, the court held that the Massachusetts Burma law was preempted under federal law. *Id.* at 71-77.

5. Federal district courts have already cited *Natsios* as authority to support injunctions against the Miami-Dade boycott of Cuba and a California insurance law that regulates insurance companies with Holocaust-era policies. *See* *Miami Light Project v. Miami-Dade County*, 97 F. Supp. 2d 1174 (S.D. Fla. 2000); *Gerling Global Reinsurance Corp. v. Quackenbush*, No. Civ. S-00-0506WBSJFM, 2000 WL 777978 (E.D. Cal. 2000).

Natsios.⁶ Much of this scholarship argues that absent a clear conflict or statement of congressional intent to preempt state or local law, the federal foreign affairs power alone does not render a state or local law unconstitutional.⁷ With the extensive published work on each side of the anti-Apartheid boycotts⁸ as well as the Burma laws,⁹ there is little need to revisit such well-plowed fields.

6. 181 F.3d at 58 n.13.

7. See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 149-65 (2d ed. 1996); Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675 (1998); Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L.REV. 815 (1997); Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT'L L. & POL'Y 405 (1997); Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1 (1999); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. (1995); Brenda S. Beerman, Comment, *State Involvement in the Promotion of Export Trade: Is it Time to Rethink the Concept of Federalism as it Pertains to Foreign Relations?*, 21 N.C.J. INT'L L. & COM. REG. 187 (1995). For a perspective that stresses judicial deference to the Executive Branch more than Congress, see Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

8. For articles defending state and local authority, see, e.g., LAURENCE TRIBE, MEMORANDUM ON THE NONPREEMPTIVE EFFECT OF THE COMPREHENSIVE ANTI-APARTHEID ACT OF 1986 UPON STATE AND LOCAL MEASURES, 132 CONG. REC. 23,292 (1986); Lynn Berat, *Undoing and Redoing Business in South Africa: The Lifting of the Comprehensive Anti-Apartheid Act of 1986 and the Continuing Validity of State and Local Anti-Apartheid Legislation*, 6 CONN. J. INT'L L. 7 (1990); Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469 (1987); Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 TEMP. L. REV. 813 (1989); Anne R. Bowden, Note, *North Carolina's South Africa Divestment Statute*, 67 N.C. L. REV. 949 (1989); Grace A. Jubinsky, Note, *State and Local Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543 (1985); Michael Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 FOR. POL'Y 158 (1992).

For articles challenging state and local authority, see, e.g., John H. Chettle, *The Law and Policy of Divestment of South African Stock*, 15 LAW & POL'Y INT'L BUS. 445 (1983); Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563 (1993); Peter Spiro, Note, *State and Local Anti-South African Action as an Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813 (1986).

9. Symposium, *States' Rights vs. International Trade: The Massachusetts Burma Law*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 347 (2000). For articles defending state and local authority, see, e.g., Steven R. Jenkins, *National Foreign Trade Council v. The Commonwealth of Massachusetts: A State Acting as a "Market Participant" Should Trump the Federal Government's Right to Regulate Foreign Affairs Unless Congress Expressly Declares Otherwise*, 14 CONN. J. INT'L L. 593 (1999); Douglas W. Kmiec, *May States Express Their Moral Standards by Choosing the Nations with Which They Trade?*, 6 PREVIEW U.S. SUP. CT. CAS. 298 (2000); Lynn Loschin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373 (1999); Matthew C. Porterfield, *supra* note 7; Lily Batchelder, Note, *The Costs of Uniformity: Federal Foreign Policymaking, State Sovereignty, and the Massachusetts Burma Law*, 18 YALE L. & POL'Y REV. 485 (2000); Alejandra Carvahal, Note, *State and Local "Free Burma" Laws: The Case for Sub-National Trade Sanctions*, 29 LAW & POL'Y INT'L BUS. 257 (1998); Jay A. Christofferson, Comment, *The Constitutionality of State Laws Prohibiting*

Instead, this Article seeks to derive some guidance from the *Crosby* decision for state and local legislatures, as many of these bodies want to play more than the very limited role that the Court, during oral argument, suggested was appropriate. Justice Souter, who wrote the *Crosby* opinion, suggested that states should be satisfied with simply expressing their views:

[Perhaps] the proper way to draw the line is to allow States to express themselves, to express their views . . . so long as they do not go beyond the point of verbalizing . . . [condemnation of] the regime in Burma and, indeed, . . . those who do business with it, but it would be left to the United States to go beyond the expression of views and to regulate actual relationships, including economic relationships . . . You would clear your conscience, and any fault would lie, I suppose, at the door of the national Government that was either permitting or at least refusing to block this kind of trade.¹⁰

Mr. Thomas Barnico, Assistant Attorney General of Massachusetts, replied:

I'm not sure it would clear our conscience, because our conscience is based on so much history. To allow us to feel that we were indirectly supporting what's going on in Burma would be so

Contractual Relations with Burma: Upholding Federalism's Purpose, 29 MCGEORGE L. REV. 351 (1998); Akhil Reed Amar, Opinion, *A State's Right, a Government's Wrong*, WASH. POST, Mar. 19, 2000, at B1; Robert Stumberg, Commentary, *No Business in Burma*, LEGAL TIMES, Mar. 20, 2000, at 58.

For articles challenging state and local authority, see, e.g., Anne Q. Conaughton, *Factoring U.S. Export Controls and Sanctions Into International Trade Decisions*, 27 STETSON L. REV. 1211 (1998); Brannon P. Denning and Jack H. McCall, *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307 (1999); Lucien J. Dhooge, *The Wrong Way to Mandalay: The Massachusetts Selective Purchasing Act and the Constitution*, 37 AM. BUS. L.J. 387 (2000); Michael Wallace Gordon, *The Conflict of United States Sanctions Laws with Obligations Under the North American Free Trade Agreement*, 27 STETSON L. REV. 1259 (1998); David R. Moran, *No Panacea: Analyzing Sanctions Before Imposition*, 27 STETSON L. REV. 1403 (1998); Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443 (1998); David R. 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); Jennifer Loeb-Cederwall, Note, *Restrictions on Trade with Burma: Bold Moves or Foolish Acts?*, 32 NEW ENG. L. REV. 929 (1998); Brannon P. Denning & Jack H. McCall, *States' Rights and Foreign Policy*, 79 FOREIGN AFF., Jan./Feb. 2000, at 9.

10. Oral Argument Transcript at 12, *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474).

contrary to the principles that underlie our own State constitution, which refers to unalienable rights; the point of view of Massachusetts [is that] universal rights are at stake here.¹¹

Justice Souter then asked, Olet's assume . . . that the Massachusetts statute is preempted. What will Massachusetts do then? . . . [W]ill you continue to find ways to express yourselves and your conscience, even if there is a preemption?"¹² Justice Souter's question will be very much on the minds of the state and local officials who remember the success of the South Africa boycott, which taught them to consider both moral and economic consequences in making decisions as consumers in the global economy. If Massachusetts and other local governments with Burma laws want to continue expressing their consciences through laws, they will have to first consider what the *Crosby* decision preempts and which options still remain available.

A global leader on matters of conscience, Archbishop-Emeritus Desmond Tutu, defines Burma as the South Africa of today.¹³ His analogy refers not only to the magnitude of human rights violations in Burma, as compared to South Africa under Apartheid, but also to the nonviolent economic advocacy favored by campaigns to free-Burma, which are modeled after the advocacy that helped bring down Apartheid.¹⁴

Aung San Suu Kyi, the Nobel Laureate leader of the Burmese government elected in 1990, called for U.S. citizens to "use your freedom to protect ours."¹⁵ Still the head of her party, the National League for

11. *Id.* at 12-13. "For more than two hundred years, citizens of Massachusetts and other states have used boycotts to support the natural, essential and unalienable rights' of people around the world." Brief for Massachusetts at 10, *Crosby* (No. 99-474).

12. Oral Argument Transcript at 13, *Crosby* (No. 99-474).

13. See Dennis Bernstein & Leslie Kean, Opinion, *A Boycott for Burma, the South Africa of the '90s*, S.F. EXAMINER, Apr. 26, 1996, at A-23; *From South Africa to Burma*, editorial, BOSTON GLOBE, Oct. 18, 1993, at 12.

14. See Kenneth A. Rodman, "Think Globally, Punish Locally": *Nonstate Actors, Multinational Corporation, and Human Rights Sanctions*, 12 ETHICS & INT'L AFF. 19, 22-31 (1998). The Massachusetts Burma law was conceived at a news conference on the end of sanctions against South Africa. At that event, Simon Billenness suggested to Delegate Byron Rushing that the South African measure that was being withdrawn would be just as appropriate if applied verbatim to Burma instead of South Africa. See Carey Goldberg, *After Defeat, Campaigner for "Free Burma" Begins Anew*, N.Y. TIMES, June 24, 2000, at A-6.

15. The full context for her call was as follows:

Part of our struggle is to make the international community understand that we are a poor country not because there is an insufficiency of resources and investment, but because we are deprived of the basic institutions and practices that make for good

Democracy (“NLD”), she encourages “people’s boycotts” that deny the current military dictatorship the political legitimacy and foreign exchange it needs.¹⁶ She identifies state and local government participation not merely as an instrument of foreign policy, but as an exercise of “consumer power,” adding that “in some ways it’s better to have the people of the world on your side than the governments of the world, even if governments can be more effective in certain directions.”¹⁷

The anti-Apartheid movement built momentum for its “people’s boycott” by enlisting state and local governments in the United States

government. There are multinational business concerns which have no inhibitions about dealing with repressive regimes. Their justification for economic involvement in Burma is that their presence will actually assist the process of democratization. Investment that only goes to enrich an already wealthy elite bent on monopolizing both economic and political power cannot contribute towards legality and justice, the foundation stones for a sound democracy. I would therefore like to call upon those who have an interest in expanding their capacity for promoting intellectual freedom and humanitarian ideals to take a principled stand against companies which are doing business with the military regime of Burma. Please use your liberty to promote ours.

Aung San Suu Kyi, Commencement Address at American University 3 (Jan. 26, 1997) (delivered on her behalf by her late husband, Dr. Michael Aris) (transcript on file with author).

16. In a February 2000 interview, Aung San Suu Kyi stated that “[b]y investing now, business is supporting the military regime. The real benefits of investment now go to the military regime and their connections.” Bernard Krisher, ‘Start With Unity,’ *Democracy Leader Urges Burma; Q&A / Daw Aung San Suu Kyi*, INT’L HERALD TRIB., Feb. 17, 2000, at 2. In an August 2000 interview, she elaborated further:

If you look at what happened in the Philippines under the Marcos dictatorship, there were no sanctions. People invested very freely there and the elite just got wealthier and wealthier while the rest of the people were kept scrambling around garbage piles. It’s exactly the same here. And in South Africa, sanctions were effective against the Apartheid regime. Burma is not different.

Katherine Smyth, *Face to Face with Suu Kyi*, THE IRISH TIMES, Sept. 9, 2000, at 60. Daw Suu’s defense of her boycott strategy parallels remarks by Archbishop Desmond Tutu, who argued that people who are already suffering need alternatives to violence. Tutu stated:

You get all sorts of people saying all sorts of things about sanctions: Twiddle! It’s baloney of the first order! Because you are speaking about people who are already suffering, and you are saying you are trying to find some way that is a nonviolent strategy for bringing about the change that everybody says they want.

Seven Greenhouse, *A Weapon for Consumers: the Boycott Returns*, N.Y. TIMES, Mar. 26, 2000, at § 4, at 4.

17. Leslie Kean & Dennis Bernstein, *Aung San Suu Kyi*, Interview, THE PROGRESSIVE, Mar. 1997, at 28-29.

to join a campaign that had been organized by non-government-organizations (“NGO”s). The movement grew to include twenty-five states and 164 local governments that adopted either a procurement (or “selective purchasing”) boycott of companies doing business in South Africa or a policy to divest the stock of those companies by public pension funds.¹⁸ The participation of U.S. state and local governments in the South Africa boycotts enabled the international campaign to reach critical mass, particularly in the financial services sector. When the free-Burma campaign started down the same track a decade later, it picked up the support of twenty-one local governments.¹⁹ While many of these were college towns, the cities of New York, San Francisco, and Los Angeles also joined the boycott. Fearing the consequences of a South Africa-style boycott, the corporate community marshaled its forces and mounted a preemptive strike in U.S. federal court against Massachusetts, the first state to join the boycott.²⁰

This challenge to Massachusetts’s purchasing power pitted the corporate establishment against the state and local government establishment. Joining the 600 members of plaintiff National Foreign Trade Council (“NFTC”) were twelve business associations,²¹ twenty-seven former federal officials, twenty members of Congress, the European Union, and, in the final hour, the Clinton Administration. On the other side, Massachusetts was supported by the eight major associations

18. Rodman, *supra* note 14, at 27; Kenneth P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 471-475 (Feb. 1987).

19. The 21 local governments to adopt “Burma laws” included Alameda County, CA, and the cities of Ann Arbor, MI; Berkeley, CA; Boulder, CO; Brookline, MA; Carboro, NC; Chapel Hill, NC; Los Angeles, CA; Madison, WI; New York, NY; Newton, MA; Oakland, CA; Palo Alto, CA; Philadelphia, PA; Portland, OR; Quincy, MA; San Francisco, CA; Santa Cruz, CA; Santa Monica, CA; Somerville, MA; Takoma Park, MD; and West Hollywood, CA. INVESTOR RESPONSIBILITY RESEARCH CENTER, STATE & LOCAL GOVERNMENTS WITH COUNTRY-SPECIFIC SELECTIVE PURCHASING LAWS, app. F (chart) (1998) [hereinafter IRRR REPORT 1998].

20. See *infra* Part IID for a discussion of why a state purchasing law is more vulnerable than a city purchasing law to the charge that it is interfering with the President’s ability to develop a multilateral Burma strategy.

21. The following business associations supported the NFTC: Chamber of Commerce of the United States, the National Association of Manufacturers, the U.S. Council for International Business, the Organization for International Investment, the American Petroleum Institute, the American Insurance Association, the American Farm Bureau Federation, the Chemical Manufacturers Association, the Associated Industries of Massachusetts, the Connecticut Business and Industry Association, the Retailers Association of Massachusetts, and the Industry Coalition on Technology. Brief of Amici Curiae Council of Chamber of Commerce of the United States et al., Crosby v. National Foreign Trade Council, 120 S. Ct. 2288 (2000) (No. 99-474).

of state and local governments,²² twenty-two state attorneys general,²³ sixteen local governments,²⁴ seventy-eight members of Congress,²⁵ and sixty-four nonprofit organizations.²⁶

22. The following government associations supported Massachusetts: the Council of State Governments, the National Governors' Association, the National Conference of State Legislatures, the National League of Cities, the National Association of Counties, the International City/County Management Association, the International Municipal Lawyers Association, and the U.S. Conference of Mayors. Brief of Amici Curiae The Council of State Governments et al., *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474), (No. 99-474).

23. Joining the brief submitted by Heidi Heitcamp, Attorney General of North Dakota, in support of Massachusetts, were the attorneys general of the following states: Arkansas, California, Colorado, Connecticut, Hawaii, Louisiana, Maine, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont and Washington. Brief of Amici Curiae the State of Arkansas et al., *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474).

24. Joining the brief submitted by Alan Hevesi, Comptroller of the City of New York, in support of Massachusetts, were the following local governments: Alameda County, CA; Amherst, MA; Berkeley, CA; Brookline, MA; Boulder, CO; Carrboro, NC; Los Angeles, CA; Newton, MA; North Olmstead, OH; Oakland, CA; Philadelphia, PA; Portland, OR; Quincy, MA; San Francisco, CA; and Santa Cruz, CA. Brief of Amici Curiae the New York City Comptroller et al., *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474).

25. The following members of Congress submitted the brief in support of Massachusetts: Senators Barbara Boxer (CA), Edward Kennedy (MA), John Kerry (MA), and Paul Wellstone (MN), and Representatives Neil Abercrombie (HI), Tammy Baldwin (WI), Howard Berman (CA), David Bonior (MI), Sherrod Brown (OH), Michael Capuano (MA), Julia Carson (IN), William Clay (MO), Eva Clayton (NC), John Conyers (MI), Joseph Crowley (NY), Danny Davis (IL), Peter Defazio (OR), William Delahunt (MA), Rosa DeLauro (CT), Julian Dixon (CA), Lane Evans (IL), Barney Frank (MA), Jim Gibbons (NV), Benjamin Gilman (NY), Luis Gutierrez (IL), Earl Hilliard (AL), Maurice Hinchey (NY), Jesse Jackson, Jr., (IL), Stephanie Tubbs Jones (OH), March Kaptur (OH), Sue Kelly (NY), Carolyn Kilpatrick (MI), Peter King (NY), Tom Lantos (CA), Barbara Lee (CA), Sheila Jackson Lee (TX), John Lewis (GA), Edward Markey (MA), Matthew Martinez (CA), James McGovern (MA), Martin Meehan (MA), Gregory Meeks (NY), Juanita Millender-McDonald (CA), George Miller (CA), Patsy Mink, (HI), Joseph Moakley (MA), Jerry Nadler (NY), Richard Neal (MA), Eleanor Holmes Norton (DC), James Oberstar (MN), John Olver (MA), Major Owens (NY), Bill Pascrell (NJ), Nancy Pelosi (CA), Thomas Petri (WI), Richard Pombo (CA), Dana Rohrabacher (CA), Ileana Ros-Lehtinen (FL), Lucille Royball-Allard (CA), Bobby Rush (IL), Bernie Sanders (VT), Janice Schakowsky (IL), Christopher Smith (NJ), Mark Souder (IN), Pete Stark (CA), Ted Strickland (OH), Bennie Thompson (MS), John Tierney (MA), Edolphus Towns (NY), James Traficant (OH), Mark Udall (CO), Tom Udall (AZ), Maxine Waters (CA), Melvin Watt (NC), Henry Waxman (CA), Lynn Woolsey (CA) and David Wu (OR). Brief of Amici Curiae Members of Congress, *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474).

26. The following nonprofit organizations joined the brief submitted by the Harvard Immigration and Refugee Clinic (with the Harvard Human Rights Program) in support of Massachusetts: Alliance for Democracy, American Lands Alliance, Arise Resource Center, As You Sow Foundation, Asia Pacific Center for Justice & Peace, Boston Mobilization for Survival, Burma Lifeline, Catholic Foreign Mission Society of America (Maryknoll Fathers & Brothers), Center for

As this convergence of interests suggests, the stakes were higher than the survival of a single procurement law. All of these parties were taking sides in a larger struggle over the role of government purchasing power in a global economy. In the words of Professor Akhil Amar, the states were defending their “consumer sovereignty” in a way that is “altruistic and noble.”²⁷ In the words of the U.S. Chamber of Commerce, the corporate coalition was opposing the “substantial economic leverage” of state purchasing power, particularly the “especially powerful and controversial” use of secondary boycotts, which forces companies to choose between doing business in Burma and maintaining a presence in the domestic market of state and local governments.²⁸ The choice was a real one; state procurement totaled \$730 billion in 1996, which was 79% of public procurement,²⁹ as compared with federal procurement of \$199 billion.³⁰ The stakes were heightened in this particular conflict because of the “universally repulsive behavior of the Burmese

Constitutional Rights, Center for Economic and Policy Research, Center for Economic Justice, Center for International Environmental Law, Center for Labor & Community Research, Citizens Action Network, Consumers Choice Council, Coop America, Defenders of Wildlife, Delta County (CO) Alliance for Democracy, Dictator Watch, Dominican Sisters of Hope, EarthAction, Earth-Rights International, East Timor Action Network/U.S., Edmonds Institute, Free Burma Coalition, Free Burma—No Petro Dollars, Global Exchange, Human Rights Watch, Humane Society International, Humane Society of the United States, Independent Voters of Illinois—Independent Precinct Organization, Institute for Agriculture and Trade Policy, International Committee of Lawyers for Tibet, International Human Rights Clinic—University of California School of Law, International Human Rights Law Group, International Labor Rights Fund, International League for Human Rights, International Rivers Network, Jesse Smith Noyes Foundation, Jewish Labor Committee—NY, Langley United Church, Long Island Progressive Coalition, Los Angeles Burma Forum, Merrimack Valley People for Peace, Minnesota Advocates for Human Rights, National Lawyers Guild—MA Chapter, New England Burma Roundtable, Philadelphia Burma Roundtable, Physicians for Human Rights, Project Maje, Rainforest Relief, Reverend Frank Griswold—Presiding Bishop of the Episcopal Church (USA), Rev. Thomas Shaw—Presiding Bishop of the Episcopal Diocese of Massachusetts, Ruckus Society, Seattle Burma Roundtable, Sierra Club, Sisters of St. Joseph—Office of Peace and Justice, Songbird Foundation, Sustainable America, Synapses, Unitarian Universalist Service Committee, United for a Fair Economy, Ursuline Sisters of Tildonk (NY), Ustawi, Washington Biotechnology Action Council, Women’s Division of the General Board of Global Ministries—United Methodist Church, and the Women’s International League for Peace & Freedom. Brief of Amici Curiae Non-profit Organizations, Crosby v. National Foreign Trade Council, 120 S. Ct. 2288 (2000) (No. 99-474).

27. Amar, *supra* note 9.

28. Brief of Amici Curiae Council of Chamber of Commerce of the United States et al. at 5, *Crosby* (No. 99-474).

29. U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1999) 317, tbl. 512, available at <http://www.census.gov/prod/99pubs/99statab/sec09.pdf>.

30. U.S. GEN. SERV. ADMIN., FEDERAL PROCUREMENT REPORT—FY 1999 2, FEDERAL CONTRACT ACTIONS AND DOLLARS (Jan. 2000).

government"³¹ and the complex web of economic relationships linking that behavior to multinational corporations and implicating the policies of the United States, Europe, and Japan.³²

After the corporate strategy ultimately proved successful in invalidating the Massachusetts Burma law, (but only on preemption grounds), Professor Jack Goldsmith concluded that the decision "has no implications for state foreign relations activities beyond state laws regulating transactions with Burma."³³ However, this conclusion gives little solace to the state and local governments that now must decide whether and how to replace their selective purchasing laws that target companies doing business in Burma.

Going beyond Burma, the *Crosby* decision may well have implications for other selective purchasing laws. One reason is that the tension between a state boycott and federal sanctions could recur in the future. In addition to country-specific measures, such as the federal Burma sanctions and the Comprehensive Anti-Apartheid Act, Congress has given the President the discretion to impose economic sanctions under the International Emergency Economic Powers Act (IEEPA) to deal with an "unusual and extraordinary threat" to the "national security, foreign policy, or economy of the United States."³⁴ IEEPA gives the President very broad discretion. Considering the vagueness of "obstacle preemption" as applied in *Crosby*, IEEPA could be used by multinational companies and trade associations to attack market participation policies of state and local governments if those policies affect companies that invest or trade within a country that becomes the subject of federal sanctions.³⁵

To provide legal context for the *Crosby* decision, Part II explains how the Massachusetts law worked, how the federal Burma sanctions law worked, and how the Supreme Court framed its obstacle preemption analysis. Part III then addresses whether the remaining state and local

31. Dhooge, *supra* note 9, at 479.

32. *Id.* at 479-84.

33. Jack Goldsmith, Commentary, *State Foreign Policies After the Burma Case*, WRIT, at http://writ.findlaw.com/commentary/20000626_goldsmith.html (June 2000). Frank Kitredge, President of the NFTC, was relatively cautious in claiming that the *Crosby* decision "should help put an end to state and local efforts to make foreign policy." USA*Engage, *Supreme Court Rules Massachusetts Burma Law Unconstitutional, Judgment of First Circuit Court Affirmed*, at <http://www.usaengage.org/supremecourt.html> (June 19, 2000).

34. 50 U.S.C. § 1701 (1994).

35. See Brief of Amicus Curiae the United States at 4, *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474).

policy options can avoid preemption under the federal Burma sanctions. Part IV addresses whether the options that are not preempted would retain significant power to promote human rights.

II. PREEMPTION OF THE BURMA BOYCOTT

A. *The Burma/South Africa Boycott Model in Massachusetts*

Adopted in June 1996, Massachusetts' Burma law prohibited agencies from contracting with businesses on a "restricted purchase list" of companies doing business in Burma.³⁶ Exempted from this list were businesses operating in Burma to report the news, provide international telecommunications,³⁷ or provide medical supplies.³⁸ The state would accept a bid from a company on the restricted list under three circumstances: (1) when a company doing business in Burma was the only offer or its absence would result in inadequate competition;³⁹ (2) when the state was purchasing certain medical supplies;⁴⁰ and (3) when there was no comparable bid from a company not on the restricted list.⁴¹ Comparable bids were defined as those within ten percent of the bid from a company on the restricted list.⁴² Thus, the state characterized its law not as a complete ban, but as a strong "preference" against companies that conducted business in Burma.⁴³

The law defined "doing business in Burma" broadly. The definition included: (1) having a principal place of business or operations in Burma; (2) providing financial services to the government of Burma; (3) promoting imports or sale of gems, timber, oil, gas, or other products controlled by the government of Burma; or (4) providing goods or services to the government of Burma. Delegate Byron Rushing, the sponsor of the legislation, explained that the law was predicated on the Massachusetts anti-Apartheid policy.⁴⁴

36. MASS. GEN. LAWS ANN. ch. 7, § 22H(a) (West 2000 Supp.).

37. § 22H(e).

38. § 22I.

39. § 22H(b)(1)-(2).

40. § 22I.

41. § 22H(d).

42. § 22G.

43. Brief for Massachusetts at 6, *Crosby* (No. 99-474).

44. Byron Rushing, *The People Have Spoken*, BURMA DEBATE, Summer 1999, at 4, 5.

B. *The Federal Burma Law Adopted by Congress*

As Massachusetts follow its previous anti-Apartheid boycott, the federal Burma law adopted by Congress parallels the federal Comprehensive Anti-Apartheid Act in most respects. The likely recurrence of this match-up between state and federal responses to a brutal dictatorship undoubtedly informed the NFTC's decision to litigate a "test case," which NFTC members claim had "nothing to do with Burma."⁴⁵

Congress adopted the federal Burma law in September, 1996, three months after Massachusetts adopted its law.⁴⁶ The federal law included the most significant sanctions imposed against Burma by any nation. At the same time, the law's limited approach also reflects successful lobbying by the anti-sanctions coalition.⁴⁷

The federal Burma law imposed three sanctions on Burma and authorized the President to impose additional limited sanctions or to waive any sanctions under certain conditions. The three immediate sanctions included: (1) a ban on aid to the government of Burma except for humanitarian assistance, counter-narcotics efforts, and promotion of human rights and democracy;⁴⁸ (2) a mandate for U.S. representatives to international institutions to vote against loans and other financial assistance to the government of Burma;⁴⁹ and (3) a prohibition on entry visas to officials of the Burmese government, except for those required to fulfill treaty obligations and United Nations missions.⁵⁰ The federal law will maintain these sanctions until the President determines that Burma has made "measurable and substantial progress in improving human rights practices and implementing democratic government."⁵¹

The federal law also authorizes the President to prohibit "United States persons" from making "new investment" in Burma if the President determines that the government of Burma has (1) physically harmed, re-arrested, or exiled Aung San Suu Kyi, or (2) committed large-scale repres-

45. Donna Smith, *U.S. business group challenges state sanctions law*, Reuters newswire (May 1, 1998), available at <http://www.usaengage.org/news/980501reut.html> (last visited Nov. 30, 2000); Frank Kittredge, President of the NFTC, Address at the *Crosby v. National Foreign Trade Council* Panel, Woodrow Wilson Center, Princeton University (June 28, 2000) (on file with author).

46. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. 104-208, § 570, 110 Stat. 3009-166 (1997) [hereinafter federal Burma law].

47. Rodman, *supra* note 14, at 32.

48. § 570(a)(1)(A), 110 Stat. 3009-166.

49. § 570(a)(2).

50. § 570(a)(3).

51. § 570(a).

sion or violence against the Democratic opposition.⁵² The federal act defines “new investment” narrowly. It includes contracts or ownership interests in “economical development of resources located in Burma,” but it does not include “entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology.”⁵³ President Clinton invoked this authority on May 20, 1997, when he issued an Executive Order to ban new investment in Burma.⁵⁴

The federal law also authorizes the President to waive any of the federal sanctions on Burma, either temporarily or permanently, if the President determines that the sanction is “contrary to the national security interests of the United States.”⁵⁵ It also directs the President to develop a “comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.”⁵⁶ The act’s diplomatic instructions include cooperation with members of the Association of Southeast Asian Nations (“ASEAN”) and other countries that have major trade and investment interests in Burma. Finally, the act sets a diplomatic objective of fostering dialogue between the government of Burma and democratic opposition groups.⁵⁷

C. Preemption Under Crosby

Congress did not state that it intended to preempt the state and local Burma laws that predated the federal sanctions on Burma.⁵⁸ In its *Crosby* decision, the Court explained that in cases where Congress has not expressed its intent to preempt state law, the Court can still find that a law is preempted if it interprets an implied congressional intent to do so. The Court has found implied preemption in cases where Congress intended to “occupy the field,”⁵⁹ or where the state law conflicted with the federal law in question.⁶⁰ A “conflict” occurs when a private party cannot comply with both the state law and the federal law at the same time.⁶¹ The Massachu-

52. § 570(b).

53. § 570(f)(2).

54. Executive Order, Exec. Order No. 13047, 3 C.F.R. 202 (1997).

55. § 570(e).

56. § 570(c).

57. § 570(c).

58. See generally § 570.

59. See, e.g., *United States v. Locke*, 120 S. Ct. 1135, 1151-52 (2000); *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 597-98, 600, 604 (1915).

60. See, e.g., *California v. ARC Am. Corp.*, 490 U.S. 93, 101-02 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

61. See, e.g., *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142-43.

sets Burma law, however, did not flunk this objective comparison. Rather, the NFTC persuaded the Court that the state law was an obstacle to achieving the “intended purpose and ‘natural effect’” of the Burma sanctions adopted by Congress.⁶²

The leading precedent for obstacle preemption is *Hines v. Davidowitz*, in which the Court applied a purpose-and-effect test looking at the state law “as a whole.”⁶³ This test is necessarily subjective; it requires the Court to resolve a policy conflict that Congress might resolve differently.⁶⁴ In the words of the Fourth Circuit, “preemption under a frustration of federal purpose theory is more an exercise of policy choices by a court than strict statutory construction.”⁶⁵

In *Crosby*, Justice Souter wrote that the Massachusetts Burma law was an obstacle to accomplishing three objectives of the federal Burma law: to delegate discretion to the President to achieve a political result; to set limits on the range of permissible sanctions; and to give the President authority to speak for the United States in order to develop a multilateral Burma strategy.⁶⁶

First, the Court held that the Massachusetts law undermined congressional delegation of discretion to the President to achieve a political result by adding or subtracting from the sanctions as necessary. The Court reasoned that if states adopt an inflexible sanction, they undermine the President’s authority to use access to the “national economy” as either a carrot or a stick to promote the desired result of negotiations to set up elections in Burma.⁶⁷ In addition to promoting a democratic

62. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2294 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 n.20 (1941); *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

63. *Hines*, 312 U.S. at 66-67.

64. The district court in this case felt that the preemption claim did not even merit argument. *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 292 (D. Mass. 1998) (“Plaintiff must show that Congress intended to exercise its authority to set aside a state law. Plaintiff’s burden is particularly heavy because Plaintiff argues implied, rather than express, preemption. Plaintiff has failed to carry this burden.” (citations omitted)).

65. *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988). For a sampling of commentators who describe the subjectivity of obstacle preemption theory, see Paul E. McGreal, *Some Rice With Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 833 (1995) (“That [obstacle preemption] requires a largely ad hoc policy analysis is evidenced by the Court’s minimally helpful guidance.”); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (“modern preemption jurisprudence is a muddle.”).

66. 120 S. Ct. at 2294.

67. *Id.* at 2296. Justice Souter implied that the federal Burma law enabled the President to fully restrain or apply the “coercive power of the national economy,” when the federal law limits the President to imposing a ban on future investment in developing resources in Burma, and it excludes from this ban all contracts for goods or services. *Compare id.*, with *Foreign Operations FY*

result in Burma, the Court stressed that Congress also gave the President discretion to suspend sanctions for national security reasons.⁶⁸ The elements of the Massachusetts Burma law that the Court cited as an obstacle to the President's flexibility included: (1) use of a methodology that the President did not control; (2) use of a methodology that might undermine the President's bargaining position; and (3) the immediate and perpetual nature of the state measure.⁶⁹

Second, the Court held that the Massachusetts law interfered with the intent of Congress to steer a "middle path" with sanctions that are limited to "United States persons" only, that are limited to "new investment," and that exclude trade in goods and services.⁷⁰ Massachusetts argued that the state law furthered the federal purpose, but the Court reasoned that a difference of methodology could be fatal even if the state and federal laws actually do share the same purpose.⁷¹ The Court characterized the congressional definition of "new investment" as a "calibrated" policy, in part because Congress had considered and rejected tougher sanctions such as limits on imports or prohibitions on all investment.⁷² In the Court's reading of the federal law, that calibration was designed to not only bar what the federal law prohibits, but also to allow what the federal law permits.⁷³ The Court cited several elements of the Massachusetts Burma law as obstacles to the congressional calibration of force. The state law (1) was a secondary boycott, which involved third parties rather than direct "Burmese connections"; (2) reached beyond "U.S. persons" to include corporations based in other nations; (3) penalized companies that traded in goods and services, which reached beyond the definition of "new investment"; and (4) penalized companies with pre-existing affiliates, which reached beyond the definition of "new investment."⁷⁴

1997 Appropriations, Pub. L. 104-208, § 570(f)(2), 110 Stat. 3009-166 (1997). The coercive power of the national economy is not available to the President under the federal Burma law. § 570(f)(2).

68. Crosby v. National Foreign Trade Council, 120 S. Ct. 2288, 2295 (2000).

69. *Id.* at 2296.

70. *Id.* at 2297-98.

71. *Id.* at 2298 n.14 ("Identity of ends does not end our analysis of preemption.") (citing Wisconsin Dep't. of Indus. v. Gould, 475 U.S. 282, 286 (1986)).

72. *Id.* at 2296-97 n.13.

73. *Id.* at 2298. The federal Burma law does not actually state what it intends to permit; it only defines what the President may prohibit. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L.104-208, § 570, 110 Stat. 3009-166 (1997).

74. Crosby v. National Foreign Trade Council, 120 S. Ct. 2288, 2297 (2000).

Third, the Court held that the Massachusetts Burma law interfered with the President's ability to speak for the United States in developing a multilateral Burma strategy, as intended by Congress. The Court described the President's diplomatic role as a "clear mandate" under Article II of the Constitution⁷⁵ and reiterated that "the 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."⁷⁶

This assertion of the President's power of persuasion based on access to the national market is particularly interesting in the context of preemption. The federal Burma law gives the President only the power to bargain over future U.S. investment in Burma, not the capacity to bargain for access to the "entire national economy."⁷⁷ Additionally, the evidence cited by the Court that the Massachusetts law was an obstacle to the President's capacity to bargain had nothing to do with Burma. The Court echoed the leading argument in the NFTC's complaint, that the Massachusetts law created a rift between the United States and the European Union, not regarding Burma strategy, but about compliance with trade agreements:

In early 1997, European Union Ambassador Hugo Paeman wrote a letter . . . warning that the Massachusetts Burma law is a "breach of U.S. international obligations and as such could have a damaging effect on EU-US relations." On June 20 1997, the EU formally noted its position that the Massachusetts Burma law violated the WTO Government Procurement Agreement.⁷⁸

All three federal courts have cited the diplomatic tension over compliance with trade agreements as justification for overturning the state law, either on constitutional grounds by the district court⁷⁹ and the First Circuit,⁸⁰ or on preemption grounds by the Supreme Court.⁸¹ Massachu-

75. See U.S. CONST. art. II, § 2 (authorizing the President to make treaties and appoint ambassadors); § 3 (granting the President the power to receive ambassadors and other public ministers).

76. 120 S. Ct. at 2298-99.

77. See § 570(f) (2).

78. Amended Complaint at 5, *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998) (CA No. 98-10757).

79. *Baker*, 26 F. Supp. 2d at 291 (D. Mass. 1998).

80. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 54 (1st Cir. 1999).

81. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2299-2301 (2000).

setts and its seventy-eight congressional *amici* argued, however, that in the WTO implementing legislation, Congress explicitly foreclosed use of trade conflicts as evidence of an encroachment on federal powers.⁸² The WTO legislation “occupies the field” and prohibits all private rights of action “in connection with” WTO agreements,⁸³ including “indirect” claims such as one based on Congress’ Commerce Clause authority.⁸⁴ In addition, under the WTO legislation, only the U.S. government can challenge a state law based on a conflict with a WTO agreement,⁸⁵ which Massachusetts argued was the legislated channel for handling a federal/state disagreement over its Burma law.⁸⁶ At the very least, Massachusetts (joined by members of Congress) argued, where Congress had not expressed its intent to preempt state law, the WTO legislation presumes that state law is not implicitly preempted in the event of a conflict (or an alleged conflict) with trade agreements.⁸⁷

Like the First Circuit, the Supreme Court dismissed this argument by observing that the Massachusetts Burma law was preempted by the federal Burma law, not the WTO agreement, and the federal government’s failure to challenge the state law as required under the WTO legislation was irrelevant to the “preemptive effect of the federal sanctions against Burma.”⁸⁸ In other words, the Court was not daunted by the fact that the WTO legislation precludes indirect causes of action, like the NFTC complaint in this case, that rely upon mere allegations of conflict between WTO agreements and state law.

In the long run, the Supreme Court’s acceptance of this bootstrap formula may be more significant than its decision to strike down one state law. The line of reasoning in *Crosby* enables the Executive Branch to avoid suing states directly, which it lacked the political will to do in this case, and enables private parties to use WTO arguments to demonstrate a conflict with the President’s “power to persuade” under another statute, even though Congress denied standing to make the same arguments directly.

Previous cases have raised the question of whether the need for “one voice” in foreign affairs should preempt a state law in the absence of an

82. Brief for Massachusetts at 20, *Crosby* (No. 99-474); Brief of Amici Curiae Members of Congress at 11-13, *Crosby* (No. 99-474).

83. Uruguay Round Agreements Act, § 102(c)(2), 19 U.S.C. § 3512(c)(2) (1994).

84. *Id.* (approving H.R. Doc. No. 103-316, at 676 (1994)).

85. *Id.* § 102(c)(1), § 3512(c)(1).

86. *See* Brief for Massachusetts at 20, *Crosby* (No. 99-474).

87. *Id.* at 20-21; Brief of Amici Curiae Members of Congress at 11-13, *Crosby* (No. 99-474).

88. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2301 n.24 (2000).

express statement of congressional intent to preempt. The Supreme Court has defined the “one voice” as that of Congress: did Congress consider, and implicitly accept, the overlap between federal law and a state law that has foreign policy implications?⁸⁹ In this case, the Court concluded that neither the earlier date of the state law,⁹⁰ nor the prior history of congressional acceptance of the anti-Apartheid laws,⁹¹ nor the congressional anticipation of indirect challenges to state laws in connection with WTO agreements⁹² were enough to establish that Congress had considered and accepted selective purchasing as the *status quo ante* for the federal Burma sanctions. The Court stressed again that Congress’ direction to the President to develop a multilateral strategy, combined with the President’s own constitutional powers in foreign affairs, invested the President with the “maximum authority of the National Government.”⁹³

In summary, this third aspect of preemption under *Crosby*, holding that the state law was an obstacle to President’s ability to speak for the United States, the Court cited the following factors: (1) the federal Burma law’s direction to the President to develop a multilateral strategy; (2) complaints from Executive Branch officials that the state law interfered with the ability of the Executive Branch to speak as the “one voice” of the United States; and (3) allegations by the European Union and other nations that the Massachusetts law did not comply with the WTO Agreement on Procurement.

The most far-reaching aspect of preemption analysis under *Crosby* is the application of obstacle preemption doctrine, per *Hines v. Davidowitz*, to the need for “presidential voice.” While the Court declined to comment on the First Circuit’s broad reading of federal foreign affairs power or dormant Commerce Clause power, it nonetheless leaned on *dicta* from its most expansive interpretations of federal power limitations on state power.⁹⁴ At the same time, the Court did not reach as far as its more recent conservative interpretations of federal power such as *Barclays Bank*.⁹⁵

89. See *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 324, 326, 329 (1994).

90. See 120 S. Ct. at 2291.

91. See *id.* at 2301-02.

92. See *id.* at 2301 n.24.

93. *Id.* at 2298.

94. *Id.* at 2299 n.16 (citing *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (discussing a dormant Commerce Clause claim, not a preemption claim); THE FEDERALIST No. 80, at 536 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“[t]he union will undoubtedly be answerable to foreign powers for the conduct of its members.”)).

95. In discussing *Barclays*, the Court said that Congress had taken specific actions rejecting the positions of both foreign governments and the Executive, which compared to “nothing” in the history of the federal Burma law, even though Massachusetts and congressional *amici* presented

Justice Souter, who dissented in *Barclay's*, felt compelled to acknowledge that case's holding, which stated that there is a presumption against finding an implied preemption of state law in a traditional area of state sovereignty like procurement. He noted that, assuming for purposes of argument that there is a presumption against implied preemption of a procurement law, the Massachusetts law nonetheless presented a sufficient obstacle to overcome that presumption.⁹⁶

In this light, Professor Goldsmith's conclusion about the limited significance of *Crosby* seems to be overly optimistic as far as states are concerned. While the Court presented its obstacle preemption test in neutral terms, the Court's application of that test dismissed evidence that Congress did not intend to preempt state and local law. It would be prudent for local drafters to interpret the Court's non-presumption as a presumption-in-fact, at least in the context of a federal law that delegates diplomatic discretion and "voice" to the President.

At the same time, it would be overly pessimistic to ignore the contextually specific nature of the *Crosby* analysis. The obstacle is in the eye of the beholder, and the next court to hear an obstacle preemption challenge will have to weigh a much different combination of statutory elements. The *Crosby* decision creates a statutory framework of three distinct elements with no less than eleven discrete arguments for preemption. This degree of specificity makes the doctrinal rationale in *Crosby* a flexible one: the eleven obstacles can be outlined and manipulated to identify a number of new legislative options. These new options may allow states to draft laws that avoid rulings of preemption under the federal Burma law—depending on a finding by the reviewing courts that the laws contain none of the obstacle-elements of the Massachusetts Burma law, and also comport with the spirit of the *Crosby* analysis. The grounds for preemption cited by the *Crosby* Court are summarized below.

D. *Potential Ways to Avoid Preemption*

Each of the individual grounds for preemption can be avoided. This is not to suggest that state and local governments must avoid each and every ground in order to preclude preemption. After all, the Court emphasized that its preemption analysis considered the Massachusetts

the history of congressional action on both selective purchasing and the potential for conflict under WTO agreements. *Id.* at 2300-01 (discussing *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 327-29 (1994)).

96. 120 S. Ct. at 2294 n.8.

Grounds for Preemption Under *Crosby v. NFTC*

1. **Obstacles to Presidential discretion.** The state law addressed the same purpose as the federal law, but the state law:
 - a. used a methodology that the President did not control;
 - b. used a different methodology that might undermine the President's bargaining position;
 - c. had an immediate economic impact; and
 - d. had a perpetual legal existence.

2. **Obstacles to the limited nature of federal sanctions.** The state law:
 - a. was a secondary boycott, which involved third parties rather than the congressional focus on "direct Burmese connections";
 - b. reached beyond "U.S. persons" to include corporations based in other nations;
 - c. penalized companies that traded in goods and services, which reached beyond the definition of "new investment"; and
 - d. penalized companies with pre-existing affiliates, which reached beyond the definition of "new investment."

3. **Obstacles to the President's role in developing a multilateral strategy.** These included:
 - a. the federal Burma law's direction to the President to develop a multilateral strategy;
 - b. the complaints from Executive Branch officials that the state law interfered with the ability of the Executive Branch to speak as the "one voice" of the United States; and
 - c. the allegations by the European Union and other nations that the state law did not comply with the WTO Agreement on Procurement.

Burma law as a whole. The purpose and effect of the "whole" can be significantly transformed by changing its parts, as the following potential changes reveal.

- *Narrow the purpose and scope to be "primary" rather than "secondary."* Instead of seeking to influence a country, such as Burma, the local purpose could be to abstain from doing business with individual companies connected with violations of human rights, regardless of where those companies operate. For example, instead of affecting over 300 companies doing business in Burma, the law might affect only a few companies.⁹⁷ In keeping with the Court's analysis, this approach would be: (1) neutral with respect to Burma; and (2) focused on primary business relationships, not a secondary boycott.
- *Avoid conflicts with trade agreements.* Following the model of federal procurement policy, a state could avoid the multilateral conflicts produced by the Massachusetts Burma law by exempting products

97. See *infra* Part IV-B.

or services from countries that are members of the WTO procurement agreement. Alternatively, conflict under the WTO agreement could be avoided by adopting the law at the local level, which the WTO agreement does not cover.

- *Limit duration of the law.* In addition to the preceding choices, the law can provide for its own suspension based upon actions of the federal government. This option may not affect preemption analysis on the face of a statute, but it may help to avoid a lawsuit that challenges the statute. This option also could provide a way for state and local policies to interact with federal policy in order to strengthen both levels.
- *Use non-procurement methods.* State or local governments can avoid procurement altogether in favor of using disclosure, divestment, shareholder resolutions, or political speech. Because they do not have a direct economic effect, non-procurement methods can have a broad “secondary” scope that covers all companies doing business in Burma. Alternatively, they can have a narrow “primary” scope in order to reduce administrative burdens or political opposition.

The remainder of this Article addresses two questions. Part III addresses whether state and local policies that use some combination of these approaches can avoid preemption by the federal Burma sanctions. Part IV addresses whether such policies would retain significant power to promote human rights in a global economy.

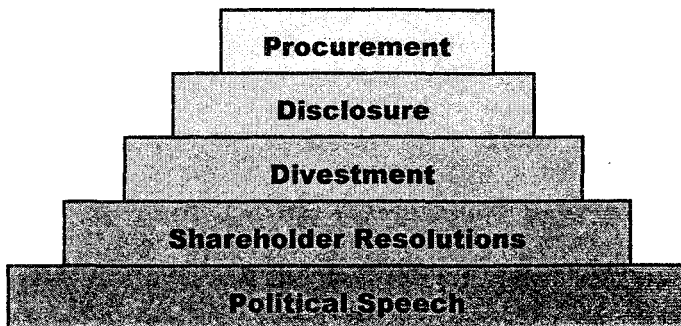
III. LOCAL OPTIONS AFTER CROSBY

The Massachusetts Burma law employed some (but not all) of the statutory methods of economic advocacy that evolved from the anti-Apartheid era. It established a procurement limit and also required disclosure of companies doing business in Burma. The Vermont Burma law used a different mechanism to address its concerns about Burma. Adopted in the midst of the Massachusetts litigation, the Vermont Burma law relied on political speech (in the form of an introductory resolution) and provisions directing public fund managers to vote for shareholder resolutions, rather than focusing on procurement.⁹⁸ Other Burma laws illustrate other possibilities. For example, the Burma ordinances put forth by Oakland and Santa Cruz combine procurement, divestment, and political speech, but not disclosure.⁹⁹

98. An Act Relating to Doing Business with Burma (Myanmar), 1999 Vt. Acts & Res. 34.

99. See Santa Cruz Res. (City Council Policy Manual No. 29.12 §§ II-IV (1997)); Oakland Ord. §§ II-IV (1996), available in IRRRC REPORT 1998, *supra* note 19, at app. F.

Potential Combination of Options



Vertical axis = political visibility and economic significance.

Horizontal axis = likelihood of federal preemption.

The methodologies employed by pre-*Crosby* legislation can be sorted in the order of greatest-to-least economic impact on private companies; this order also reflects their level of preemption risk under *Crosby*.

1. *Procurement* boycott of companies that do business in Burma. However, this secondary boycott could be narrowed to cover only companies that have a primary connection to violations of human rights (the Court found this option to be preempted by federal law).
2. *Disclosure* by companies of business they do (or do not do) in Burma as a condition for procurement. Disclosure can be used as a less-restrictive alternative to a primary procurement boycott.
3. *Divestment* of stock ownership in companies doing business in Burma.
4. *Shareholder resolutions* that seek to develop corporate human rights standards and accountability.
5. *Political speech* in either of two forms. The first is publication of the names of companies doing business in Burma, with which the state or local government must now do business. The second is adoption of a legislative resolution that condemns human rights violations by the government of Burma and the complicity of corporations that support the military government.

These options can be combined in order to increase the political visibility as well as the legal sustainability of a local policy. If options that are at a higher risk of preemption were found to be vulnerable, the lower-risk components of the policy would still remain in place with a well-drafted severability clause. The following chart illustrates the possible layers of a state or local policy. The broader the layer, the more secure it is from legal challenge on grounds of preemption.

The following sections analyze the risk of preemption for each of these respective layers, starting with the option at the greatest risk of preemption, procurement.

A. *Procurement*

As interpreted by the *Crosby* Court, the federal Burma law preempted the Massachusetts Burma law because the state law created an obstacle to congressional policy objectives, even though both laws shared the same broad goal. The NFTC made much of the purpose declared by the state law's sponsor, Representative Byron Rushing, which was to promote a foreign policy purpose: democracy in another country.¹⁰⁰

When defending its Burma law, the Massachusetts attorney general argued more cautiously that the law served a local moral purpose,¹⁰¹ which was "to disassociate the Massachusetts government and its tax dollars from the denial of human rights in Burma. There is no question on this record that the Massachusetts Legislature would have enacted the Burma Law even if it believed that it could not affect change in Burma."¹⁰² In short, Massachusetts argued that its right to disassociate its spending from "a repugnant regime" is a valid purpose, regardless of whether the law might serve a broader foreign policy goal.¹⁰³

The NFTC argued, in effect, that a secondary boycott cannot serve a local purpose because its ultimate objective is to avoid doing business with a country, and individual companies doing business in Burma may have no direct connection to the human rights abuses. When asked by the Court to compare the secondary boycott to a boycott of goods derived from Burma, counsel to the NFTC responded, "that's a very different case. [The secondary boycott] is not limited to goods coming from Burma. [Massachusetts is saying,] [w]e're not going to buy computers from a German company because they sell pencils to Burma

100. See Rushing, *supra* note 44, at 7. Representative Byron Rushing, stated that "if you're going to engage in foreign policy, you have to be able to identify a goal that you will know when it is realized . . . [T]he identifiable goal is, free democratic elections in Burma." National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 291 (D. Mass. 1998); see Rushing, *supra* note 44, at 7.

101. See, e.g., Brief for Massachusetts at 48, *Crosby* (No. 99-474) ("the Court should uphold the law because it has a legitimate local purpose: to disassociate Massachusetts from the human rights violations in Burma.").

102. *Id.* at 31-32.

103. *Id.* at 32.

. . . That is highly coercive, and it has nothing to do . . . with the notion of disassociation."¹⁰⁴

This distinction between primary and secondary boycotts is the basic idea behind an alternative procurement standard. The primary/secondary distinction is well developed in U.S. labor law; the National Labor Relations Act prohibits unions from engaging in secondary boycotts, but not primary boycotts.¹⁰⁵ A union may not refuse to handle goods of a "secondary" business, with which the union has no complaint, in order to put economic pressure on the "primary" business with which the union has a complaint.¹⁰⁶ The Supreme Court has recognized that a primary labor boycott may legally have incidental effects upon secondary employers who deal with boycotted goods.¹⁰⁷

The labor law analogy does more than define the difference between primary and secondary boycotts: it suggests that if a primary boycott can withstand judicial scrutiny under an explicit prohibition of secondary boycotts by Congress, then a primary procurement boycott would withstand even strict judicial scrutiny under the obstacle preemption doctrine. A primary boycott of individual companies based on their own conduct can be distinguished from the purpose and effect of a secondary boycott based more broadly on doing business in Burma, which the Court has found to be an obstacle to the objectives of federal sanctions.¹⁰⁸

104. Oral Argument Transcript at 26, *Crosby* (No. 99-474). Also during oral argument, Timothy Dyk, counsel for the NFTC, argued that secondary boycotts "only work if you communicate disapproval [of a country], or communicate a desire to change." He acknowledged that if Massachusetts sought to avoid goods made in Burma that would be "a different case," although the NFTC's position is that a boycott of goods made in Burma would also be unconstitutional and presumably preempted by the federal Burma sanctions as well. *Id.* at 26-27.

105. National Labor Relations Act, 29 U.S.C. § 158(b)(4) (2000).

106. The Supreme Court has had numerous occasions to elaborate on the distinction between primary and secondary boycotts. *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 91 (1964); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 466 (1921) (defining a secondary boycott as an "exercise [of] coercive pressure upon . . . customers . . . in order to cause them to withhold or withdraw patronage" from the party with whom a union has a complaint). It is conceivable that companies would argue that they are merely "customers" of government ministries or private firms in Burma that violate human rights. This distinction is not valid for at least two reasons. First, many of those companies are joint venture partners with government ministries, not merely customers. Second, even if they were "customers," a downstream boycott of goods or services is still "primary" if the goods or services retain a competitive benefit (because of the human rights violations) or if the downstream boycott is "against the merchandise" or service of the primary producer. 377 U.S. at 64 n.7.

107. See *International Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. 212, 217 n.9 (1982).

108. See *infra* Part IV-B-2.

A primary boycott of individual companies is much narrower than a boycott of all goods made in Burma.¹⁰⁹ It is a boycott of specific companies, or companies within a defined economic sector, based specifically upon the behavior and harm caused by companies connected to violations of human rights. For example, some oil and gas companies benefit from the use of forced labor. Forced labor is not merely regulated conduct, it is a crime under international law that applies to governments, private individuals, and companies alike.¹¹⁰ Thus, a primary procurement standard seeks to disassociate from particular companies because they are connected to violations of international law. Such a standard is much narrower—and also more difficult to establish—than merely finding that a company does business within a repressive nation like Burma.

For a procurement limit to avoid preemption under the *Crosby* analysis, it must be neutral with respect to companies that are simply doing business in Burma. Many companies do business in Burma (or even business with the government of Burma) without any complicity in human rights violations *other than* the indirect complicity of providing financial support to the government. Conversely, a company that does no business in Burma but benefits elsewhere from violations of human rights could be affected by a primary procurement policy.

In short, a “primary” procurement standard would disassociate a government purchaser from companies that are complicit in violations of human rights. Two elements require statutory definition – human rights and complicity. The review of human rights abuses in Burma in part IV-B below illustrates three options for defining the human rights element, each of which is recognized in an international human rights agreement:

- repression of labor rights of association;¹¹¹

109. Several commentators have described a boycott of goods made in Burma as a “primary” boycott because it does not avoid business with companies simply because they do business in Burma. See, e.g., Mark Tushnet, *Globalization and Federalism in a Post-Prinz World*, 36 TULSA L.J. 11, 26 n. 87 (2000).

110. See INT’L LABOR ORG., FORCED LABOUR IN MYANMAR (BURMA) § 204 (1998) [hereinafter ILO REPORT].

111. Convention Concerning Freedom of Association and Protection of the Right to Organize (No. 87), entered into force, July 4, 1950, 68 U.N.T.S. 17; see also International Covenant on Civil and Political Rights, art. 22.1, entered into force Mar. 23, 1976, 999 U.N.T.S. 1171 (“Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”) [hereinafter ICCPR]; *Universal Declaration of Human Rights*, art. 20, G.A. Res. 217A, 3 U.N. GAOR Pt. 1, U.N. Doc. A/810 (1948) [hereinafter UDHR].

- forced relocation;¹¹² and
- forced labor.¹¹³

Approximately twenty-three of the 329 foreign companies doing business in Burma operate in sectors where human rights violations are prevalent, and an additional thirty-four firms have withdrawn from those sectors but could return if the business climate becomes more tolerant of human rights abuses.¹¹⁴ However, not all of these firms sell products or services that are purchased by governments. Roughly, there are at least six companies that operate in sectors where human rights violations are prevalent and these companies are also active in procurement markets; an additional nine firms have withdrawn from those sectors but could, likewise, return if the business climate becomes more tolerant of human rights abuses.¹¹⁵ The review of corporate connections to human rights violations in Burma reveals that there are several degrees of complicity, as shown in the following chart.

The review of company involvement with human rights violations in Part IV-B does not identify any foreign companies that directly participate in violating human rights. However, there are many companies that directly benefit from violations of human rights. For example, Totalfina and Unocal are companies that have directly benefited from

112. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 17, *entered into force* Dec. 7, 1978, 1125 U.N.T.S. 609, 616, providing:

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

See also ICCPR, *supra* note 111, art. 12.1 (“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”) and art. 17.1 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”); *UDHR*, *supra* note 111, arts. 12 and 17.

113. Convention Concerning the Abolition of Forced Labor, *entered into force* Jan. 10, 1957, 320 U.N.T.S. 291, *ratified* May 14, 1991 (by the United States); Convention Concerning Forced or Compulsory Labor, May 1, 1932, 39 U.N.T.S. 55. *See also* ICCPR, *supra* note 111, art. 8(3)(a) (“No one shall be required to perform forced or compulsory labour.”).

114. *See* Chart, Potential Reach of Primary Investment & Procurement Measures, *infra* Part IV-B-2.

115. *Id.*

**Levels of Corporate Complicity
in Violation of Human Rights**

<i>Level of Complicity:</i>	<i>Includes Companies that:</i>
1. Participate in violating human rights.	a. Operate apparel sweatshops that repress labor rights. b. Use forced labor to build hotels or industrial parks/facilities. c. Use forced labor to harvest or transport logs or crops.
2. Directly benefit from violating human rights.	a. Purchase/resell apparel made in sweatshops. b. Purchase/resell logs or crops harvested or transported with forced labor. c. Occupy or manage facilities or industrial parks built with forced labor. d. Invest in or provide financial services to projects built with forced labor or projects on land cleared by forced relocation. f. Sell construction services, equipment or transportation used in projects built with forced labor or projects on land cleared by forced relocation. f. Contract for security services that use forced labor, use forced relocation or commit violence against civilians.
3. Indirectly benefit from violating human rights.	a. License trademarks to companies that buy sweatshop apparel. b. Provide equity, financing or services to industries/ministries that benefit from forced labor.

the government's use of forced labor to build and police a gas pipeline.¹¹⁶ Most of the examples in Part III-B fall into this "directly benefit" definition. An example of a company that "indirectly benefits" might be Suzuki, which provides equity value and financing as a joint-venture partner with the military government in order to operate a manufacturing facility in Burma.¹¹⁷

Using definitions of human rights and complicity, the syntax of "primary" procurement legislation might follow this model: The government must not purchase goods or services from a company that:

- (a) participates in, or benefits from, violation of
- (b) internationally recognized labor rights of association, freedom from forced relocation, and freedom from forced labor.

The definition of either complicity or human rights could be scaled back in order to further reduce the risk of preemption, the scope of political opposition, or the administrative complexity of the procurement policy. For example:

- The degree of corporate complicity could cover only companies that directly benefit from violation of human rights. An indirect benefit test would encompass so many companies that have economic ties to

116. See *infra* Part IV-B-2.

117. See *infra* notes 288-90.

the government that it would approach the scope of a secondary boycott, both conceptually and numerically. A “direct benefit” test is probably necessary to make a clean distinction between primary and secondary complicity in violation of human rights.

- The human rights element could be narrowed to cover only companies that benefit from violations of freedom from forced labor, rather than a broader scope of core labor standards.

To reduce the risk of preemption, legislation could also be tailored to narrow the scope of companies that would be affected by the policy. For example:

- The policy could exempt products or services from countries that are members of the WTO procurement agreement, which would avoid the conflicts that the European Union and Japan raised over the Massachusetts Burma law. Alternatively, the policy could be limited to the local level of government, which is not covered by the WTO agreement.
- The scope of affected procurement could be scaled back to cover only the products or services of a corporation that are within an economic sector where human rights violations are prevalent.
- To narrow the reach of legislation still further, the scope of affected procurement could be scaled back even further to cover only those products or services that were actually produced with the benefit of human rights violations.¹¹⁸

A “primary” human rights standard for procurement would not be preempted by the federal Burma law if an affected company and its conduct have nothing to do with Burma.¹¹⁹ If a company’s conduct does link it to Burma, the purpose and scope of the statute would be far narrower than a secondary boycott, affecting just a few companies rather than a few hundred.

118. The California legislature recently adopted a “benefit from” standard that applies only to goods and services provided to the state, not to the company with which the state does business. CAL. PUB. CONTRACT CODE § 6108 (a)(1) (2000) (amended Sept. 28, 2000). It required contractors to certify that goods and services provided to the state were not produced “with the benefit of forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor.” *Id.* § 2(a)(1).

119. There could be other federal statutes pertaining to other countries, now or in the future, that might preempt the application of a procurement policy to companies that benefit from human rights violations in those countries.

Would this dramatic narrowing of the purpose and scope save a primary procurement policy from preemption under the *Crosby* analysis? An argument that it would not might start with the Court's observation that the federal Burma sanctions were designed not only to bar what federal law prohibits, but also to allow what federal law permits.¹²⁰ Thus, a primary procurement policy arguably would prohibit contracts with some companies that trade rather than invest in Burma, non-U.S. companies, or companies whose investments pre-date the federal Burma sanctions, all of which Congress intended to permit (in the opinion of the Supreme Court).¹²¹

In addition, even a narrow primary procurement policy could still give the European Union, Japan, or other nations cause to complain that the policy violates the WTO procurement agreement if it results in states (not local governments) rejecting business from companies that benefit from violations of human rights. Hence, the problem with multilateral cooperation still might exist.

Given the subjective nature of obstacle preemption, these preceding complications could well end a judicial inquiry in favor of preemption. But this same degree of subjectivity also means that a policy with a dramatically narrower purpose and scope might withstand obstacle preemption scrutiny. As the NFTC has acknowledged, even a boycott of goods made in Burma would be "a very different case" than the one decided in *Crosby*,¹²² and a primary procurement policy would be much narrower than that.

The argument that a primary boycott would not be preempted under *Crosby* draws support, first, from the Court's own obstacle preemption analysis, which, as noted above, might leave room for a procurement policy that dramatically reduces the level of "obstacle" conflict with the federal Burma law. A law that presents a lower level of conflict is even

120. As noted previously, however, the federal law does not actually state what is intended as permissible; it only defines what the President may prohibit. See *National Foreign Trade Council v. Crosby*, 120 S. Ct. 2288, 2298 (2000); see *Foreign Operations, Export Financing, and Related Programs Appropriations Act*, Pub. L. 104-208, § 570(f)(2), 110 Stat. 3009-166 (1997). Professor Lucien Dhooge concludes that "any local procurement scheme that requires the termination of international business relationships deemed legal by federal law is ripe for preemption." Dhooge, *supra* note 9, at 453. The concept of "deeming" something to be legal for certain purposes on the state and local level because it is not banned on the federal level goes even further than obstacle preemption doctrine to make statutory interpretation an exercise in subjective policy judgement rather than a guideline of interpretation that can be applied consistently through a complex federal system.

121. See 120 S. Ct. at 2297-98.

122. Oral Argument Transcript at 26, *Crosby* (No. 99-474).

more likely to avoid preemption if courts recognize a presumption against preempting state and local market participation laws.

By its own reckoning, the Court took pains to avoid ruling out a presumption against preempting state market participation measures.¹²³ Instead, it held that even if there a presumption against preemption exists, the degree of conflict with the Massachusetts Burma law was high enough to overcome such a presumption. Accordingly, a presumption against preempting market participation measures still may exist if the measures present a lower level of conflict (such as a primary boycott). There are no less than three justifications for a presumption against preemption of a primary boycott measure.

The first justification is that a primary boycott is arguably a form of political activity that is at least favored, if not protected, under the First Amendment. Like foreign affairs, labor relations is a field of strong federal interest. Yet in interpreting the ban on secondary labor boycotts under the National Labor Relations Act, the Supreme Court has avoided regulating primary boycotts because a broad ban "might collide with the guarantees of the First Amendment."¹²⁴ This does not mean that primary labor boycotts are immune from regulation, but the Court has gone to great lengths to distinguish primary from secondary boycotts, and it has tolerated the incidental economic effects that a primary product boycott has upon the secondary employers who sell a boycotted product.¹²⁵

A presumption against preempting primary procurement boycotts is also supported by the Court's holding that political boycotts outside of the labor context are protected by the First Amendment.¹²⁶ Courts need not find that state and local governments enjoy immunity from regulation under the First Amendment in order to find that First Amendment values support a presumption against preempting primary boycotts in the public sector, as long as there is a legitimate public purpose to justify the boycott.¹²⁷

123. 120 S. Ct. at 2294 n.8.

124. *National Labor Relations Board v. Fruit and Vegetable Packers and Warehousemen*, Local 760, 377 U.S. 58, 62 (1964).

125. See *International Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. 212, 217 n.9 (1982); Gary Minda, *The Law and Metaphor of Boycott*, 41 BUFF. L. REV. 807, 843, 898 (1993).

126. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); see also *Missouri v. NOW*, 620 F.2d 1301 (8th Cir. 1980).

127. See Matthew Porterfield, *supra* note 7, at 40-47. There are at least three published opinions that support giving First Amendment protection to the activities of state and local governments. See *Creek v. Village of Westhaven*, 80 F.3d 186 (7th Cir. 1996); *County of Suffolk v.*

The second justification for a presumption against preemption is that a primary procurement boycott, which avoids companies that directly benefit from violations of international law, is arguably entitled to the deference that courts have traditionally shown to procurement preferences and ethical standards. It is true that some courts interpret state competitive bidding statutes narrowly to limit discretion such that the lowest bidder may be avoided only on grounds that the lowest bidder is not capable.¹²⁸ However, most courts enforce procurement preferences like minority contractor preferences that are based on clearly stated “public interests” and interpret “responsible bidder” requirements to mean that qualified bidders must be socially responsible in addition to being a financially qualified bidder.¹²⁹ New Jersey courts, for example, have defined “responsible bidder” to include a consideration of moral integrity and have upheld rejection of low bidders in order to avoiding associating with criminals or with firms that knowingly associate with criminals.¹³⁰

These public standards, which are tantamount to a primary boycott of unethical business partners, are analogous to private sector sourcing guidelines such as those of Levi Strauss & Co., which are based on avoiding business partners that associate with governments that violate human rights.¹³¹ Actually, private-sector standards function much more like a secondary boycott than the more limited ethical contracting standards to which courts routinely defer.

The third justification for a presumption against preemption of a primary boycott is the relationship of state governments to specific human rights conventions. As our culture and economy become more global, international law gains increasing importance in defining universal standards of public morality.¹³² It is common sense that state and local governments would orient their standards of public welfare and morality to international consensus on “those benefits deemed essential for indi-

Long Island Lighting Co., 710 F. Supp. 1387 (E.D.N.Y. 1989); *Nadel v. Regents of University of California*, 34 Cal. Rptr. 2d 188 (1994).

128. See, e.g., *MCM Construction, Inc. v. City & County of San Francisco*, 78 Cal. Rptr. 2d 44 (1998); *Arrington v. Associated General Contractors*, 403 So. 2d 893 (Ala. 1981).

129. See generally 10 McQUILLIN ON MUNICIPAL CORPORATIONS § 29.73a—To other than lowest bidder; M. Victoria Wilson, *Set-Asides of Local Government Contracts for Minority Owned Businesses: Constitutional and State Law Issues*, 17 N.M. L. REV. 337 (1986).

130. See *Bodies by Lembo, Inc. v. County of Middlesex*, 669 A.2d 254 (N.J. Sup. Ct. 1996); *Trap Rock Ind., Inc. v. Kohl*, 284 A.2d 161, 166 (N.J. 1971).

131. See *Levi Strauss & Co., Global Sourcing and Operating Guidelines—Terms of Engagement*, at <http://www.levistrauss.com/about/code.html> (last visited Nov. 28, 2000).

132. See Brief of Amici Curiae Non-profit Organizations at 12, *Crosby* (No. 99-474).

vidual well-being, dignity and fulfillment and . . . a common sense of justice, fairness and decency.”¹³³ With regard to worker rights of association, freedom from forced relocation, and freedom from forced labor, international commitments have been ratified by the United States. A primary procurement standard would honor the letter and the spirit of these federal foreign commitments and thus deserve some deference in the balancing of interests in obstacle preemption analysis. For example, the Convention Concerning the Abolition of Forced Labor (No. 105), not only prohibits forced labor, it commits its signatories to suppress the use of any form of compulsory labor “for purposes of economic development.”¹³⁴

Equally important for preemption analysis, U.S. state governments retain delegated discretion in meeting their own obligations under the international agreements that define worker rights of association and freedom from forced relocation and forced labor. The forced labor conventions are implemented under the constitution of the International Labor Organization (“ILO”). The ILO constitution has its own federalism clause, which means that when the subject of a labor convention involves state authority *as well as* federal authority, that convention is treated like a recommendation to the states and is “referred to the state[s] for such action as they may care to take,” including state-level implementation of an ILO convention that is independent of actions of the national government, even if the national government has not ratified the ILO convention.¹³⁵

On June 15, 2000, for the first time in its history, the ILO called upon its members (nation-states, labor unions and employers) to limit their trade relationships with a country, Burma, in order to suppress the use of forced labor (beginning on November 30, 2000).¹³⁶ The ILO action

133. LOUIS HENKIN, *THE AGE OF RIGHTS* 2 (1996); see Peter J. Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567 (1997).

134. Convention Concerning the Abolition of Forced Labor, *supra* note 113, at art. I (b).

135. The Constitution of the International Labour Organisation Instrument of Amendment, 1946, art. 19.7, *opened for signature* Oct. 9, 1946, 62 Stat. 3485, 3522, 15 U.N.T.S. 35, 72; *Hearings on S.J. Res. 117 Before the Senate Subcomm. on Labor & Pub. Welfare*, 84th Cong. 249-50 (1956) (statement of Philip M. Kaiser, Assistant Sec. of Labor for Int'l Affairs).

136. The relevant part of the ILO resolution reads as follows:

[The International Labor Conference recommends] to the Organization's constituents as a whole—governments, employers and workers—that they . . . review . . . the relations that they may have with [Burma] and take appropriate measures to ensure that [Burma] cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour.

strengthens the position of ILO-member nations and their sub-national units of government against future arguments that withdrawal from trade with Burma in the context of forced labor somehow violates international trade obligations. In general, ILO action establishes a more favorable context for future court review of procurement standards that seek to avoid businesses that have a direct or “primary” connection to ventures that perpetuate a system of forced labor.

An even more explicit delegation of discretion to state governments is contained in the International Convention on Civil and Political Rights, which defines worker rights of association and human rights to freedom from forced relocation and forced labor. The United States Senate ratified this convention in 1992, subject to a federalism reservation that states that the United States government must implement the convention “to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention *and otherwise by the state and local governments.*”¹³⁷

The Senate’s deference to state sovereignty is consistent with the Supreme Court’s more recent development of a constitutional principle against singling out state officials and commanding them to implement federal policy objectives.¹³⁸ The *Crosby* Court may have ruled out constitutional immunity for the Massachusetts Burma law, but the Court’s reasoning leaves room for a qualified immunity that applies to less “coercive” forms of state market participation.¹³⁹ The

Int’l Labor Conference, 88th Session, Geneva, June 15, 2000, Fourth Report of the Selection Committee, Resolution ¶ 1 (b). The effective date of the resolution was deferred until November 30, 2000, to enable the government of Burma to take concrete action through legislative, executive, and administrative measures to suppress the use of forced labor. When the government of Burma failed to do so, the ILO governing body refused to stay implementation of the resolution, which took effect on November 30, 2000. Press Release, International Labor Organization, ILO Governing Body opens the way for unprecedented action against forced labor in Myanmar (Nov. 17, 2000) (on file with author).

137. 138 CONG. REC. 4784 (1992) (emphasis added).

138. *New York v. United States*, 505 U.S. 144, 149 (1992) (holding that Congress may not require states to take title to nuclear waste as an incentive for states to take responsibility for disposing it); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress may not direct state officials to conduct background checks in order to implement federal handgun policy).

139. Mark Tushnet suggests that states might retain some degree of constitutional immunity for market participation that would protect statutes less intrusive than the Massachusetts Burma law. *See* Tushnet, *supra* note 109. Professor Tushnet offers a primary boycott law as an example that a state law that might be immune from preemption as well as the reach of the dormant commerce clause. However, he defines a primary boycott more broadly than the option presented in this

idea that the federal Burma sanctions should also preempt a narrow primary boycott sounds much more like interpreting Congressional intent as mandating “forced commerce” with morally offensive business partners when, in fact, Congress said nothing of the sort. Mark Tushnet argues that preemption of state procurement preferences amounts to “conditional commandeering” or “negative commandeering” of state policy, a practice which raises the same federalism concerns that motivated the Supreme Court to strike down federal laws that affirmatively commandeer state policy.¹⁴⁰

The problem is not only that the *Crosby* decision interprets the federal Burma law in such a way that it commands state officials to do business with companies that the state would otherwise avoid on grounds of public morality. More specifically, the problem is that if read too broadly, the *Crosby* interpretation appears to single out state and local governments and target them for regulation in a way that is distinct from the way that Congress regulates private market participants.

In the Burma-law litigation, Massachusetts and its *amici* drew upon this non-targeting principle and arguments based on the 10th Amendment asserting that states are immune from judicial or congressional commands that leave them with inferior market participation rights in comparison to corporations in the private sector.¹⁴¹ The Supreme Court did not seriously consider this argument, ostensibly because Massachusetts had conceded the obvious but different point that Congress has the power to preempt its Burma law if Congress chooses to exercise that power.¹⁴²

One way to resolve the tension between the Court’s federalism decisions and preemption under *Crosby* is simply to recognize a presumption against preemption of state market participation laws that are consistent with the objectives and practices of private market participants. With or without such a presumption, it is much easier to argue that a narrow primary boycott would survive judicial scrutiny, in part because it is indistinguishable from the routine behavior of private market participants, including members of the

section. The narrower approach to defining primary boycott in this section strengthens Professor Tushnet’s immunity argument. *Id.*

140. *Id.*

141. See Brief for Massachusetts at 30, *Crosby* (No. 99-494); Brief of Amicus Curiae Earth-Rights International, *National Foreign Trade Council v. Laskey*, *sub nom.* *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304).

142. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2294 n.7 (2000).

NFTC who have chosen to avoid suppliers that exploit the repressive conditions in Burma.¹⁴³

While it opposed the secondary Burma boycott, the Executive Branch appears to agree that a primary procurement policy focused on specific sectors or companies does not conflict with the federal Burma sanctions. Long after the federal Burma sanctions were in place and the NFTC challenge to the Massachusetts Burma law was on appeal, the President issued an Executive Order barring federal agencies from purchasing goods produced with forced child labor;¹⁴⁴ the order was based upon a broad definition in federal law that bans the import of goods made with forced child labor.¹⁴⁵ After the *Crosby* decision was announced, the U.S. Department of Labor issued a list of banned products made with forced child labor, which listed the products by country of origin. All eleven products listed are from Burma; one product is also from Pakistan.¹⁴⁶ This product list is based upon an Executive Order that is neutral with respect to Burma or any other country of origin. As such, it shows how a primary boycott policy can be independent of the federal sanctions on Burma.¹⁴⁷ Like a primary state procurement policy, this federal policy is designed to serve a moral policy objective that does not impair the “delicate balance” of the federal Burma sanctions.

143. See Carlos M. Vasquez, *Breard, Printz, and the Treaty Power*, 70 *COLO. L. REV.* 1318, 1344-50 (1999). For example, Levi Strauss has sourcing guidelines that enable the company to avoid suppliers based on the “human rights environment” and the employment practices of potential business partners including such core labor standards as a prohibition on use of child labor, prison labor, forced labor and discrimination against workers who exercise their rights to organize or associate with a union. See *Levi Strauss & Co.*, *supra* note 131.

144. Executive Order 13126, 64 *Fed. Reg.* 32,383 (June 12, 1999).

145. A state or local primary procurement ban would be compatible with the federal import ban on products made with forced labor, which was passed by Congress that took effect in 1932, the same year that the ILO Forced Labor Convention entered into force. It prohibits import of goods “produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor.” *Tariff Act of 1930*, title III, part I, § 307, 46 *Stat.* 689 (1930) (current version at 19 *U.S.C.* § 1307 (1994)). It defines “forced labor” to include “all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.” The term includes forced child labor. *Id.*

146. The complete list of products made with forced or indentured child labor includes: Bamboo, beans, bricks (hand-made), chilies, corn, pineapples, rice, rubber, shrimp (aquaculture), sugarcane and teak. Request for Comments, Notice of Preliminary List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Under Executive Order No. 13,126, 65 *Fed. Reg.* 54,108, 54,109 (Sept. 6, 2000) [hereinafter *Forced Labor Notice*].

147. The *Forced Labor Notice* cites the *Tariff Act of 1930* and Department of Labor reports on suppressing child labor as its legal authority and policy purpose. *Id.* at 54,109.

To summarize, state or local governments may be able to avoid preemption under the federal Burma sanctions or other similar sanctions of the local interest can be defined narrowly to affect companies that benefit from trade in sectors where violations of human rights predominate. However, this argument is stronger if the local interest is defined more narrowly to affect companies whose own products or services directly benefit from violations of human rights. The argument is stronger still if the local interest can be defined as avoiding business with such a company but only regarding the specific products that directly benefit from the violation of human rights.

While these options are promising, a word of caution is in order. The inherent vagueness of obstacle preemption means that a court might see an obstacle even in avoidance of a company that directly benefits from the violation of human rights if the law is challenged by a company doing business in Burma. If so, a savings clause should work to limit the effect of any preemption to just companies in Burma. Of course, the arguments on either side of this option will be theoretical until they are tried and tested.

Two issues that worked against the Massachusetts Burma law remain: potential conflict with trade agreements, and duration of the law. Both of these concerns can be avoided with careful legislative drafting.

As noted above, conflict with the WTO procurement agreement is a problem only at the state level. Local procurement is not covered by that agreement. The potential for state-level conflict can be avoided by following the approach of the President's Executive Order, which bans federal government purchase of products made with forced or indentured child labor. That policy avoids the WTO conflict by simply exempting products from nations that are signatories to the WTO procurement agreement or NAFTA.¹⁴⁸

148. The Executive Order provides that:

This order does not apply to a contract that is for the procurement of any product, or any article, material, or supply contained in a product that is mined, produced, or manufactured in any foreign country if: (1) the foreign country is a party to the Agreement on Government Procurement annexed to the WTO Agreement or a party to the North American Free Trade Agreement ("NAFTA"); and (2) the contract is of a value that is equal to or greater than the United States threshold specified in the Agreement on Government Procurement annexed to the WTO Agreement or NAFTA, whichever is applicable.

Executive Order 13126, § 5(b), *supra* note 144.

This exception might be a symbolic loophole, but it sacrifices little of substance because it affects products from only two dozen countries, most of which have highly developed economies. Ultimately, it excludes very few products and companies that benefit from the violation of human rights.¹⁴⁹ For example, the exception does not exclude products made in Burma, which like most developing countries, has not joined the WTO procurement agreement.

The Supreme Court also objected to the Massachusetts Burma law because of its permanent status. Even if the President removed federal sanctions as an incentive or a reward for progress toward democracy in Burma, the Massachusetts law would have remained in place (unless repealed). One obvious way to avoid this problem—the simple approach of annually sunsetting a primary procurement policy—would be cumbersome and unsuitable to a policy that is not Burma-specific. There are at least two additional ways to provide flexibility in a permanent procurement policy, however. One is to authorize a mayor or governor to suspend application of the law. The other way to promote flexibility is to make suspension of the law automatic upon the occurrence of certain circumstances.

Whether suspension is authorized or automatic, the legislation should provide the guidelines or standards for doing so. For example, the law could authorize or require suspension of a primary procurement policy as applied to a company doing business in a particular country, if:

- the President suspends or terminates limits on trade or investment within that particular country, or
- Congress or the President recommend to state and local governments that they suspend a primary boycott policy as applied to companies doing business in a particular country.

The idea of linking suspension of state or local measures to a federal recommendation could introduce a more nuanced and effective relationship between state and federal policies, particularly in the context of foreign affairs. Neither the alternative of a primary boycott nor a suspension clause to temper its administration were considered during the litigation over the Massachusetts Burma law.

149. The most notable problem under such an exception would probably be Mexico. There are numerous reports that companies harass and intimidate workers who attempt to exercise their rights to organize under Mexican law. See, e.g., David Bacon, *Tijuana Troubles; NAFTA is Failing Mexican Workers*, IN THESE TIMES, Aug. 21, 2000, at 23; William K. Tabb, *Turtles, Teamsters, and Capital's Designs*, MONTHLY REVIEW, July 1, 2000, at 28; Susan Ferriss, *Mexico Labor Battle Tests NAFTA Rules*, ATLANTA J. CONST., Aug. 3, 1998, at 6A; Laura Eggerston, *Canadian Labour Backing Mexican Workers*, TORONTO STAR, Apr. 7, 1998.

A suspension provision is not necessary in the sense that the President or federal agencies have the power to “administratively preempt” state or local law. Administrative preemption requires either exclusive presidential power or a clear delegation of discretion to the President or an agency, which exists under the federal Burma sanctions.¹⁵⁰ However, in *Crosby*, the Court held that the opportunity for an Executive Branch preemption option was not a factor that should weigh against a finding of obstacle preemption.¹⁵¹ Suspension provisions would alleviate the need for federal officials to formally preempt state or local law.

The foregoing analysis provides drafting choices for creating a primary procurement option that can avoid preemption: purpose, scope, level of government, and suspension (duration). The result could be a policy that is dramatically lower-profile than the secondary boycott that the Supreme Court found to be preempted in *Crosby*. Its impact on foreign commerce in Burma could be reasonably characterized as incidental. Still, the subjective nature of the obstacle preemption doctrine means that the risk of preemption is moderate to high, depending on the scope of the measure. The least-risky options within this range would be the narrowest: (1) avoiding any procurement business with a company that benefits from violation of human rights; or more narrowly, (2) avoiding only a specific product from a specific company when that product benefits from the violation of human rights.

A full discussion of drafting options for a primary boycott exceeds the scope of this article because of its technical complexity. However, it is worth noting some of the approaches that drafters could take. These include:

- Requiring companies to certify that they do not benefit from violation of human rights (the scope of which would have to be defined as noted above).
- Including respect for human rights as part of the moral or integrity standards for being a “responsible bidder,” which would enable the

150. See, e.g., *United States v. Pink*, 315 U.S. 203, 210-13, 230 (1942); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, Substance and Procedure § 12.4, at 220 n.23 (3d ed. 1999) (“When Congress gives an administrator or agency discretion to regulate a field of commercial activity the agency’s decision to preempt should be upheld unless it is clear that Congress would *not* have sanctioned a preemption of state authority in the area regulated by the agency.”); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 272 (1997); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 115 cmt. e (1987) (“In principle, a United States treaty or international agreement may also be held to occupy a field and . . . supersede State law or policy even though that law or policy is not necessarily in conflict with the international agreement”).

151. See *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2301 n.24 (2000).

government purchaser to either select a higher bidder that does not benefit from violation of human rights or disqualify a bidder as not responsible.

- Including human rights provisions in an ethics policy for the government and its business partners, the violation of which would enable the government to terminate or avoid a business relationship.
- Including human rights provisions in a fair competition policy, which would enable competitors or citizens to challenge a bidder on grounds that the bidder has an unfair advantage based on violation of human rights.

B. *Disclosure*

An alternative to a primary boycott of companies that benefit from human rights violations would be a requirement that such companies disclose the nature of their business if they operate in a sector that is prone to human rights violations. A company would not be placed at any disadvantage in bidding for public procurement except for the requirement to disclose.

If a state or local government can confirm that a company does benefit from the violation of human rights, this information has several potential uses. First, the information can underscore the need for a stronger procurement or investment policy to disassociate from companies that benefit from the violation of human rights. Second, a state or local government can use the information to petition Congress on the need for adopting, keeping in place, or changing federal policy with respect to companies that benefit from the violation of human rights. Third, simply asking for the information and publicizing it will get the attention of a company's management.

The NFTC established its standing to challenge the Massachusetts Burma law by showing the court that at least fifteen companies did business in Burma and had an interest in bidding for procurement contracts with Massachusetts. The NFTC asked for and received a protective order from the court in order to keep the names of these companies secret, acknowledging that mere disclosure has a power all its own.¹⁵² Apparently, disclosure alone raises a risk of embarrassment, consumer boycotts or shareholder resolutions for these companies.¹⁵³

152. National Foreign Trade Council's Motion for Protective Order at 1, National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998) (CA No. 98-CV-10757).

153. *Id.* at 1-2.

The NFTC's past efforts to protect the identity of its members in Burma suggest that even a disclosure measure connected to procurement but detached from a secondary boycott would be challenged on preemption grounds. A disclosure requirement is less "coercive" than a procurement standard based on how or where a company does business: even if a company does benefit from violation of human rights, it can still make a procurement contract as long as it discloses the information. This reduces the risk of preemption slightly, but if failure to disclose results in loss of a contract, then preemption arguments might still be used to challenge disclosure.¹⁵⁴ A cautious approach to drafting a disclosure law would be to make it as narrow as a procurement measure would have to be in order to avoid preemption, as noted in the previous section.

In sum, while disclosure may not be more secure from preemption, the option is still worth considering because it offers a less coercive alternative to a primary boycott of companies that benefit from the violation of human rights.

C. *Divestment*

A divestment ordinance would affect portfolio investments, not the foreign direct investment addressed by Congress in the federal Burma sanctions. The Supreme Court's decision in *Crosby* does not invalidate Burma-divestment laws because the Massachusetts law did not include portfolio divestment; therefore, the connection between the federal Burma sanctions and portfolio divestment was simply not an issue.¹⁵⁵ Even if it had been, divestment does not constitute a secondary boycott, which is what the Court found to conflict with the sanctions adopted by Congress. It was the "coercive" force of a secondary boycott that the Court found to conflict with the federal sanctions, in part because it sanctioned trade that Congress did not prohibit, and in part because it allegedly conflicted with the procurement agreement of the World Trade Organization ("WTO").

154. In *Gerling Global Reinsurance Corp. et al. v. Quakcenbush*, No. Civ. S-00-0506WBSJFM, 2000 WL 777978 (E.D. Cal. 2000), the California Insurance Commissioner threatened that failure to disclose information related to the insurance policies of Holocaust survivors would result in loss of several companies' licenses to sell insurance in California. The Federal District Court granted a preliminary injunction against enforcement of the statute on foreign affairs and foreign Commerce Clause grounds. *Id.* at 10, 13.

155. See Brief of Amicus Curiae the United States at 29, *Crosby* (No. 99-474) (the Massachusetts case presented "no occasion in this case" to consider the validity of divestment).

While acknowledging that disassociation from morally tainted companies is a legitimate objective,¹⁵⁶ the NFTC took the position in *Crosby* that divestment laws are unconstitutional.¹⁵⁷ Presumably, the NFTC objects to the broad scope of divestment from all companies doing business in a specific country, viewing such expansiveness as an encroachment into foreign affairs and an implicit criticism of a foreign government. However, a law that divests from all companies doing business in Burma has no direct economic effect on those companies, which means it would pose no obstacle to the “delicate balance” of congressional sanctions or presidential discretion in implementing those sanctions. Nor does divestment have any bearing on a WTO agreement, which was the source of international conflict over the Burma law. Additionally, the United States government has not complained, as it did repeatedly about the Massachusetts procurement law, that divestment laws create any problem under the Burma sanctions or for foreign policy in general. In fact, it has suggested divestment as a viable state and local non-procurement option.

While noting that corporations might claim that divestment laws attempt to “regulate,” the United States agreed that divestment would not have as direct an effect as a regulation, because “stock divested by a pension could still be purchased by someone else, and the transaction would not be directly linked to any conduct by the purchaser, the company, or the foreign government.”¹⁵⁸

The low economic impact of divestment makes it virtually a symbolic act of economic speech.¹⁵⁹ Symbolic speech of this nature might be resented by a foreign government or a corporation from which a city or state seeks to disassociate itself. However, to stretch *Crosby*’s “purpose and effect” reasoning to reach divestment would ignore the fact that divestment has no direct economic effect. It would also ignore the purpose of divestment, which is to reject the intimacy of ownership of a morally tainted company, as compared with avoiding trade with a company.

The most persuasive reasons to balk at wholesale divestment are not legal; they are administrative and tactical. For example, a law that requires divestment from all companies doing business in Burma

156. See Oral Argument Transcript at 27, *Crosby* (No. 99-474).

157. *Id.* at 22 (“we think the divestiture laws are unconstitutional, but we recognize they’re quite different [from selective purchasing]”).

158. Brief of Amicus Curiae the United States at 28-29, *Crosby* (No. 99-474).

159. See *infra* Part III-E.

would be a one-time symbolic event, and then the city or state will be out of the game as an investor. The alternative would be to sell the stock of a narrow class of companies that benefit from the violation of human rights. These could be companies within a sector, such as oil and gas pipelines in a country like Burma. Alternatively, a city or state could sell stock selected from a list of specific companies.

A narrower approach to divestment preserves the option of future divestment, and thus may carry equal or greater symbolic weight than a one-time event. The message is also more direct. Rather than trying to focus on a large number of companies that support the military government by doing business in Burma, the narrower approach can focus attention on companies that are themselves connected to human rights violations. This is a more cost-effective approach as well. Compared to divestment from all companies that do business in Burma, divestment from a narrower class of companies enables pension fund managers to undertake fewer transactions, make fewer inquiries of individual companies, and reduce the cost of implementing divestment.¹⁶⁰

160. Concerns over the cost of divestment to pension fund beneficiaries have been addressed in the context of divestment from South Africa. There are two levels of concern, one being the transaction costs of divestment, and the other being the effect of divestment on risk and rate of return. Both concerns were raised in the challenge against Baltimore's divestment ordinance, *Board of Trustees v. Mayor & City Council of Balt.*, 562 A.2d 720 (Md. 1989), *cert. denied*, 493 U.S. 1093 (1990).

The Maryland Court of Appeals agreed with the trial court's judgement that the costs of divestment were *de minimus* when viewed in relation to the system's total assets." *Id.* at 737 n.36. The annual divestment cost was estimated at between 1/10th and 1/20th of one percent of fund assets. The percentage was this low even though the Baltimore ordinance required divestment of 47% of the fund's equity holdings. *Id.* at 726-27. Divestment costs are likely to be significantly less for Burma than for South Africa because fewer foreign companies do business in Burma than did business in South Africa in the early 1980s.

The Maryland court rejected the argument that divestment would imprudently reduce the universe of eligible investments needed to maintain portfolio diversity by noting that economically competitive substitutes remained available. *Id.* at 735. Nor did a morally based policy for divestment conflict with the trustees' duty of loyalty to beneficiaries of the fund. The court explained that the fiduciary standard is not to "maximize the return on investments but rather to secure a 'just' or 'reasonable' return while avoiding undue risk." *Id.* at 737. The court concluded that it is appropriate for fund managers to avoid investments that are morally offensive to the community: "by investing in business with 'a proper sense of social obligation,' they will in the long run best serve the beneficiaries' interests and most effectively secure the provision of future benefits." *Id.* at 738.

While the Maryland court had little trouble accepting the divestment ordinance on fiduciary grounds, it stressed repeatedly that the ordinance protected the interests of pension beneficiaries

While divestment from all companies doing business in Burma poses a low risk of preemption, divestment from a much narrower class of companies that benefit from human rights violations reduces that minimal risk is even further.¹⁶¹

Regardless of how the legal scope of divestment is defined, however, a reviewing court will probably respect a decision to divest because of the complexity and fiduciary judgement involved in that decision.¹⁶² When considering divestment from South Africa, local legislatures and pension fund managers based their decisions on both the moral considerations and the investment risks presented by investing in companies that are prone to consumer boycotts, or that invest in countries where repression could eventually spark civil strife or revolution.¹⁶³ The managers of a public pension fund may not need a legislative mandate; they may choose to divest from a company doing business in Burma based solely on their risk analyses. This is exactly the tack taken by the nation's largest public pension fund, the California Public Employees Retirement Fund (CalPERS), when it recently announced a policy of avoiding unnecessary risk by avoiding stock companies that trade or invest in unstable and undemocratic nations.¹⁶⁴ Simply put, moral and prudential considerations intertwine, and the exercise of fiduciary judgment to divest from companies doing business in Burma is in no way an obstacle to congressional policy objectives.

There are some drafting considerations worth noting for any divestment option. One is to recognize that "divestment" connotes not only disassociating from corporations in which stock is already owned, but also that the policy should apply prospectively to future purchases of

by giving fund managers a reasonable period of time for divestment and the latitude they needed to manage risks that might arise due to market fluctuations. *Id.* at 736.

161. Minneapolis and Los Angeles were the first cities to enact divestment measures after the *Crosby* decision. The Minneapolis resolution prohibited new investment and retention of investments in companies that engage in "the economic development of resources located in Burma." City Council of Minneapolis Res. § 1, Oct. 10, 2000 (enacted Oct. 13, 2000); see Rochelle Olson, *Panel Approves Latest Myanmar Divestiture Resolution*, STAR-TRIB, Oct. 11, 2000, at 5B. The resolution also authorizes divestment from any company based on investment risk. City Council of Minneapolis Res. § 2. The Los Angeles City Council voted unanimously to adopt a recommendation to managers of the city's pension funds to sell the stock of all companies that invest in Burma. Press Release, Burma Forum—Los Angeles, L.A. City Council Votes Unanimously to Sell Burma-Related Stock (on file with author).

162. See Robert Collier, *Pension Fund Tightens Foreign Stock Rules, CalPERS Board Gives Weight to Human Rights*, S.F. CHRON., Nov. 14, 2000; Tribe, *supra* note 8, at 23,291-92.

163. See Rodman, *supra* note 14, at 26.

164. See Tribe, *supra* note 8, at 23,292 ("no prudent investor could fail to see the economic implications of investing in a country undergoing a profound political and social upheaval").

stock as well. Another drafting consideration is that local governments may not have the authority to set policy for the public pension funds in which their employees participate. This is important because most of the Burma laws were adopted at the city or county level. These jurisdictions can still act on divestment policies, but they must do so in the form of a resolution that advises the pension fund managers, state legislature, or other body with legal authority to change investment practices. This complicates the task because success may depend on persuading other cities and counties to adopt the resolution in order to accomplish a change in state-level policy. The result may be well-worth the greater effort, however, because state pension funds have so much greater visibility and clout in the stock markets.

D. *Shareholder Resolutions*

Investor initiatives, such as shareholder resolutions, are not an economic transaction. Rather, they are pure speech between an investor (possibly a government investor) and the company in which that investor holds stock. Nonetheless, the NFTC has speculated that mere state government expression of views critical of a foreign government *may be unconstitutional*.¹⁶⁵ This is presumably because the NFTC has argued that under *Zschernig v. Miller*, city or state criticism of a foreign government creates a “great potential for disruption or embarrassment” to the United States.¹⁶⁶ *Zschernig*’s constitutional preemption of “embarrassing” local statements may be used as an analogy to support a statutory preemption claim. Under the *Crosby* preemption analysis, any “speech” made by a city or state that is critical of a foreign government would compromise the capacity of the President to speak for the United States in developing a unified Burma policy.¹⁶⁷

As noted in the context of divestment, however, *Zschernig* does not hold that critical speech alone encroaches on federal foreign affairs power. Nor does the U.S. Government oppose speech by state or local officials that is critical of a foreign government because its impact on

165. Oral Argument Transcript at 22, 26, *Crosby* (No. 99-474).

166. This constitutional assertion is addressed in the following section. *Zschernig v. Miller*, 389 U.S. 429, 435 (1968); Brief of National Foreign Trade Council at 27, *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474).

167. See *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2299 (2000). This analogy is superficial at best because the actions by Oregon probate courts at issue in *Zschernig* involved more than political speech. The risk of embarrassment in *Zschernig* was created when local courts undertook their own investigations into the “democracy quotient” of communist governments, including direct contact with officials in those governments. See 389 U.S. at 433-34.

foreign affairs is merely “indirect or incidental.”¹⁶⁸ Moreover, Justice Souter himself suggested that state and local governments should be able to “express themselves, to express their views . . . so long as they do not go beyond the point of verbalizing [condemnation of] the regime in Burma and, indeed, those who do business with it. . . .”¹⁶⁹ In sum, courts are unlikely to conclude that investor initiatives fall within the scope of the federal Burma sanctions and the findings of *Crosby*.

However, the Securities and Exchange Commission (“SEC”) does set limits on shareholder resolutions. In addition to numerous technical standards, the SEC¹⁷⁰ allows a company to exclude a shareholder proposal if it relates to operations that account for less than five percent of a company’s total assets, *and* less than five percent of net earnings and gross sales, *and* is not otherwise significantly related to the company’s business.¹⁷¹ The larger a company, the more likely it can exclude a shareholder resolution with respect to human rights violations in any particular locale where the company operates. This *de minimus* rule is likely to exclude the most direct kind of resolutions that are specific to a location, for example: (1) a resolution to disclose the nature of a company’s business in Burma, or (2) a resolution that recommends that a company withdraw from operations in Burma.

In recent years, a number of resolutions have survived the *de minimus* rule. A state or local investment policy could require or authorize fund managers to vote “yes” or even cosponsor resolutions such as the following:

- *Adopt human rights standards.* The purpose of the standards would be (1) to avoid business relationships in countries where all commerce indirectly supports repression of human rights, or (2) to avoid business with particular partners, contractors, or suppliers that benefit from the violation of human rights or participate in

168. Brief of Amicus Curiae the United States at 36, *Crosby* (No. 99-474) (quoting *Zschernig*, 389 U.S. at 434).

169. Oral Argument Transcript at 12, *Crosby* (No. 99-474).

170. The standards include a SEC requirement that the sponsor of a resolution own stock that is worth at least \$2,000 in market value or 1% of the company’s securities. 17 C.F.R. Ch. 11, § 240.14a-8(b) (2000). In addition, without a company’s consent, shareholders have only four bites at the apple. If a second shareholder proposal deals with “substantially the same subject matter” as another proposal in the previous five years, then the company may exclude the current proposal if the first vote was less than three percent. The company may exclude a third proposal if the second vote was less than six percent. The company may exclude a fourth proposal if the third vote was less than 10%. § 240.14a-8(b)(2)(ii).

171. § 240.14a-8(i)(5).

projects or products that were developed or produced with violation of human rights. As proposed to several companies in recent years:

the shareholders request the Board to review and develop guidelines for country selection and report these guidelines to shareholders and employees by October [year]. In its review, the Board shall develop guidelines on maintaining investments or withdrawing from countries where:

- there is a pattern of ongoing and systematic violation of human rights;
- a government is illegitimate; or
- there is a call by human rights advocates, pro-democracy organizations or legitimately elected representatives for economic sanctions against their country.¹⁷²
- *Evaluate the cost of business in Burma.* The resolution would require a committee of independent directors to weigh the benefits of doing business in Burma (or other areas that are prone to pervasive violation of human rights) against the costs of risking consumer boycotts, lobbying expenses to oppose federal, state or local policies, and damage to the company's reputation and good will.¹⁷³
- *Provide incentives for ethical management.* The resolution would require a committee of independent directors to review ways to link executive compensation with the Company's ethical and social performance.¹⁷⁴

While shareholder resolutions do not have direct economic consequences, some human rights strategists believe that resolutions are superior to divestment as a communication and constituency-building tool.¹⁷⁵ Rather than disassociate shareholders from a morally tainted company, they engage the shareholders in discussion or debate with corporate managers and other shareholders. The value of shareholder

172. BAKER HUGHES CORP., RESOLUTION ON HUMAN RIGHTS (1998) (on file with author); CATERPILLAR CORP., RESOLUTION ON HUMAN RIGHTS (1997) (on file with author); INTERDIGITAL CORP., RESOLUTION ON HUMAN RIGHTS (1997) (on file with author); UNITED TECHNOLOGIES CORP., RESOLUTION ON HUMAN RIGHTS (1997) (on file with author).

173. UNOCAL CORP., RESOLUTION ON EXECUTIVE COMPENSATION (June 2000) (on file with author).

174. UNOCAL CORP., RESOLUTION ON REPORT OF FULL COSTS OF DOING BUSINESS IN BURMA (June 1998) (on file with author).

175. See Simon Billenness, *Burma Divestment Revisited* (Apr. 15, 1997), available at <http://www.freeburmacoalition.org/old/divestment.html>.

resolutions for promoting human rights may come from the substance of that debate, the risk of wasting the company's good will and appeal to consumers, the sheer "hassle factor,"¹⁷⁶ or most likely a combination of these factors.

The most persuasive voices for human rights standards in business will likely be corporations themselves. For example, Levi Strauss (a member of the NFTC) pulled out of Burma in the early 1990s, citing its own sourcing guidelines, which provide that:

Levi Strauss & Co. bases its decision on whether to do business in certain countries based on criteria that include whether:

- Brand image would be adversely affected by a country's perception or image among our customers and/or consumers.
- Human rights environment would prevent us from conducting business activities in a manner that is consistent with the Global Sourcing guidelines and other company policies.
- Political, economic and social environment would threaten the Company's reputation and/or commercial interests.¹⁷⁷

What is most striking about this policy is not its idealism, but its focus on sustainable profitability and the risks posed to the company by associating with violators of human rights. The policy suggests not only that repression creates risk of strife or revolution but that consumers will judge the corporation by the company it keeps.

E. *Political Speech*

Political speech options take one of two forms. The first is publication of the names of companies doing business in Burma, with which the state or local government must now do business. Unlike the preempted Massachusetts law, this kind of list cannot be linked to any economic consequences or it too would be preempted. Rather, the option is simply to publish information, which requires the publisher to undertake a duty of accuracy. Considering that erroneous information could have economic consequences, publishing information about companies in Burma also brings the usual concerns about publishers' liability.

The second form of "political speech" is adoption of a stand-alone resolution or a preamble that accompanies a procurement or invest-

176. See Rodman, *supra* note 14, at 27.

177. LEVI STRAUSS & CO., GLOBAL SOURCING & OPERATIONS GUIDELINES 155-57.

ment law. It is usually a factual resolution that summarizes human rights abuses and how governments that violate human rights are dependent upon foreign trade and investment. An equally important purpose is to explain how specific economic sectors and corporations are connected to human rights abuses. The facts are available in reports of the U.S. Government, the ILO, and the UN, among other sources.¹⁷⁸

As Justice Souter's recommendation implies, it may be obvious that this kind of political speech is the least coercive role for state and local governments offended by the conduct of their business partners in the private sector. Nonetheless, state and local officials need to be prepared in case the NFTC or one of its members reasserts that it is unconstitutional for state or local officials to express views critical of a foreign nation.

The NFTC has asserted that political speech can be constitutionally preempted under the foreign affairs power of the federal government,¹⁷⁹ but the Supreme Court has never adopted this view. The NFTC's argument ignores the implications of the First Amendment for state and local political speech.¹⁸⁰ Both James Madison and Thomas Jefferson suggested that the First Amendment limits the capacity of Congress to regulate the speech of states, just as it limits the capacity of Congress to regulate the speech of individual citizens.¹⁸¹ The Court has ruled that political speech may not be restricted simply to avoid offending a foreign government.¹⁸² While the Supreme Court has not decided whether states have First

178. See *infra* Part IV.

179. In oral argument before the First Circuit Court of Appeals, Timothy Dyk, counsel for the NFTC, speculated that "perhaps even a resolution by the state condemning a foreign government would be preempted by the foreign affairs power." Oral Argument Transcript at 8, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304). In oral argument before the Supreme Court, Dyk faulted selective purchasing laws because they "target a foreign country" and "communicate disapproval." Oral Argument Transcript at 19, *Crosby* (No. 99-704).

180. For comprehensive arguments against constitutional preemption under the foreign affairs power, see, e.g., Brief of Amicus Curiae City of Berkeley, Cal., at 1, *National Foreign Trade Council v. Laskey*, *sub nom.* *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304); Porterfield, *supra* note 7.

181. Thomas Jefferson and James Madison drafted resolutions for the Kentucky and Virginia legislatures, respectively, denouncing the restrictions on political expression under the 1789 Alien and Sedition Acts of Congress as violations of both the First and Tenth Amendments. See Porterfield, *supra* note 7, at 26.

182. See *Boos v. Barry*, 485 U.S. 312 (1988) (striking down a District of Columbia law banning signs within 500 feet of a foreign embassy). The Court held that regulating a type of speech in

Amendment rights, it has ruled that the identity of the speaker is not important when considering the First Amendment as a limit on the power of Congress to regulate speech.¹⁸³ At least four published opinions of federal and state court have recognized that political speech by state and local governments is protected by the First Amendment.¹⁸⁴

Accordingly, state and local officials should feel secure in their official capacity to speak on issues that affect foreign affairs. The immediate concern is not what they may say, but what they should say. As the opponents of “sanctions” rightly observe, the least-attentive audience is a foreign government that violates human rights to stay in power.¹⁸⁵ Consistent with that observation, the immediate audience for political speech is the U.S. public, the Congress, and the Executive Branch of the federal government. For these audiences, the most important questions to address in a resolution that accompanies procurement or investment legislation are the following:

- *State or local interest.* Is there a connection between the participation of state and local governments in a global market (as investors or consumers) and either (a) the ability of companies to benefit from the violation of human rights; or (b) the ability of repressive governments to draw financial resources from foreign trade and investment? If so, then it is important to state the purpose of a local procurement or investment measure in terms of disassociating the government from companies that are connected to the violation of human rights?
- *Federal-state relations.* Is there a need for Congress or the Execu-

order to minimize its “secondary impact” on foreign governments is still a content-based restriction, which triggers strict scrutiny. *Id.* at 334.

183. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). When political speech is involved, the Court has recognized the free speech rights of various organizational entities, including regulated private utilities, for-profit corporations, non-profit corporations and political parties. See *Pacific Gas & Elec. Co. v. Public Utilities Comm’n*, 475 U.S. 1, 8 (1986) (ruling that California may not require a privately-owned utility to include in its billing envelopes the speech of third parties with which the utility disagrees); *Bellotti*, 435 U.S. at 767, 797 (concluding that the First Amendment rights of for-profit corporation could not be limited to issues materially affecting its business, property, or assets); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (holding that the NAACP, even as a non-profit corporation, engages in activities meriting First Amendment protection); *San Francisco County Democratic Cent. Comm. v. March Fong Eu*, 826 F.2d 814, 825-26 (9th Cir. 1987), *aff’d* 489 U.S. 214 (1989) (establishing First Amendment rights for political parties).

184. See *Porterfield*, *supra* note 7, at 34.

185. See, e.g., Dan Griswold, *Trade Sanctions & Selective Purchasing Laws*, BURMA DEBATE, Summer 1999, at 12-13, 15.

tive Branch to show greater deference to the exercise of legislative or market-participation power at the state and local level? State and local governments that have been preempted may want to petition Congress to authorize (or reauthorize) their exercise of selective purchasing power. However, before making such a request, state and local officials should remember the importance of politically astute timing. A petition to Congress to restore local authority could backfire unless it first takes into account (a) the foreign affairs climate of the day, and (b) Congress's tendency to take no action on a petition unless the timing is right and the petition is part of a well-orchestrated lobbying campaign.

- *Federal foreign policy.* Is there a need to adopt, keep in place, or change a particular kind of national policy?

Another important audience is the market in which a state or local government is a participant. This market includes the corporations that benefit from violations of human rights as well as their consumers and investors. With this audience, a resolution can state the local interest as noted above, as well as address the following questions:

- *Consumer and investor relations.* How can consumers and investors hold corporations accountable for violating standards of public morality? The law introduced by the resolution is one way to do so, but participation by other market actors is necessary for corporate accountability.
- *Corporate human rights standards.* How can corporations assure their consumers and investors that they will not exploit repression as a market opportunity? A resolution can explain the history and use of human rights standards, which corporations can adopt individually or collectively.

Whether the audience is Congress and the public or corporations and their consumers, the political speech component of state and local policy communicates the importance of economic advocacy in a global economy.

IV. ECONOMIC ADVOCACY FOR HUMAN RIGHTS

The corporate campaign against the Burma law has always been reinforced by the political argument that selective purchasing and other forms of economic advocacy are "sanctions" that do not work.¹⁸⁶

186. *Id.*

“Not working” has been defined in terms of the futility of persuading dictators to give up power. For example, the military government of Burma has little to do with the U.S. economy and cares little about public opinion anywhere.¹⁸⁷

The free-Burma campaign also understands the isolationist character of the military government, perhaps as well as the junta’s business partners. Not surprisingly, the view of “what works” for a human rights campaign is more from the bottom-up than from a top-down perspective. From the bottom-up perspective, influencing the generals in Rangoon is indeed an objective, but it is the least of five functions of procurement policy or other forms of economic advocacy. The five functions follow a natural sequence in building a grassroots campaign into an international movement. They include:

- defining human rights standards for market participation;
- targeting violations of those standards;
- building a constituency for human rights;
- creating a laboratory for national policy; and
- influencing foreign affairs.

Human rights advocates can evaluate the policy options discussed above in terms of whether the options enable them to fulfill these functions of economic advocacy for human rights. This is not to say that the process or means are more important than the policy result, which is to create economic incentives for corporations and governments to implement human rights. Rather, the point is that the process/means and the policy/ends are symbiotic. You cannot organize without a viable policy goal, and you cannot change policy without an organized base of support.

A. *Defining Human Rights Standards for Market Participation*

The first function of economic advocacy measures is the most obvious: they define human rights standards for market participation. Most immediately, they determine the companies with which a government will do business or in which a public investment manager will own stock.

Human rights standards for market participation can be classified in terms of whether they seek to avoid support for a repressive government or whether they seek to avoid association with individual companies:

187. *Id* at 16-18.

- *Avoiding support for repressive governments.* In addition to the Burma and South Africa boycotts, there have been proposals for procurement or divestment campaigns related to Nigeria,¹⁸⁸ Cuba,¹⁸⁹ Indonesia,¹⁹⁰ and Tibet.¹⁹¹ The lack of success in building the latter campaigns can be attributed to how difficult it is to amass the financial, human, and organizational resources that it takes to mount an international campaign. It also indicates the heavy burden of proof that advocates must meet in order to make the political case that violations of human rights are so endemic to the political and economic system that merely doing business in the country necessarily provides economic support that perpetuates the repression.¹⁹² This standard can be narrowed somewhat by focusing on delivery of financial services to a repressive government¹⁹³ or by focusing on strategic industries (such as oil, other extraction industries and electric power generation) that are directly owned or controlled by the repressive government in order to maximize its foreign exchange and revenue.¹⁹⁴
- *Avoiding association with individual companies.* A human rights standard can be defined as a boycott of goods that are produced in violation of a specific human right based on international law. For example, California amended its procurement code in September of 2000 to ban state agencies from purchasing goods made with the

188. The jurisdictions include Alameda County, CA; Amherst, MA; Berkeley, CA; and Oakland, CA. IRRR REPORT 1998, *supra* note 19, app. F (char).

189. See *Miami Light Project v. Miami-Dade County*, 97 F. Supp. 2d 1174, 1176 (S.D. Fla. 2000). As noted above, the Miami-Dade resolution was partly enjoined as an unconstitutional encroachment on the federal foreign affairs power and preempted by the federal sanctions on Cuba. See *id.* at 1181.

190. Bills were proposed in a number of jurisdictions but not adopted. See, e.g., H.B. 3177, 181st Gen. Court, Reg. Sess. (Mass. 1999).

191. Free-Tibet activists have promoted self-determination for Tibet and condemned Chinese occupation of Tibet through non-binding "Tibet Support Resolutions" that have been adopted in 2 states and 13 cities as of May 2000. The states include Massachusetts and New Mexico. The cities include Amherst, MA; Atlanta, GA; Berkeley, CA; Indianapolis, IN; Los Angeles, CA; Madison, WI; Miami, FL; Middletown, CT; New Paltz, NJ; Philadelphia, PA; Princeton, NJ; Santa Cruz, CA; and Tucson, AZ. *United States Supreme Court to Rule on Selective Purchasing*, TIBET BRIEF (Int'l Comm. of Law. for Tibet, Berkeley, Cal.), Spring/Summer 2000, at 13.

192. There are other important reasons why the burden of persuasion is high, including the risk of retaliation to U.S. companies (as in the case of China) and the quickly changing nature of events in the foreign country (as in the case of Nigeria).

193. See, e.g., H.B. 1273, 413th Reg. Sess. (Md. 1999) (proposing, but failing to enact, a bill for Nigeria).

194. *Id.*

benefit of forced labor.¹⁹⁵ A somewhat broader approach would be to boycott companies (not just individual products) that violate specific human rights or that directly benefit from exploitation of human rights. For example, four jurisdictions recently threatened to boycott Swiss banks because they benefitted from withholding assets from the families of Holocaust survivors and (at the time) refused to make what the families considered to be adequate compensation.¹⁹⁶ Another way to define a class of companies is to incorporate a corporate code of conduct by which companies can make a public commitment to honor human rights in the countries where they do business. For example, at least fifteen jurisdictions have a purchasing or investment preference for companies that subscribe to the MacBride principles for employers to avoid religious discrimination in Northern Ireland.¹⁹⁷

- As the litigation over the Burma law reveals, defining the scope of a human rights standard is a crucial political judgment. A broad definition will hit the target, but it will also include a large number of powerful market participants that may object to the standard and attack it in legislatures and courts. Human rights advocates are likely to be more risk-averse after the *Crosby* decision. If they choose an option that has a high risk of being overturned in court, they risk losing political credibility with public officials as well as wasting their time and resources. However, if they are too risk averse, they may miss an opportunity to retake and defend the middle ground. Whether that middle ground is worth defending depends upon the value that potential procurement or investment options add to the other functions of economic advocacy, which are addressed below.

195. CAL. PUB. CONT. CODE § 6108 (Deering 2000 Supp.).

196. The threatened boycott produced an almost immediate response by the banks, which led to a settlement of claims. The public officials involved in this effort included the comptroller of the City of New York and the state treasurers of California, New York and Pennsylvania. See John Zarcorostas, *Bern Withdraws Threat over Holocaust claims*, J. COM., July 8, 1998, 3A; John Goshko, *Swiss Banks' Pact Ends NY Threat of Sanctions*, WASH. POST, Aug. 14, 1998, at A14; John Goshko, *Sanctions on Swiss Banks to Proceed*, WASH. POST, July 2, 1998, at A3; David Sanger, *How a Swiss Bank Goat ld Deal Eluded a U.S. Mediator*, N.Y. TIMES, July 12, 1998, at A6; Henry Weinstein & John Goldman, *Nazi-Era Claims Spark Sanctions on Swiss Banks*, L.A. TIMES, July 2, 1998, at A1.

197. See, e.g., MASS. GEN. LAWS ANN. ch. 32, § 23(1)(d)(iii) (West 1998). The other 12 jurisdictions include Albany, NY; Boston, MA; Chicago, IL; Cleveland, OH; Lakewood, OH; New York, NY; Philadelphia, PA; Rensselaer City, NY; Rochester, NY; San Francisco, CA; Scranton, PA; and Yonkers, NY.

B. *Targeting Violations of Human Rights*

From an organizing and media perspective, the level of conflict that surrounded the Massachusetts selective purchasing law was desirable.¹⁹⁸ This is not to say that generating media coverage was the objective in choosing a controversial legislative standard, but it was certainly one tangible outcome of the strategy. Both the process of campaigning to enact selective purchasing laws and the process of defending those laws against legal attack enabled human rights advocates to communicate their message to millions of people. According to Simon Billenness, a strategist in the free-Burma campaign, the litigation “expanded public awareness of the human rights violations in Burma and how we as consumers, as investors, can use our freedom in the marketplace to effect political and social change.”¹⁹⁹ Of course, the publicity value of litigation does not justify starting or provoking litigation that would risk losing important economic policies. However, once the battle is joined, the Burma law litigation proves that even a losing cause can generate opportunities for public education.

Would purchasing or investment measures that stop short of a country-specific boycott enable human rights advocates to publicize violations of human rights? The alternative would be for private actors to disclose violations to the media or to promote company boycotts without any connection to public policy. By comparison, linking the same actions to a public procurement or public investment policy brings several advantages. First, it turns a distant human rights issue into a local issue that connects to the moral grounding of taxpayers and pension fund investors. Second, the passage of a controversial law and the likelihood of conflict over that law make news. Third, the focus on an individual company can still illustrate the violation of human rights by the government of a country.

The way to illustrate the value that middle-ground options bring to a campaign is to first summarize the nature of human rights violations by the Burmese government as a case study and then ask whether the presence of specific companies is direct enough to engage the company-specific policies being considered. The examples below presume that the alternative to a secondary boycott of all companies in Burma is

198. A Lexis News search on the terms “Massachusetts,” “Burma” and “National Foreign Trade Council” since the date on which the NFTC filed its complaint against the Massachusetts law (April 30, 1998) shows that there have been over 300 media stories on the litigation or relating the case to the human rights violations in Burma.

199. Goldberg, *supra* note 14.

either a primary boycott of companies that directly benefit from violations of human rights in Burma or non-procurement options such as divestment or shareholder resolutions that aim to change corporate behavior.

1. Violation of Human Rights by the Government of Burma

The “foreign policy” objective of both state and federal Burma laws was the restoration of democracy. After the government of Burma lost eighty-two percent of the seats in Parliament in 1990 to the National League for Democracy (“NLD”), the government repudiated the election.²⁰⁰ The junta—the State Law and Order Council (“SLORC”)—wages a war of attrition against the NLD. Its goal is to “annihilate” the NLD by imprisoning, harassing, economically coercing, and isolating NLD leaders.²⁰¹ Recently, the SLORC dropped all pretense of tolerating an opposition party when it blockaded attempts by Aung San Suu Kyi to travel outside of Rangoon, placed her and the entire NLD leadership under effective detention, raided the headquarters of the NLD, and escalated what various reports describe as an endgame to “finish off” the NLD.²⁰² A Special Rapporteur for the UN concludes that the economic suffering of the Burmese people is a result of this repressive political climate.²⁰³

200. For a capsule history of Burma since World War II, see *Brief History, BURMA: COUNTRY IN CRISIS* (Open Society Institute, New York, N.Y.), 1999, at 1-2 [hereinafter OSI REPORT]; see also Dhooge, *supra* note 9, at 390-92.

201. Aung San Suu Kyi, Editorial, *Why Burma Must Take Steps to Change*, WASH. POST, July 16, 2000, at B7; Katherine Smyth, *supra* note 16. The junta now calls itself the State Peace and Development Council (“SPDC”). However, outside of Burma and throughout this Article, the junta is referred to as the SLORC.

202. See Bertil Lintner, *Tightening the Noose: Rangoon's Military Junta Seems Bent on Finishing off the Main Opposition Party this Year*, FAR E. ECON. REV., Nov. 16, 2000, at 30; *Burma Cracks down on Pro-Democracy Party*, WASH. POST, Sept. 3, 2000, at A2; Seth Mydans, *Burma Leader Forced Home; Standoff Ends*, N.Y. TIMES, Sept. 3, 2000, at A1, 9.

203. The UN has reported the scope of repression in Burma as

including the practice of torture, summary and arbitrary executions, forced labor, including forced portering for the military, abuse of women, politically motivated arrests and detention, forced displacement, serious restrictions on the freedom of expression and association, and the imposition of oppressive measures directed, in particular, at ethnic and religious minority groups.

Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs, U.N. GAOR, 51st Sess., Agenda Item 110(c) 3-4, U.N. Doc. A/51/466 (1996) [hereinafter *Reports of Special Rapporteurs*].

The SLORC political repression extends to an elaborate system of economic control.²⁰⁴ It is not possible for a foreign investor or trader to do business in Burma without supporting and dealing with the military government.²⁰⁵ As recently reported by the National Labor Committee:

Foreign companies are not allowed to operate independently in Burma, but are required to be in joint ventures with the military government. . . . [For example,] apparel and textile firms in Burma are part-owned and controlled by the Burmese military government and the military itself. A portion of money earned from garment exports to the U.S. goes directly to the regime and is used to purchase weapons from China to repress the people of Burma.²⁰⁶

The military government derives financial support from trade not only from tariffs and taxes, but also profit-sharing from the holding companies that are owned by the Directorate of Defense Procurement or by the military's pension fund.²⁰⁷ Foreign investors and traders can only move funds through government-owned banks, and Burmese

204. See Brief of Amici Curiae American Federation of Labor and Congress of Industrial Organizations, *National Foreign Trade Council v. Laskey*, sub nom. *National Foreign Trade Council v. Natsois*, 181 F.3d 38 (1st Cir. 1999) (98-2304).

205. Blaine Harden, *How to Commit the Perfect Dictatorship*, N.Y. TIMES, Nov. 26, 2000, at WK5; Blaine Harden, *The New Burmese Leisure Class: Army Capitalists*, N.Y. TIMES, Nov. 21, 2000, at A3. In her extensive discussion of economic repression in Burma, Barbara Victor writes:

Without exception, outside investors who do business in Burma—ventures that range from real estate to drug trafficking to money laundering—are selected based on their understanding and agreement that all profits are shared with the SLORC. Although kickbacks and bribes are not unusual, what is most disturbing is how many foreigners who represent legitimate enterprises—both Asians and westerners—and who may be upstanding citizens in their own countries, change drastically when they arrive in Burma. Somehow, they tend to ignore all the basic tenets of human rights. Instead of bringing wit them their own code of ethics, they embrace the practices of the SLORC and pay the Burmese shamefully low wages; frequently turn a blind eye to inhuman conditions . . . and tacitly condone the razing of people's homes and lands to make way for their companies' industrial projects.

Barbara Victor, *THE LADY, AUNG SAN SUU KYI, NOBEL LAUREATE AND BURMA'S PRISONER* 19-20 (1998).

206. NAT'L LABOR COMM., U.S. RETAILERS INCREASE USE OF SWEATSHOPS IN BURMA AS IMPORTS SOAR 2-3, at <http://www.nlcnet.org/burma/burmapress.htm> (June 22, 2000) (hereinafter NLC REPORT).

207. See AM. EMBASSY RANGOON, 1 U.S. DEP'T OF STATE, FOREIGN ECONOMIC TRENDS REPORT: BURMA 16 (1997) (hereinafter EMBASSY REPORT).

citizens must exchange any foreign currency that they receive.²⁰⁸ According to the U.S. Embassy in Burma, “whenever, since 1988, the [government of Burma] received large infusions of foreign exchange, its defense imports increased sharply the following year.”²⁰⁹

It is this economic food chain linking all foreign trade and investment with military repression that Massachusetts sought to avoid by implementing the secondary boycott. In the words of the Levi-Strauss Corporation, one of the NFTC members that withdrew from Burma, “it is not possible to do business in Myanmar without directly supporting the military government and its pervasive violations of human rights.”²¹⁰ Curiously, the strength of this evidence was scarcely acknowledged in the judicial review of the Massachusetts law. The trial judge only alluded to the state’s moral concerns (which “may well be regarded as admirable”),²¹¹ while the First Circuit limited its moral inquiry to dismissive agreement: “There is one matter on which the parties are agreed: human rights in Burma are deplorable. This case requires no inquiry into these conditions.”²¹² It is no doubt easier to dismiss a moral purpose when that purpose is presented as a pure abstraction, stripped of all facts and human content.

The links between international trade and repression in Burma go beyond the financial food chain that sustains a regime seeking to “annihilate” its democratic opposition. The other links involve government policies that directly violate specific human rights. Addressing these government policies, rather than avoiding all contact with commercial actors connected to Burma, could serve as the standard for procurement or investment. Objectionable policies include the repression of labor rights, the forced relocation of Burmese citizens, and the systemic use of forced labor.

- *Repressing labor rights.* The AFL-CIO describes Burma as “one of the most longstanding and egregious violators” of international labor

208. Brief of Amici Curiae American Federation of Labor and Congress of Industrial Organizations at 19, *Natsois* (98-2304).

209. 2 EMBASSY REPORT, *supra* note 207, at 3.

210. Letter from Sabrina Johnson, Levi Strauss Corporation, to C.B. Loeb, Franklin Research & Development (June 22, 1992) (on file with author). This point is supported by the former U.S. Ambassador to Burma, Burton Levin, who said, “Foreign investment in most countries acts as a catalyst to promote change, but the Burmese regime is so single-minded that whatever money they obtain from foreign sources they pour straight into the army while the rest of the country is collapsing.” RAINFOREST RELIEF, FREE BURMA—NO PETRO-DOLLARS FOR SLORC CAMPAIGN 4, at <http://www.biblio.org/freeburma/boycott/oil/oil.html>.

211. *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 292 (D. Mass. 1998).

212. *National Foreign Trade Council v. Natisos*, 181 F.3d 38, 45 (1st Cir. 1999).

standards.²¹³ The ILO has documented systemic violations of ILO core labor standards on twelve different occasions in the past nineteen years: the military government recognizes no trade unions, and its Trade Union Act formally inhibits organizing and restricts the choice of union officials. In practice, it does not permit collective bargaining, and workers who attempt to organize or complain about conditions or wages are reported to the government, which threatens them with arrest.²¹⁴ This repression of labor rights violates the ILO Convention Concerning Freedom of Association and Protection of the Right to Organize.²¹⁵

- *Forced relocation.* Approximately 1,000,000 farmers and rural villagers have been displaced by the Burmese government.²¹⁶ About half have been concentrated in camps without adequate food supplies or medical care, and there are reports of arrests or shootings of people who attempt to return to their farms.²¹⁷ As a result, many

213. Brief of Amici Curiae American Federation of Labor and Congress of Industrial Organizations at 16, *Natsois* (98-2304).

214. See U.S. DEP'T OF LABOR, BUREAU OF INT'L AFFAIRS, REPORT ON LABOR PRACTICES IN BURMA 65-70 (1998) [hereinafter DOL REPORT] for a summary of the ILO findings; see also NLC REPORT, supra note 206, at 3. Burma's Law on the Formation of Associations and Organizations prohibits formation of a labor federation, so the Burmese Federation of Trade Unions is forced to operate in exile with the support of international labor organizations. Brief of Amici Curiae American Federation of Labor and Congress of Industrial Organizations at 17, *Natsois* (98-2304); DOL REPORT, supra, at 66, fns. 319, 320.

215. Convention Concerning Freedom of Association and Protection of the Right to Organize (No. 87), art. 2, Aug. 31, 1948, 68 U.N.T.S. 17.

216. The U.S. Committee for Refugees has estimated that the the total number of displaced persons within Burma as high as 1,000,000. U.S. COMM. FOR REFUGEES, WORLD REFUGEE SURVEY 2000: COUNTRY REPORT: BURMA 1 (2000), available at http://www.refugees.org/world/countryrpt/easia_pacific/burma.htm. The Burmese Border Consortium reports a minimum of 600,000 internally displaced persons in the border areas, mainly as a result of forced village relocations, including between 100,000 and 200,000 in the Karen State, 300,000 in the Shan State, 70,000 in the Karenni State, and 40,000 in the Mon State. Burmese Border Consortium, *Areas in Which Forced Labor Have Taken Place Since 1996* (map), reported in NORWEGIAN REFUGEE COUNCIL, GLOBAL IDP DATABASE, INTERNALLY DISPLACED PERSONS IN MYANMAR (BURMA), CAUSES AND BACKGROUND OF DISPLACEMENT, POPULATION PROFILE AND FIGURES, NATIONAL TOTAL FIGURES, available at <http://www.db.idproject.org/Sites.html> (last visited Sept. 21, 2000). Reports from the Karen Human Rights Group are higher than the estimates above, with 300,000 reported in central Shan State, 50,000 in Karenni State, more than 300,000 in Karen State, and many throughout the Tenasserim Division. KAREN HUMAN RIGHTS GROUP, AN INDEPENDENT REPORT BY THE KAREN HUMAN RIGHTS GROUP (June 1, 2000), at <http://www.ibiblio.org/freeburma.html> [hereinafter KHRG REPORT]. See generally AMNESTY INT'L, MYANMAR AFTERMATH: THREE YEARS OF DISLOCATION IN THE KAYAH STATE (June 1999) (hereinafter, AMNESTY INT'L REPORT).

217. AMNESTY INT'L REPORT, supra note 216, at 3; *Burma: Refugees*, in OSI REPORT, supra note 200, at 11; U.S. DEP'T. OF LABOR, 2000 UPDATE ON FORCED LABOR AND FORCED RELOCATION

people die from easily preventable diseases.²¹⁸ Those who flee from the camps live in primitive conditions in the jungle, or they attempt to cross military lines to join over 300,000 refugees in camps on the other side of the borders with Thailand, India and Bangladesh.²¹⁹ There are two motivations for forced relocation in Burma: the “four cuts” military campaign against armed ethnic minorities²²⁰ and major economic development projects such as logging, state farms, urban redevelopment, pipelines, and dams, which require large amounts of land to be cleared and secured.²²¹ The U.S. Department of Labor reports that the practice of forced relocation “appears to have escalated” since 1988.²²²

- *Forced labor.* Burma is building its commercial infrastructure at gunpoint. In the past decade, the military government has pressed over 5,000,000 people²²³ (approximately 11% of the population) into forced labor on railroad, highway, airport runway, agricultural-irrigation system, tourist attraction, and logging projects.²²⁴ Forced labor accounts for approximately

§ VI(A)-(B) (2000), at <http://www.dol.gov/ilab/public/media/reports/ofr/burma/forced.htm> [hereinafter DOL UPDATE].

218. “Forced relocations place people into life-threatening conditions in relocation centers . . . Relocation centers often have inadequate or entirely lack housing, proper sanitation, safe drinking water, food, and medical care.” DOL UPDATE, *supra* note 217, § VI(B).

219. AMNESTY INT’L REPORT, *supra* note 216, at 4-5; *Burma: Refugees*, OSI REPORT, *supra* note 200, at 11.

220. The army’s “Four Cuts” counter-insurgency strategy entails cutting links of intelligence, food, money and recruits between the ethnic guerilla forces and the local civilian population. For example, “In March 1992, 57 villages were ordered to relocate to Pruso and other sites in northwest Kayah State. As a result, 8000 people moved; dozens of them were reported to have died from malnutrition in the relocation centres; and others were forced to do work on the Aungban-Loikaw railway and perform portering duties for the military.” AMNESTY INT’L REPORT, *supra* note 214, at 3.

221. DOL UPDATE, *supra* note 217, § VI; *Burma: Refugees*, in OSI REPORT, *supra* note 200, at 12; U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, SUMMARY OF THE 1998 REPORT ON LABOR PRACTICES IN BURMA § II (Sept. 1999), at <http://www.dol.gov/dol/ilab/public/media/reports/ofr/burma/summary.htm> [hereinafter DOL SUMMARY].

222. DOL SUMMARY, *supra* note 221, § III.

223. DOL REPORT, *supra* note 214, at 35; ILO REPORT, *supra* note 110, § 262.

224. *See, e.g.*, 1 BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1999 987, 1003 (2000) [hereinafter 1999 COUNTRY REPORT]; DOL REPORT, *supra* note 214, at 31-33; DOL UPDATE, *supra* note 217, § I; ILO REPORT § 528, *supra* note 110; *Measures Taken by the Government of Myanmar Following the Recommendations of the Commission of Inquiry Established to Examine its Observance of the Forced Labour Convention* §§ 34-44, ILO Doc. GB274/MYANM (May 21, 1999), at <http://www.ilo.org/public/english/standards/reln/gb/docs/gb274/dg-myanmar.htm> [hereinafter *ILO Director’s Report*]; NAT’L COALITION GOV’T

seven percent of Burma's economy.²²⁵ Children and the elderly are commonly forced onto labor teams because village elders want to avoid sending the adults who are needed to grow food upon which the village depends for its survival.²²⁶ The penalties for refusing to work include fines, beatings, arrest and detention.²²⁷ Use or toleration of forced labor violates the ILO forced labor conventions, which Burma ratified in 1948,²²⁸ and even the Burmese constitution prohibits forced labor.²²⁹

- *Military portering.* The most common form of forced labor, military portering, is not included in the numbers reported above.²³⁰ Portering is most likely to be a violent experience for ethnic minorities and women, who are separated at night and frequently raped by soldiers.²³¹ The U.S. Department of Labor reports that in

OF THE UNION OF BURMA (NCGUB), HUMAN RIGHTS YEARBOOK 1998-99: BURMA 106-07 (1999) (hereinafter NCGUB REPORT).

225. DOL REPORT, *supra* note 214, at 42.

226. ILO Director's Report, *supra* note 224, § 24.

227. *Id.* § I(B). A U.S. State Department report on Burma's human rights violations stated:

[i]n April authorities in Rangoon Division's Htan-Da-Bin Township ordered villagers to work on a road between Hle-Seik and Kyun Ngu villages; after some villages failed to appear, the authorities sent a letter to village ward leaders threatening to fine them if they failed to contribute labor the next day. In May authorities in Rangoon Division ordered villagers to work on a road from Insein to Nyaung Don or pay a fine of about \$1 (300 kyat) per household; police threatened residents with beatings or detention if they refused and arrested those who did not comply.

1999 COUNTRY REPORT, *supra* note 224, at 1003.

228. Convention Concerning the Abolition of Forced Labor (No.105), *supra* note 113; Convention Concerning Forced or Compulsory Labor, *supra* note 113; DOL REPORT, *supra* note 214, at 20 & n.59;

229. DOL REPORT, *supra* note 214, at 23.

230. Military portering is distinct from forced labor in that forced laborers usually return to their homes at the end of the day, while porters are forced to accompany soldiers on the move for days or weeks at a time. AMNESTY INT'L REPORT, *supra* note 216, at 7-13.

231. The U.S. State Department found that

[m]any detailed credible reports indicate that in recent years, especially in areas inhabited chiefly by members of the Chin, Karen, Karenni, and Shan ethnic groups, army units have greatly increased their use of forced labor for logistical support purposes, including to build, repair, or maintain army camps and roads, as well as to plant crops, cut or gather wood or bamboo, cook, clean, launder, weave baskets, fetch water for army units—and, in the case of young women, to provide sexual services to soldiers. The number of reports of this practice has increased since 1997, when the

numerous cases, portering has involved “the destruction of villages, torture, rape, maiming and killing of exhausted, sick or wounded porters, the killing of a non-cooperative village head, and the use of civilians, including women and children, as mine sweepers and human shields.”²³²

All of this evidence of human rights violations by the government of Burma is no longer relevant to the validity of a secondary boycott of all companies doing business in Burma; the Court has concluded that promotion of democracy in Burma through a secondary boycott is preempted by the federal Burma law. However, as discussed in Part III above, the Court arguably left room for a “primary” approach that is neutral with respect to doing business in Burma. It is even more likely that the Court left room for non-procurement policies such as divestment or support for shareholder resolutions. There is no shortage of meaningful targets for such investment policies.

In September of 2000, the Investor Responsibility Research Center (“IRRC”) reported that there are still 329 foreign companies doing business in Burma,²³³ 73 of them are likely to have a significant number of shares held by U.S. investors.²³⁴ Of these, fifty-one U.S. parent companies do business in Burma, including seven with equity ties and forty-four with non-equity ties.²³⁵

One of the more interesting aspects of the IRRC research is that many U.S. firms feel a need to report minimal contacts with Burma, even though their subsidiary engagement in Burma can be very extensive. For example:

junta required regional military commanders to become more self-sufficient logistically.

1999 COUNTRY REPORT, *supra* note 224, at 1003; NCGUB Report, *supra* note 224, at 99 (“Porters are also exposed to dangerous combat situations. These can include exposure to mines, booby-traps and ambushes. Soldiers sometimes force the porters to walk ahead of them in areas where mines or ambushes are suspected in order to minimize the exposure of troops to such dangers.”).

232. DOL UPDATE, *supra* note 214, § IV.

233. INVESTOR RESPONSIBILITY RESEARCH CTR., MULTINATIONAL BUSINESS IN BURMA (MYANMAR) 6 (Sept. 2000) [hereinafter IRRC REPORT 2000].

234. The count of 73 companies is based on the number of companies that sell their stock on the New York, American, or Nasdaq stock exchanges. *See id.*

235. *Id.*

- *Emerson Electric* reported to IRRC that it has a representative trading agreement with a Rangoon company.²³⁶ Emerson also owns a 100% interest in 176 subsidiaries that do business in Burma.²³⁷
- *American Express* reported to IRRC that it “maintains no direct presence in Burma.”²³⁸ American Express also owns a 100% interest in 143 subsidiaries, more than a 50% interest in 12 subsidiaries, and less than a 50% interest in 19 subsidiaries, all of which do business in Burma.²³⁹
- *Caterpillar* reported to IRRC that it has two formal sales channels in Burma, one of which is an Indian company, and one of which is a Caterpillar subsidiary.²⁴⁰ Caterpillar also owns a 100% interest in 30 other subsidiaries, more than a 50% interest in 6 subsidiaries, and less than a 50% interest in 27 subsidiaries, all of which do business in Burma.²⁴¹
- *Black & Decker* reported to IRRC that it has “no assets, property, equity or employees in Burma.” The company reported that its sales through a local distributor were on an “exceedingly small scale.”²⁴² Black & Decker also owns a 100% interest in 31 subsidiaries that do business in Burma.²⁴³

This information should remind policy makers that corporate structures are designed to limit liability, and they can obscure visibility and accountability as well. Any policy that must look through the corporate veil of parent companies to examine whether they have simply assigned their unsavory business relationships to a subsidiary.

2. Complicity in Violation of Human Rights by Private Companies

A “primary” procurement measure would avoid doing business with companies that violate human rights themselves or directly benefit from the violation of human rights. While this narrower approach might escape obstacle preemption, it also constricts a law’s utility as a tool to promote human rights. Thus, a second review of the human rights abuses in Burma is necessary in order to explore the extent to which private companies are more directly connected to the violation

236. *Id.* at AII-3.

237. *Id.* at app. B.

238. *Id.* at AII-1.

239. *Id.* at app. B.

240. *Id.* at AII-2.

241. *Id.* at app. B.

242. *Id.* at AII-1.

243. *Id.* at app. B.

of human rights. For example, private companies might be involved in handling Burmese exports that were produced under conditions that violate human rights.

The paragraphs that follow summarize evidence of the connections between human rights violations and foreign corporations on two levels. The first level identifies specific sectors of the Burmese economy in which corporations are most likely to benefit from violation of human rights. The second level identifies three types of corporate connections: (1) U.S. companies still active in those sectors; (2) U.S. companies that have withdrawn from Burma, but which could return in the future; and (3) the foreign firms in those sectors that are most likely to sell stock to U.S. investors or sell goods or services to U.S. consumers.²⁴⁴

- *Oil and gas pipelines.* Forced labor was used in construction of the Yadana gas pipeline, which is a joint venture between the military government's oil and gas enterprise, MOGE, Total S.A., a French corporation, and Unocal, a U.S. corporation. The ILO has cited evidence that forced labor was used by the military government to clear the jungle by hand, grade the pipeline route and build a service road, build the parallel Ye-Dawei railroad, construct landing pads for helicopters, construct barracks, and provide porters for troops guarding the pipeline.²⁴⁵ After all this work was done, Unocal and Total paid workers to lay the pipeline. They sought to distance their paid work "by the Project" from the vast amount of forced labor commandeered by the government "on behalf of" the Project, of which they were aware.²⁴⁶
 - *The corporate connection.* A group of fourteen villagers from the Tenasserim region of Burma sued Unocal in the United States under the federal Alien Tort Claims Act²⁴⁷ for acts of the military for the benefit of the pipeline project with Unocal's knowledge and consent. These acts included violation of international

244. Each company is cited with its home country and stock exchange noted in parenthesis. The stock exchanges counted as most likely to sell to U.S. investors are NYSE, Nasdaq and OTC. However, U.S. institutions also invest in foreign stock exchanges, particularly larger institutional investors such as endowments and mutual funds.

245. ILO REPORT, *supra* note 110, at §§ 505-509.

246. Order Granting Defendants' Motion for Summary Judgment, John Doe I v. Unocal Corp. (C.D. Cal. 2000) (No. CV96-96-6959, John Roe III v. Unocal Corp. (C.D. Cal. 2000) (No. CV 96-6112).

247. 28 U.S.C. § 1350 (1994); see William Branigin, *Rights Victims in Burma Want a U.S. Company to Pay, Suit Alleges Army Abuses While Pipeline Was Built*, WASH. POST, Apr. 13, 1999, at A13.

human rights including forced labor, forced relocation and other violent acts.²⁴⁸ The federal trial judge dismissed the tort claim on grounds that the villagers had to prove that Unocal “controlled” the military’s abuses or that it “sought” the use of forced labor.²⁴⁹ However, the court did find that “Unocal knew that forced labor was being utilized and that the joint venturers participants benefitted from the practice.”²⁵⁰

Unocal has divested its petroleum sales business in the United States, which takes it out of the procurement market. In terms of investment policy, Unocal and its contractors present visible targets for shareholder initiatives and, therefore, a potential subject of local divestment or shareholder accountability measures. Another important target is Totalfina, Unocal’s joint-venture partner in Burma. When Total S.A. acquired Fina, it became the fourth-largest petroleum company in the world, controlling 2,400 gas stations in the United States.²⁵¹ Subsidiaries of Halliburton built the offshore portion of the Yadana gas pipeline,²⁵² and

248. Order Granting Defendant’s Motion for Summary Judgment, *John Doe I* (No. CV96-96-6959), *John Roe III* (No. CV 96-6112) at 2.

249. Order Granting Defendant’s Motion for Summary Judgment at 30, 37, *John Doe I* (No. CV 96-6959).

250. *Id.* at 38. Without deciding the specific claims before a trial, the trial court summarized the evidence against Unocal as demonstrating that

Unocal knew that the military had a record of committing human rights abuses; that the project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortuous acts.

Id. at 27-28; see Daniel Zwerdling, *Blood and Oil in Burma*, AMERICAN RADIO WORKS, trans., (June 12, 2000) at <http://www.americanradio-works.org/features/burma/index.html>; William Branigin, *Unocal ‘Smoking Gun’ Alleged*, WASH. POST, May 2, 2000, at E1.

251. See Edmund L. Andrews, *A French Concoction; Totalfina’s Acquisition of Elf May Be Only a Prelude*, N.Y. TIMES, Sept. 21, 1999, at C1; *Takeover Bid Helps Spark Rally in Europe; Total Fina Targets Rival*, CHI. TRIB., July 6, 1999, at C3.

252. A division of Halliburton’s Energy Services Group, European Marine Contractors (EMC), built the 365-kilometer offshore portion of the Yadana pipeline after Halliburton

have signed an agreement to build a pipeline from Burma to India.²⁵³ The other U.S. pipeline firms active in Burma include BJ Services and Smith International, both of which are publicly traded.²⁵⁴ At least ten U.S. petroleum firms have withdrawn from Burma including eight that are publicly traded and two that sell petroleum products to the public.²⁵⁵ Including Totalfina, at least seventeen foreign petroleum-sector firms are still active in Burma, eight of which are traded in the United States.²⁵⁶ At least six foreign

Geophysical Services provided pre-construction services for the pipeline. KENNY BRUNO & JIM VALLETTE, HALLIBURTON'S DESTRUCTIVE ENGAGEMENT 9 (EarthRights Int'l Report), Oct. 2000, at <http://www.earthrights.org/Halliburton.pdf> [hereinafter EARTHRIGHTS HALLIBURTON REPORT]; Peter Waldman, *A Pipeline Project In Myanmar Puts Cheney in Spotlight, Halliburton's Contract Came as U.S. Officials Sought to Isolate a Brutal Junta*, WALL ST. J., Oct. 27, 2000, at A1.

253. *Id.* at 11; see Wayne Madsen, *Cheney at the Helm*, THE PROGRESSIVE, Sept. 1, 2000, at 21; Matthew Campbell, *Deputy Dick's Posse of Women Join Fight*, SUNDAY TIMES, July 30, 2000, at <http://www.sunday-t..pages/sti/2000/07/30/stifgnusa02005.html>; Simon Pia, *Oiling the Wheels*, THE SCOTSMAN, Sept. 15, 2000, at 16; Public Information Network, *Corporate Profiles Compiled by George Dufan*, available at <http://www.endgame.org/dtc/h.html> (last visited Oct. 31, 2000). Halliburton is a corporate board member of the National Foreign Trade Council, and Dick Cheney, Halliburton's recently departed CEO, has been a leading critic of sanctions. See Christopher Marquis, *Over the Years, Cheney Opposed U.S. Sanctions*, N.Y. TIMES, July 27, 2000, at A21.

254. BJ Services Co. (formerly a wholly-owned Baker Hughes subsidiary) and Smith International are both traded on the NYSE. IRRIC REPORT 2000, *supra* note 19, at A-I-1 and A-II-6.

255. The 10 U.S. firms that have withdrawn from Burma include: Baker Hughes (USA/NYSE), ExxonMobil (USA/NYSE), Grant Geophysical (USA/OTC), Marine Drilling (USA/Nasdaq), McDermott International (USA/NYSE), Murphy Oil (USA/NYSE), Pacific Architects & Engineers (USA/privately held), Parker Drilling (USA/NYSE), Santa Fe Snyder Corp. (USA/NYSE), and Texaco (USA/NYSE). SOROS Foundation Network, *The Burma Project*, at <http://www.soros.org/burma/burmainvestors.html> (last modified July 17, 2000) [hereinafter *OSI Corporate List*]; see IRRIC REPORT 2000, *supra* note 19, at app. C; Press Release: Free Burma Coalition, Free Burma Coalition to Dick Cheney: Get Out of Burma (July 31, 2000) (on file with author) (hereinafter FBC Press Release).

256. The 17 foreign firms that are active in Burma include: Daewoo Corp. (Korea/SEO), Dominion Bridge Corp. (Canada/Nasdaq), Export Import Bank of Thailand, Hyundai Pipe—a Hyundai subsidiary (Korea/SEO), Itochu Corp. (Japan/OTC), Kailis Holding (Australia/unknown), Longreach Gold Oil (Australia/ASX), Mercantile International Petroleum (Bahamas/OTC), Mitsubishi (Japan/OTC), Mitsui & Co. Ltd. (Japan/Tokyo), Mitsui Construction Co., Ltd. (Japan/Tokyo), Nippon Mitsubishi Oil Corp. (Japan/OTC), Petroliam Nasional—Petronas (Malaysia), PTT Exploration & Production (Thailand/OTC), Pacrim Energy (Australia/unknown), Premier (UK/OTC) and Totalfina (France/NYSE). EARTHRIGHTS HALLIBURTON REPORT, *supra* note 252, at 11; IRRIC REPORT 2000, *supra* note 19, at app. C; *OSI Corporate List*, *supra* note 255.

petroleum firms have withdrawn from Burma, four of which sell stock in the United States, and two of which sell products in the United States.²⁵⁷

- *Dams for hydro-power.* The military government is “wiping out the population of areas to be flooded by the Salween dam project,” which is planned for Southern Shan state. Most of this forced relocation, which destroyed several hundred villages in twenty-three townships, has already occurred.²⁵⁸ The government cannot build a project of this size (a dam 188 meters high and costing three billion dollars) without foreign investment and foreign financial, engineering, and construction services.
 - *The corporate connection.* To date, the companies providing these services are reported to include Japanese, Thai, and German corporations.²⁵⁹ Any company involved in the project is aware of the forced relocation of over 300,000 people in the Shan state and the reliance of Burmese authorities on forced labor for clearing jungles, building roads and portering for security forces. There are already 500 troops “protecting” the companies involved in preparations to build the dam.²⁶⁰ According to human rights groups monitoring the project, the foreign companies avoid contact with local Shan people, much in the way that Unocal avoided contact with forced labor that paved the way for its

257. The six foreign petroleum-sector firms that have withdrawn from Burma include: Empire Oil (Australia/privately owned), BP Amoco (UK/NYSE), Petro-Canada (Canada/CDNX), Royal Dutch Petroleum-Shell (Netherlands/NYSE), Shell Transport & Trading (UK/NYSE), and Yukong Ltd. (S. Korea/NYSE). IRRRC REPORT 2000, *supra* note 19, at app. C.

258. *Government Reportedly Moving Villagers to Make Way for Dam Project*, BBC Summary of World Broadcasts, Sept. 11, 2000, at Part 3

259. “For years potential builders and funders have eyed the Salween the same way hungry wolves might gaze upon a stray lamb.” Richard Humphries, *Controversy Dogs Burma’s Salween Dam*, MAINICHI DAILY NEWS, Aug. 3, 2000, at 9. According to Harn Yawngshwe of Brussels-based Euro-Burma, a program funded by the EU, the Japanese government is implicated because it owns 67% of Electric Power and Development Corporation, which has completed a feasibility study for the dam. *Id.*

260. *Id.*

pipeline construction.²⁶¹ At least three U.S. construction firms have withdrawn from Burma (none of which are publicly traded), and none are reported as active there now outside of the oil and gas pipeline sector.²⁶² At least three foreign construction or construction equipment firms are active in Burma, two of which sell stock in the United States.²⁶³

- *Transportation.* Forced labor is commonly used to build transportation infrastructure including roads,²⁶⁴ airports,²⁶⁵ and railroads, which are often large-scale projects involving thousands of forced laborers.²⁶⁶
 - *The corporate connection.* The U.S. Embassy reports that U.S. firms provide transportation services in Burma.²⁶⁷ Caterpillar sells and services locomotives for Burma's railroads.²⁶⁸ One U.S. delivery company remains in

261. *Id.* (citing reports from non-governmental monitoring groups, including Salween Watch, the Shan Herald Agency for News, and Towards Ecological Recovery and Regional Alliance, a Thai environmental organization).

262. The three U.S. firms that have withdrawn from Burma include: Black & Veatch (USA/privately held), KD Engineering Co. Inc. (USA/privately held), and Pacific Architects & Engineers Inc. (USA/privately held). IRRRC REPORT 2000, *supra* note 19, at app. C.

263. The three foreign companies involved with dams and hydro-power construction include: Hitachi Construction Machinery Co. (Japan/Tokyo), Hitachi Ltd. (Japan/NYSE) and Kajima Corp (Japan/OTC). *Id.* at BI-13, BI-16.

264. Forced labor on roads includes DOL UPDATE, *supra* note 217, at 5-7.

265. Forced labor was used to construct access roads to the Mandalay international airport and to extend runways at other airports. 1999 COUNTRY REPORT, *supra* note 224, at 7; DOL REPORT, *supra* note 214, at 36-37.

266. Forced labor on railroads includes the following: "3000-4000 people (men, women, minors, and the elderly) were forced to work without compensation to rebuild an embankment along the Ye-Tavoy railway road. Almost all of the villagers in Yebyu, Longlon, Thayet Chaung, and Tavoy townships had to work at the construction sites about 10-15 days every month from June 1998 until the end of the year." DOL UPDATE, *supra* note 217, at 8. "[I]n Saigaing Division over 1000 persons were herded into a 'volunteer labor camp' and forced to work to build a railroad; at least 17 reportedly died from malaria." 1999 COUNTRY REPORT, *supra* note 224, at 1003.

267. U.S. DEP'T OF STATE, COUNTRY COMMERCIAL GUIDES FY 1999: BURMA ch. I (1998), at http://www.state.gov/www/about_sta..ides/1999/eastasia/burma99_01.html [hereinafter COMMERCIAL GUIDE].

268. Myanmar Railways reports that it uses a number of Caterpillar locomotives, and the military government's rail ministry has sent representatives to several Caterpillar plants in the United States for training. IRRRC REPORT 2000, *supra* note 19, at AII-2.

Burma,²⁶⁹ and two have withdrawn.²⁷⁰ DHL International, a Belgian parent company that operates a subsidiary in Burma, does a very large business in the United States, the most prominent aspect of which is a venture to create an “international strategic alliance” with the U.S. Postal Service.²⁷¹ Including DHL, at least ten foreign firms provide transportation services in Burma,²⁷² two of which sell stock in the United States. At least one foreign transportation firm has withdrawn from Burma.²⁷³ A less direct connection is presented at Yangon Port. There, the government has licensed one of the world’s largest heroin traffickers, to own and operate port facilities.²⁷⁴ This comes at a time when Burma already supplies 60 percent of heroin seized in the United States, and the amount of Burmese heroin sold in New York City tripled between 1989 and 1996.²⁷⁵

- *Apparel.* The military government supports the Burmese apparel industry by using forced labor to build industrial parks where the newest factories are located.²⁷⁶ As noted above, the government

269. The U.S. firm that remains is Indo-China Express (USA/privately held). *Id.* at AI-1.

270. The two U.S. delivery firms that withdrew from Burma include: Federal Express (USA/NYSE) and United Parcel Service (USA/NYSE). *Id.* at app. C; *OSI Corporate List, supra* note 255.

271. IRRRC REPORT 2000, *supra* note 19, at BI-6; U.S. Postal Service, *Introducing . . . Global Express Guaranteed, available at* <http://gxxg.smi.com/gxxg/index.html> (last visited on Nov. 30, 2000).

272. The 10 foreign transportation firms that are active in Burma include: Boustead Holdings (Malaysia/OTC), C&P Holdings (Singapore/unknown), DHL International (Belgium/privately held), Export Import Bank of Thailand (Thailand), Malayan Banking (Malaysia/Kuala Lumpur), F.A. Voight (Netherlands/privately held), Hutchinson Whampoa (Hong Kong/OTC), Italian-Thai Development (Thailand/Thailand), Kelang Port Management (Malaysia/unknown), and Yusen Air & Sea Service (Japan/unknown). IRRRC REPORT 2000, *supra* note 19, at BI-4-16, BII-14.

273. The foreign transportation firm that withdrew from Burma is Transurb Consultants (Belgium/unknown). *Id.* at app. C.

274. Dennis Bernstein & Leslie Kean, *People of the Opium: Burma's Dictatorship of Drugs*, THE NATION, Dec. 16, 1996, at 11.

275. *Id.*

276. 1999 COUNTRY REPORT, *supra* note 224, at 1004; U.S. INT'L TRADE COMM'N, U.S. IMPORTS FOR CONSUMPTION AT CUSTOMS VALUE FROM BURMA (MYANMAR) (1999), at http://dataweb.usitc.gov/scripts/cy_m3.asp (indicating that the two highest-ranked categories account for 80% of total U.S.

threatens to arrest and imprison workers who complain or attempt to organize in joint-venture factories owned by foreign investors and state-owned trading companies. The Economist Intelligence Unit reports that textile workers in Burma now earn some of the world's lowest wages, approximately five U.S. cents per hour.²⁷⁷

- *The corporate connection.* Apparel trade accounts for eighty percent of U.S. imports from Burma,²⁷⁸ notwithstanding the fact that several U.S. apparel companies pulled out of Burma since the early 1990s.²⁷⁹ However, since the U.S. sanctions on "new investment" were implemented in 1996, U.S. apparel imports from Burma have grown dramatically, up 272% between 1995 and 1999 to a level of \$340 million per year in 2000.²⁸⁰ "Made in Myanmar" labels have begun appearing on university-licensed logo apparel in campus stores, prompting immediate boycotts and removal of goods.²⁸¹ At least thirty apparel companies are report-

imports from Burma). One foreign firm known to operate a garment factory is Daewoo Corp. (Daewoo's now bankrupt/inreceivership—they might not have the factory anymore). IRRIC REPORT 2000, *supra* note 19, at BI-6.

277. Economist Intelligence Unit, *Country Report—Myanmar, Employment, Wages & Prices*, May 11, 2000, subscription service available at <http://db.eiu.com> (on file with author).

278. U.S. INT'L TRADE COMM'N, *supra* note 276.

279. For example, the Levi Strauss Company stated that "It is not possible to do business in Myanmar without directly supporting the military government and its pervasive violations of human rights. This is not consistent with our own sourcing guidelines." Letter from Sabrina Johnson, *supra* note 210. Other apparel companies to leave Burma include Eddie Bauer, J. Crew, Liz Claiborne, London Fog/Pacific Trails, Macy's, Oshkosh B'Gosh, Ralph Lauren, and Reebok. IRRIC REPORT 2000, *supra* note 19, at app. C; *OSI Corporate List*, *supra* note 255.

280. The brand names found with "Made in Myanmar" labels in early 2000 include Adidas, ASL, Bugle Boy, Burlington Coat Factory Conway, Dress Barn, Filene's, Jordache, Karl Kani, Kasper, Kohls, Macy's, Montgomery Ward, Nautica, Perry Ellis, Sports Authority, Warner Bros., and Williams-Sonoma. NAT'L LABOR COMM., U.S. RETAILERS INCREASE USE OF SWEATSHOPS IN BURMA AS IMPORTS SOAR 1-2 (June 22, 2000, New York, N.Y.). As of July 20, 2000, the following companies responded to the National Labor Committee report by announcing that they would cease future production in Burma: Adidas, Nautica and Warner Brothers. Correspondence from the respective companies to Charles Kernaghan, Executive Director of the National Labor Committee (July 2000) (on file with author).

281. Logo apparel made in Burma was on sale under the JanSport label at the University of California - Berkeley. The University of California is on of many schools to join the Worker's Rights Consortium, which acts as a watchdog to assure that universities to not license their logos for sale on apparel that is made under sweatshop conditions. See Andrea O'Brien, *Activists Angry at Cal Student Store*, THE DAILY CALIFORNIAN, Sept. 21, 2000, at <http://www.dailycal.org/article.asp?id+3258>. JanSport responded to these reports by authorizing retailers to return Burmese-

edly sourcing their goods in Burma,²⁸² at least fifteen of which are U.S. firms that are publicly traded on U.S. stock exchanges. At least fourteen apparel firms have withdrawn from Burma, thirteen of which based in the United States (and eight of which are publicly traded)²⁸³ and one of which is a foreign firm.²⁸⁴

- *Manufacturing.* Like apparel, manufacturing in Burma most directly benefits from violation of human rights because of the repression of labor rights. Some firms also benefited from the in-kind subsidy of cheap land in industrial parks that were cleared by forced relocation and developed with forced labor.²⁸⁵ The Karen Human Rights Group estimates that the national figures on forced relocation would more than double when urban displacement connected with foreign-owned factories is taken into account.²⁸⁶
 - *The corporate connection.* U.S. exports have been declining, although the trade in industrial machinery still accounts for fifty-four percent of U.S. exports to

made apparel to the company, freight-free. Free Burma Coalition, *No Sweat Money for the Burmese Regime!* (Oct. 25, 2000), at <http://www.freeburmacoalition.org/frames/campaigns/sweatshops/sweatshops.html>.

282. Including the 17 companies identified by the National Labor Committee, the companies reported to source their goods in Burma are Adidas, Bugle Boy, Bradlee's, Burlington Coat Factory (USA/NYSE), Capital Mercury Shirt Co. (USA/privately held), Cluett Peabody & Co., Consolidated Stores (USA/NYSE), Conway, Dress Barn (USA/Nasdaq), Filene's, Gaeltaryn Ltd. (USA/privately held), Jordache, Karl Kani (USA/privately held), Kasper ASL (USA/Nasdaq), Kohl's (USA/NYSE), Leslie Fay Companies, Macy's—Federated Department Stores (USA/NYSE), Montgomery Ward (USA/NYSE), Mothers Work (USA/Nasdaq), Nautica, J.C. Penny, Perry Ellis, Salmor Import Export Corp. (privately held), Sears (USA/NYSE), Sports Authority (USA/NYSE), Warner Bros. (USA/NYSE), and Williams-Sonoma (USA/NYSE). IRRRC Report 2000, *supra* note 19, at AII-2-6; NAT'L LABOR COMM., *supra* note 280, at 1-2; *OSI Corporate List*, *supra* note 255.

283. The 13 U.S. apparel firms that withdrew from Burma are Braun's Fashions (USA/Nasdaq), Columbia Sportswear (USA/Nasdaq), J. Crew (USA/privately held), Kmart (USA/NYSE), Kellwood (USA/NYSE), Levi Strauss (USA/privately held), Liz Claiborne (USA/NYSE), London Fog (USA/privately held), Mamiye Brothers (USA/privately held), Osh Kosh B'Gosh (USA/NYSE), Polo Ralph Lauren (USA/unknown), Target (USA/NYSE), and Venture Stores (USA/NYSE). IRRRC REPORT 2000, *supra* note 19, at app. C.

284. The Burton Group (UK/unknown) is the foreign apparel firm that withdrew from Burma. *Id.*

285. DOL SUMMARY, *supra* note 221, § II; DOL UPDATE, *supra* note 217, § VI.

286. See KHRG REPORT, *supra* note 216, part IV (estimating a total of 2-4 million internally displaced persons including uncompensated urban displacees connected with factory construction).

Burma.²⁸⁷ Probably the most visible importer to the United States that operates manufacturing operations in Burma is the Suzuki Motor Corporation, which opened a Rangoon car and motorcycle plant in 1998 as a joint venture with the military government.²⁸⁸ At that time General Motors held a 10% share of Suzuki stock, and in September 2000, GM doubled its stake when it purchased an additional \$600 million of new Suzuki stock.²⁸⁹ While Suzuki is currently the target of a consumer boycott because of its partnership with the military government,²⁹⁰ Toyota has withdrawn from Burma.²⁹¹ Including Suzuki, seven foreign manufacturing firms are active in Burma, of which at least three (Daewoo, Hitachi and Suzuki) sell goods or services in the United States, and three (Hitachi, Mitsui and Suzuki) sell stock in the United States.²⁹²

- *Agriculture.* Apart from opium, the U.S. Embassy identifies the primary agricultural exports from Burma as rubber, aquaculture shrimp and cash crops.²⁹³ Forced labor, including forced child labor, has been widely used since 1998 to drain virgin wetlands

287. U.S. INT'L TRADE COMM'N, U.S. DOMESTIC EXPORTS AT FAS VALUE TO BURMA (MYANMAR) (1999), at <http://dataweb.usitc.gov/scripts/c..TS2&cc=5460&cn=Burma+%28Myanmar%29.asp> (estimating the two highest-ranked categories at 54% of total exports to Burma).

288. See James B. Trece, *Suzuki Sets Joint Venture in Myanmar*, AUTOMOTIVE NEWS, Oct. 19, 1998, at 17. Suzuki is based in Japan (OTC). IRRRC Report 2000, *supra* note 19, at BI-31.

289. Edwina Gibbs, *GM to Double Stake in Suzuki, Cement Asia Footing*, REUTERS NEWSWIRE, Sept. 14, 2000; Trece, *supra* note 288, at 17. General Motors is based in Detroit, Michigan (NYSE). IRRRC REPORT 2000, *supra* note 19, at AII-4.

290. See Free Burma Coalition, *Protest—Free Burma Coalition, DC Burma Activist Network, and the Burmese Women's Union*, FNS DAYBOOK, Aug. 27, 1999; Free Burma Coalition, *Free Burma Coalition Launches Suzuki Boycott, 'Japanese Company Propping Up Narco-Dictatorship in Burma'*, PR NEWSWIRE, May 4, 1999, at 12; Steven Greenhouse, *A Weapon for Customers; The Boycott Returns*, N.Y. TIMES, Mar. 26, 2000, § 4, 4.

291. Toyota recently announced its withdrawal from Burma. FBC press release, *supra* note 246. However, Toyota continues to operate a service center through a subsidiary. IRRRC REPORT 2000, *supra* note 19, at BI-34.

292. The seven foreign manufacturing firms that are active in Burma include: Ban Hock Hin Engineering (Singapore/unknown), Daewoo (Korea/SEO), Hitachi Ltd. (Japan/NYSE), Mamee-Double Decker (Malaysia/Kuala Lumpur), Mitsui & Co. Ltd. (Japan/OTC), Parekh Platinum (/India) and Suzuki (Japan/OTC). *Id.* at BI-3-31.

293. COMMERCIAL GUIDE, *supra* note 267, ch. I.

for crops that the government of Burma describes as export commodities in its economic plans.²⁹⁴ For purposes of the U.S. government procurement ban on products made with forced labor, the U.S. Department of Labor reports that crops grown in Burma with forced child labor include beans, chilies, corn, pineapples, rice and sugarcane.²⁹⁵ Forced labor is also used to construct dams and ditches for agricultural irrigation,²⁹⁶ produce rubber, and raise shrimp in commercial ponds built on the coast.²⁹⁷

- *The corporate connection.* By far, the fastest growing category of Burmese imports to the United States is fish and crustaceans, including shrimp. The rate of increase in the past year is over 500%.²⁹⁸ The U.S. importers of Burmese food products have not been identified; one U.S. food processor (not publicly traded) has withdrawn from Burma.²⁹⁹ At least two foreign firms are known to have withdrawn from Burma, one of which sells stock in the United States.³⁰⁰
- *Logging.* Tropical hardwoods including teak are one of Burma's primary exports,³⁰¹ and they are harvested extensively with forced labor.³⁰² Because of rapid deforestation in China, India and Thailand, Burma now holds half of the remaining hardwood forest in mainland Southeast Asia,³⁰³ including eighty percent of the remain-

294. 1999 COUNTRY REPORT, *supra* note 224, at 1005.

295. Forced Labor Notice, *supra* note 146, at 54,109.

296. 1999 COUNTRY REPORT, *supra* note 224, at 1003.

297. Forced Labor Notice, *supra* note 146, at 54,109; ILO REPORT, *supra* note 110, at § 504.

298. U.S. INT'L TRADE COMM'N, *supra* note 276 (ranking fish and crustacean as the sixth-ranking U.S. import from Burma).

299. The U.S. food processor that has withdrawn from Burma is Zin International (USA/privately held). IRRRC REPORT 2000, *supra* note 19, at app. C.

300. The foreign food processors that have withdrawn from Burma include: Ajinomoto Co. (Japan/OTC) and Nickerson Group (UK/privately held). *Id.*

301. Forced Labor Notice, *supra* note 146, at 54109; COMMERCIAL GUIDE, *supra* note 267, at ch. I.

302. ILO REPORT, *supra* note 110, at § 504.

303. World Resources Institute: Forest Frontiers Initiative, *Logging Burma's Frontier Forests: Resources and the Regime*, at <http://www.wri.org/wri/ffi/burma/findings.htm> (last visited Sept. 23, 2000).

ing natural teak.³⁰⁴ Logging in Burma increased dramatically after 1988 (the year that the military government killed thousands of students to suppress the democracy movement) after the Thai government stopped issuing logging concessions in order to preserve its remaining forests.³⁰⁵ By 1991, Burma had the third highest rate of deforestation in the world at 8,000 square kilometers per year.³⁰⁶ Military units conduct large-scale logging, milling, and related road construction with tens of thousands of forced laborers. For example, one local report explained how people from several villages were ordered to clear-cut a forest without pay. The logs were sold commercially, the proceeds shared between two brigade commanders, and “those who complained got punished and torture[d].”³⁰⁷ To indicate the scale of military logging, another report describes two logging projects. For each project, military forces commandeered 5,000 laborers to work for ten to fourteen days without providing food or pay.³⁰⁸

- *The corporate connection.* One U.S. furniture manufacturer imports Burmese teak,³⁰⁹ while three U.S. manufacturers or importers report that they have recently withdrawn from Burma; two of these are publicly traded.³¹⁰ At least seven foreign firms export or import Burmese teak, and a large number of retailers sell Scandinavian furniture that is made with Burmese teak.³¹¹ Since the teak market is increasingly depen-

304. Tim Keating, *Forced-Labor Logging in Burma* (May 1997), at http://www.enviroweb.org/rainrelief/reports/teak_tort.html.

305. *Id.*

306. *Id.* The extensive deforestation in Burma has become an environmental issue of international importance because of the resulting soil erosion, sedimentation of rivers, increased flooding, water shortages during dry season and loss of habitat to many plants and animals. World Resources Institute: Forest Frontiers Initiative, *supra* note 303.

307. Keating, *supra* note 304.

308. *Id.*

309. The firm is Dean Hardwoods of Wilmington, N.C. (privately held). See IRRC REPORT 2000, *supra* note 19, at AII-3; *OSI Corporate List*, *supra* note 255.

310. The three U.S. firms that withdrew from Burma include: Angelina Hardwood (USA/privately held), Pier I Imports (USA/NYSE), and Williams Sonoma (USA/NYSE). See IRRC REPORT 2000, *supra* note 19, at AII-7, app. C.

311. The seven active exporters or importers of Burmese timber include: Bollinger Furniere (Switzerland/unknown); Dalhoff Larsen & Hronemann (Denmark/Copenhagen); Det Ostasiatiske Kompagni (Denmark/Copenhagen); Earth Industrial (Thailand/unknown); Karl Danzer Furnerwerke (Germany/unknown); and Sun (which is supplied by the Sunti Forestry Group of Thailand/unknown). See *id.* at BI-4-16. The Scandinavian outlets that sell furniture made with

dent upon Burmese imports, this sector will remain the subject of investor initiatives and to a lesser extent, an issue for government procurement of furniture.

- *Tourism travel services.* The government of Burma uses forced labor to develop hotels and rehabilitate tourist attractions such as religious shrines and archeological sites.³¹² Considerably more forced labor has been commandeered to build transportation links specifically to support tourism including the work of 2.3 million workers for a ring road and restoration projects in Mandalay, 30,000 workers for runway extensions at Bassein airport, a 50-mile road from Rangoon to Pegu, a highway from Pangoon to Mandalay, and the clearing of Inlay Lake.³¹³
 - *The corporate connection.* The government tourism ministry has expanded its marketing strategy from a focus on Europe to include North America. The ministry has contracted with Aeroground Group Services, a San Francisco-based firm, to handle marketing, expositions, trips for tourism operators and writers, and ticketing services.³¹⁴ At least two U.S. transportation or hotel firms (Marriott International and Silversea Cruises) are reportedly active in Burma,³¹⁵ while two U.S. companies have withdrawn.³¹⁶ At least two foreign cruise companies remain active in Burma.³¹⁷ At least eighteen foreign hotel or resort companies remain active in Burma, three of which sell stock in the

Burmese teak include Dania, Happy Viking, Scan Design, and Scandinavian Design. Rainforest Relief, *Protecting the Continuing Oppression of the Burmese People and the Destruction of their Rainforests by the SLORC*, INTERNATIONAL TEAK WEEK OF ACTION, at <http://www.enviroweb.org/rainrelief/newsnotes/teakweek.htm> (last modified Feb. 18, 1998).

312. Forced labor on tourist attractions includes work on Buddhist temples near Rangoon and the ancient Danoke Pagoda. 1999 COUNTRY REPORT, *supra* note 224, at 1004.

313. DOL REPORT, *supra* note 214, at 36-37.

314. *Myanmar Hires Aeroground to Bring in North American Tourists*, MYANMAR TIMES & BUS. REV., Aug. 14, 2000, at http://www.myanmar.com/myanmartimes/no24/global_touch.htm.

315. The two U.S. tourism-sector firms that are active in Burma include: Marriott International (USA/NYSE) and Silversea Cruises, Ltd. (USA/privately held). IRRIC REPORT 2000, *supra* note 19, at AII-5-6.

316. The two U.S. tourism firms that withdrew from Burma are Best Western (USA/privately held) and Northwest Airlines (USA/Nasdaq). *Id.* at app. C; *OSI Corporate List*, *supra* note 255.

317. The two foreign cruise companies that are active in Burma include: Ocean Cruises Line (a subsidiary of the Italian firm Costa Crociere/unknown), and Sea Containers, Ltd. (Bermuda/NYSE). IRRIC REPORT 2000, *supra* note 19, at BI-29, BII-3.

United States.³¹⁸ Japan Air Lines (“JAL”) not only flies to Burma, it also trains the crews of Myanmar Airways International and owns a hotel subsidiary in Burma.³¹⁹ Including JAL, there are a total of eight foreign airlines that serve Burma, three of which sell stock in the United States.³²⁰

To summarize, the degree of corporate complicity in violation of human rights is not likely to involve perpetration of crimes, but rather, direct economic benefit from those crimes, which frequently function as a type of subsidy. These benefits are knowingly realized through cheap land, cheap labor, cheap commodities, and market opportunities that open up because many potential competitors have disassociated themselves from participating in such a repressive market. Presumably, most of the approximately 329 parent companies doing business in Burma do not directly benefit from an illicit in-kind subsidy.³²¹ However, as the brief survey above indicates, a few score companies are nonetheless complicit in violations in that they receive the economic benefits made possible only by abuses of human rights.

The recent upsurge in imports indicates that the adoption of primary procurement or investment standards could be just as important in discouraging firm’s re-entry into Burma as they are in disassociating from firms that have remained in Burma. The most relevant U.S. import sectors include apparel, hardwoods, and seafood, while the export sectors include petroleum services, electronic equipment, construction equipment, engineering and construction services.

318. The 18 foreign hotel firms that are active in Burma include: Accor (France/OTC), Adman Club Co. (Thailand/unknown), Amara Holdings (Singapore/Singapore), Baiyoke Group (Thailand/unknown), Bangkok Bank (Thailand/Thailand), Exe Design (Japan/privately held), Exe Sakura (Japan/privately held) Fidelio Software (Thailand/privately held), Hazama Corp. (Japan/Tokyo), Hotel Properties (Singapore/Singapore), Idris Hydraulic (Malaysia/Kuala Lumpur), Keppel Corp. (Singapore/OTC), L.P. Holding (Thailand/unknown), Mandarin Oriental International (Hong Kong/OTC), Myanmar Hotels International (Hong Kong/unknown), Myanmar Swan Investment (Singapore/unknown), Nikken Rentacom (Japan/unknown), and Nikko Shoji - JAL Trading (Japan/unknown). *Id.* at BI-1-23.

319. *Id.* at BI-15.

320. The eight foreign airlines that serve Burma include: British Airways (UK/NYSE), Deutsche Lufthansa (Germany/OTC), Japan Airlines (Japan/Nasdaq), M.O. Air System (Japan/unknown), Malaysian Airlines System (Malaysia/Kuala Lumpur), Pakistan International Airlines (Pakistan/unknown), Royal Brunei Airlines (Brunei/government-owned) and Thai Airways International (Thailand/Thailand). *Id.* at BI-4-27, B-II-1-13.

321. See IRRIC REPORT 2000, *supra* note 19, at 6. For further analysis of the levels of corporate complicity, see *infra* Part IV-B-1.

Potential Reach of Primary Investment & Procurement Measures

Commercial Sectors	Method of "Primary" Disassociation	
	Investment <i>at least:</i>	Procurement <i>at least:</i>
Apparel	15 active firms 8 departed firms	unknown
Oil & gas/pipeline const.	8 active firms 17 departed firms	2 firm active firms 4 departed firms
Manufacturing	3 active firms 1 departed firm	3 active firms 1 departed firm
Travel services	3 active firms 1 departed firm	unknown 2 departed firms
Hydropower/const. & equip.	2 active firms 2 departed firms	unknown
Transportation services/equip.	2 active firms 2 departed firms	unknown 2 departed firms
Furniture/logging	not known 2 departed firms	not known
Agriculture	not known 1 departed firm	not known
Approx. - active firms	23 active firms	6 active firms
Approx. total - departed firms	34 departed firms	9 departed firms

The inquiry does not end, however, with the fact of corporate complicity. A company must participate in either a U.S. public procurement market or stock market for procurement or investment policies to have any real significance for that company. The following chart indicates the broader reach of investment policies discussed above.

The chart also indicates that both investment and procurement policies could affect companies that have previously withdrawn from Burma, but which could choose to return there if the investment climate changed. Most but not all of the companies that would be affected by procurement policies would also be affected by investment policies (some of them are privately held companies).

A total of approximately fifty-seven companies could be affected by primary investment policies. Twenty-three of these are active in Burma; thirty-four are departed. A secondary investment policy could reach a much larger number of the 329 parent companies that do business in Burma, approximately 73 of which trade their stock on the New York or Nasdaq stock exchanges. The political visibility of the narrower policies is reduced only if there are no meaningful targets, of which there is no shortage, except perhaps in the logging sector, where consumer boycotts are still active.

With respect to procurement, there are approximately fifteen companies that could be affected in the sectors of petroleum and manufacturing, six of which are active and nine of which have departed.

C. *Building a Constituency for Human Rights*

Human rights advocates value public procurement and investment policies because their adoption and implementation helps to build a broader constituency for human rights. The policies make local and concrete that which is otherwise global and abstract—they help build a national constituency. Campaigns to adopt and implement public procurement and investment standards achieve the following goals:

- *Educating the public.* By a large margin, the U.S. public favors liberalization of trade,³²² but at the same time, they favor a value-based approach to trade that includes standards for protecting the environment and human rights.³²³ Specifically, seventy-seven percent of Americans favor economic measures to limit trade with Burma.³²⁴ Much of the public's education about human rights in Burma has been generated by the debate over policies at the state and local level.
- *Engaging consumers.* Public standards have inspired purchasing and investment decisions by U.S. consumers since 1763.³²⁵ As Professor Amar has observed, procurement advances public values not as

322. See, e.g., PROGRAM ON INT'L POLICY ATTITUDES, AMERICANS ON GLOBALIZATION: A STUDY OF U.S. PUBLIC ATTITUDES (Mar. 28, 2000), at <http://www.pipa.org/onlinereports/globalization/contents.html>.

323. *Id.* § 1D, Trade Sanctions.

324. *Id.*

325. See, e.g., Brief of Massachusetts at 29-30, Crosby v. National Foreign Trade Council, 120 S. Ct. 2288 (2000) (No. 99-474); CHARLES MCLEAN ANDREWS, THE BOSTON MERCHANTS AND THE NON-IMPORTATION MOVEMENT 17, 33-34, 40-41, 43, 55 (1968); James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 129 PA. L. REV. 287, 330-335 (1990); Porterfield, *supra* note 7, at 28 n.182.

regulation, but as part of commerce itself.³²⁶ Procurement policies can provide leadership by example for non-government institutions, and *vice-versa*.³²⁷ For example, when the first college towns were joining the Burma Boycott in 1996-1997, thousands of students were engaged in the successful boycott that led Pepsi to withdraw from direct sales in Burma.³²⁸ Consumer boycotts speak loudly to companies in retail sectors, and as the Burma campaign illustrates, consumer boycotts can be a catalyst for public-sector boycotts in “heavier” sectors such as investment banking and construction.³²⁹

- *Engaging investors.* As of 1999, the U.S. citizens shifted over one-tenth of their investment assets (2.16 trillion dollars out of a total of 16.3 trillion dollars) to “socially responsible” investment funds that avoid companies with adverse human rights or environmental records.³³⁰ Among the institutional investors to divest from companies doing business in Burma are the University of Wisconsin,³³¹ the University of Minnesota³³² and Kommunernes Pensionsforsikring, the leading Danish pension fund, both of which sold their stock in Total, S.A.³³³

The prospect of recruiting public pension funds to divest their holdings in the most morally challenged corporations is significant for at least three reasons. First, a divestment decision by such a large shareholder makes news. Second, a divestment decision by a pension fund or a mutual fund can add value to a corporation’s “good will” assets in the investment community. Third, the globalization of

326. Amar, *supra* note 9.

327. See, e.g., Free Burma Coalition, *American University Statement of Principles on Burma* (July 25, 1997), at <http://www.freeburmacoalition.org/old/au-resolution.html>.

328. FREE BURMA COALITION, *THE FREE BURMA COALITION MANUAL* 36-43 (1997) [hereinafter *FBC MANUAL*]. Jeff Faux, executive director of the Economic Policy Institute, recently stated:

The times may be ripe for more consumer boycotts. We have more of a consumer culture, and people see themselves more as consumers today. While people are participating less in the political process, as consumers they see that one way they can exercise political power is by where they spend their money and where they don't.

Greenhouse, *supra* note 290.

329. See Rodman, *supra* note 14, at 33-34.

330. See Social Investment Forum, *Socially Responsible Investing in U.S. Tops Two Trillion Dollar Mark* (Nov. 4, 1999), at <http://www.socialinvest.org/areas/news/1999-trends.htm>.

331. IRRIC REPORT 1998, *supra* note 19, at app. G, 6 (showing the sale of Texaco stock).

332. *Id.* at v-vi and app G, 6 (showing the sale of Total stock).

333. *Id.* at app. G, 3.

investment portfolios and corporate subsidiary structures means that divestment decisions can focus public attention on corporations based in Europe, Japan and elsewhere.

In November 2000, the nation's largest public pension fund, the California Public Employees Retirement Fund, announced what could be a breakthrough in pension fund leadership. In the words of Phil Angelides, the California State Treasurer, the new policy "recognizes the correlation between political stability and human rights and the long-term stability and profitability of our investments."³³⁴ The elements of this policy include shifting to active management of investments in emerging markets (rather than broadly inclusive index funds) and screening those investments for compliance with the Global Sullivan Principles, which include human rights, environmental and labor standards.³³⁵

One of the most innovative investment/divestment campaigns is now targeting the few oil companies that have invested in Southern Sudan. The principal target to date has been Talisman Energy of Toronto. Professor Eric Reeves of Smith College, a leader of this campaign, estimates that the campaign has effectively frozen the capital value of Talisman stock when it would have otherwise risen over 20% percent on the strength of 400% profit gains and a highly favorable price/earnings ratio.³³⁶ On the strength of this result, Professor Reeves argues that when divestment campaigns are targeted at individual companies with the worst human rights records, divestment can create significant economic leverage. Thus, targeted divestment can have a greater impact than the symbolic statement that is made by divesting from many companies just because they do business in a repressive country.³³⁷

In addition to seeking to constrain the capital value of a company, the Sudan campaign has also employed a number of equity-related policy initiatives, which could be models for use in other situations. These include:

- *Disclosure of risk.* Sudan advocates have petitioned the SEC to investigate whether oil companies have misled investors by failing

334. Robert Collier, *Pension Fund Tightens Foreign Stock Rules, CalPERS Board Gives Weight to Human Rights*, S.F. CHRON., Nov. 14, 2000, at A8.

335. *Id.*

336. Letters from Prof. Eric Reeves to the author and Robert Dennis (Nov. 3 & 8, 2000) (on file with author).

337. *Id.*

to disclose their Sudan investment in the company's prospectus for an initial public offering ("IPO"). A recent target has been the China Petroleum & Chemical Corporation ("Sinopec").³³⁸ Previous Sudan-related advocacy—aimed at the IPO PetroChina, Ltd., a subsidiary of the China National Petroleum Corporation—is credited with limiting the firm to half of the capital it expected to raise from its IPO.³³⁹

- *Capital sanctions.* In October 2000, the U.S. House of Representatives approved a provision within the Sudan Peace Act that, if enacted, would effectively de-list from the New York Stock Exchange companies that do business with the government of Sudan. The bill would limit "the sale of stocks in the United States or to any U.S. person . . . in support of a . . . project in or within Sudan."³⁴⁰ Supporters of the bill favor this approach because it can target only companies at fault and minimize collateral damage to other companies that would result from broader sanctions.³⁴¹

Shareholder resolutions can serve the same visibility goals as divestment campaigns, but they go a step further. For example, shareholder resolutions have sought disclosure of company operations in Burma (Unocal 1994), as well as outright withdrawal (Texaco 1996).³⁴² Other resolutions have sought more generic human rights policies such as sourcing guidelines (Atlantic Richfield, Caterpillar, and Mobil) that would apply to operations in Burma.³⁴³ After opposing such shareholder resolutions, a number of companies including Texaco and Atlantic Richfield later withdrew from Burma.³⁴⁴

338. Letter from Elliott Abrams, Chairman, U.S. Commission on International Religious Freedom, to David B.H. Martin, Director, Division of Corporation Finance, Securities and Exchange Commission (Oct. 20, 2000) (on file with author).

339. Peter Wonacott, *Chinese Oil Firm Cut Sudan Links Before IPO*, WALL ST. J., Oct. 11, 2000, at A23.

340. 146 Cong. Rec. H10,641 (daily ed. Oct. 24, 2000).

341. Edward Allen, *U.S. Legislators Want Markets to Sway Sudan*, FIN. TIMES (LONDON), Nov. 2, 2000, at § 6; Steven Edwards, *U.S. Bill May Hit Calgary's Talisman*, NAT'L POST, Nov. 8, 2000, at C6.

342. *Id.* at v-vi (sale of Total stock). Some Burma-specific resolutions have never been presented to shareholders because the company invoked the SEC shareholder proposal rule, which allows companies to omit proposals that affect less than five percent of a company's net assets and gross sales and are not otherwise significantly related to those activities. *Id.* at app. G, 3.

343. *Id.* at app. G, 4.

344. *Id.* at app. C; *OSI Corporate List*, *supra* note 255.

During both the anti-Apartheid campaign and the free-Burma campaign, there has been a synergy between divestment and shareholder initiatives. When pressured to divest, many universities chose the less complicated option of supporting shareholder resolutions.³⁴⁵ Shareholder initiatives have longer staying power and the potential to influence company behavior as compared to a divestment campaign. A successful divestment campaign removes an institutional investor from the public debate over that corporation's conduct. On the other hand, the divestment decisions of a few leading institutions can spur other much larger institutional investors to either divest or vote in favor of shareholder resolutions.³⁴⁶ At some universities, students have pursued both divestment and shareholder initiatives simultaneously in order to take advantage of the synergy between the two.³⁴⁷

- *Engaging significant political actors.* Human rights advocates who seek to build a public constituency to oppose repression in places like Burma, Tibet or East Timor have few political resources to draw on in terms of U.S. citizens whose families descend from those foreign cultures. Their hope is that their human rights cause will be seen as universal and reflect the priorities of significant domestic constituencies. For example, the AFL-CIO has acted against the repression of labor rights and use of forced labor in Burma. John Sweeney, the AFL-CIO president, has called for local labor councils and state federations to ask state and local governments to "ban procurement of goods produced in conditions that violate fundamental workers rights."³⁴⁸ Human rights advocates cannot be dismissed as marginal if they can effectively reach and affect the AFL-CIO.
- *Creating a laboratory for national policy.* The First Circuit acknowledged that "it may be that the Massachusetts law was a catalyst for federal sanctions."³⁴⁹ So it was that the state and local laws demon-

345. FBC MANUAL, *supra* note 328, at 48-51; Simon Billenness, *supra* note 175.

346. Simon Billenness, *supra* note 175.

347. *Id.*; FBC MANUAL, *supra* note 328, at 48-49.

348. John Sweeney, President of the AFL-CIO, Making the Global Economy Work for Working Families: Beyond the WTO, Address Before the National Press Club (Nov. 19, 1999), at <http://www.aflcio.org/publ/speech11999/sp1119.htm>.

349. *Natsios v. National Foreign Trade Council*, 181 F.3d 38, 77 (1st Cir. 1999) ("The passage of the Massachusetts Burma Law has resulted in significant attention being brought to the Burmese government's human rights record. Indeed, it may be that the Massachusetts law was a catalyst for federal sanctions. Massachusetts also played a role, through its representatives in the House and the Senate, in Congress's decision to impose sanctions on Burma.").

strated broad public support before Congress first passed and then overrode President Reagan's veto of the Comprehensive Anti-Apartheid Act in 1986.³⁵⁰ The engagement of geographically diverse state and local governments can establish the political viability of a policy that is otherwise certain to face business opposition.³⁵¹

D. *Influencing Foreign Affairs*

State and local procurement and divestment laws during the anti-Apartheid boycott are credited with having a significant impact on both the political climate and investment banks, which proved to be the Achilles heel of the Pretoria government.³⁵² Burma may be an economic "basket case," but it has no particular vulnerability such as South Africa's reliance on international financial investment networks.

However, Burma has demonstrated that it cannot build large-scale revenue-generating projects without foreign investment and developmental services. If procurement and investment policies can dampen foreign direct investment, they can stunt the economic staying power of the junta. In addition to the modest economic constraints that procurement and investment policies could present to the military government, they may also serve to restrain that government's claim of political legitimacy. Conversely, the prospect of free-flowing investment and trade in a democratic Burma could be a powerful carrot, just as its withholding works as a stick.

The point of reviewing this political context is that when considering "what works," human rights advocates evaluate investment and purchasing options from a very different perspective than the corporations that challenge them. The NFTC condemns procurement and investment policies as "sanctions" that fail to accomplish the goal of forcing dictators out of office. However, from a human rights perspective, these economic measures have a different purpose and value. As standards for doing business with public funds, their first function is to disassociate state and local governments from corporate behavior that

350. Pub. L. 99-440, 100 Stat 1086 (Oct. 2, 1986); see Rodman, *supra* note 14, at 22.

351. For example, long after the end of the anti-Apartheid campaign, The Africa Fund continues to nurture and engage the network of state and local officials who have a political, cultural or economic interest in Africa. Recently, The Africa Fund announced that 14 state and local officials were calling for debt-relief for impoverished African nations, referring to the debts to the World Bank and the International Monetary Fund as the "chains of slavery in the 21st Century." Press Release, The Africa Fund, State and Municipal Officials Call for Cancellation of Africa's Debt (Sept. 20, 2000) (on file with author).

352. See Rodman, *supra* note 14, at 23-26.

knowingly supports violation of human rights, either indirectly or indirectly. By setting a visible public standard, they make it much easier for advocates to target corporate complicity in violation of human rights.

V. CONCLUSION

Conventional wisdom now holds that globalization limits the capacity of sovereign nations to project their values through regulation of economic transactions, particularly when a regulation has an extraterritorial effect. However, globalization also brings economic interdependence, which begets greater political inter-connection. Both governments and individual citizens can more readily see and feel the consequences of each other's economic behavior.³⁵³

When the first human rights agreements were negotiated decades ago, the relative isolation of national economies made it easy for countries to sign on, even those that violated human rights. There were, after all, no foreseeable consequences for those who benefited from violation of the agreements. But now, consumers and investors can learn which companies benefit from violation of human rights. As consumers and investors, rather than regulators, governments actually enjoy greater power, not less, because of globalization.

The Supreme Court's decision to strike down Massachusetts' Burma law has implications beyond Burma. In the future, a congressional response to foreign governments that systemically repress human rights is likely to repeat the elements of federal sanctions against South Africa and Burma. However, these "delicately balanced" sanctions are not designed to have a real economic impact. They merely convey a symbolic statement that will not upset corporate interests.

The post-*Crosby* options for market participation have a dramatically narrower purpose and effect than a secondary boycott. These options for procurement, disclosure, divestment, shareholder resolutions, and political speech are summarized in the chart and options menu in the annex following this conclusion. Because their impact on foreign

353. This realization arose in oral arguments on the Massachusetts Burma law when one of the justices asked Thomas Barnico, Assistant Attorney General of Massachusetts, why state governments had not participated in economic boycotts between American revolution and the anti-Apartheid campaign. Mr. Barnico replied that it "has to do with the fact that there was very limited global trade for those years. There was limited information available to state governments about other activities in foreign states." Oral Argument Transcript at 11, *Crosby* (No. 99-474).

governments is indirect and incidental, they should escape the reach of federal preemption

Is such an incidental impact worth the effort? The answer is “yes” to the extent that the post-*Crosby* options still fulfill the functions of economic advocacy. They establish market participation standards based on human rights; they target violations of human rights; they build a constituency for human rights; and they enable that constituency to call on the federal government for more direct foreign affairs action to promote human rights.

As market participants, state and local governments dwarf the federal presence. At \$730 billion, state and local procurement accounts for three quarters of public-sector purchasing in the United States. Public pension funds stand among the leading institutional investors. Their purchasing power, their visibility as investors, and their public accountability make state and local governments a prime constituency for human rights in the global economy. The Supreme Court cannot alter that fact; nor has it accepted the corporate invitation to commandeer every aspect of market participation from the federal bench. Rather, the Court left room for another round of policy innovation at the state and local level.

For state and local governments that see the moral consequences of their market participation, the logical course is to use the same powers that private market participants enjoy unless Congress or the Supreme Court says otherwise. The post-*Crosby* options are the middle ground between using “coercive” boycotts and merely writing letters to Congress. For the sake of a humane global economy, one that is shaped more by market participation than government regulation, it is ground well worth claiming and defending.

LOCAL OPTIONS TO REPLACE BURMA BOYCOTT LAWS

Summary of Options & Risk of Preemption

Each option in the chart is defined in the menu that follows.

▼		Options In Order of Risk of Preemption
▼		Risk of Preemption - <u>H</u>igh, <u>M</u>oderate, <u>L</u>ow, or <u>V</u>ery <u>L</u>ow
▼		Local Legislative Options
I. Procurement		
		A. Secondary Boycott - Option is preempted; the alternatives are to:
		1. Suspend the existing law.
		a. Suspend indefinitely.
		b. Suspend 3 years, then repeal.
		2. Repeal the existing law immediately.
		B. Primary Boycott
1	H	1. Goods made in Burma - Option is not available; high risk of preemption.
2	H	2. Companies connected to human rights violations.
3	H	a. General sector of violations.
		1. Avoid all business from that sector.
		2. Avoid a product or service from that sector.
		b. Specific project or product with human rights violations.
4	H	1. Avoid all business with that company.
5	M	2. Avoid specific product/service of that company.
II. Disclosure - As an Alternative to a Primary Boycott		
		A. General Sector with Human Rights Violations. Triggered by:
6	M	1. General - any procurement from company in sector.
7	M	2. Specific - procurement within an affected sector.
		B. Specific Project with Human Rights Violations. Triggered by:
8	M	1. General - any procurement from company that makes/sells the product.
9	M	2. Specific - procurement of that specific product.
III. Divestment		
		A. Indirect Connection. Sell stock of a company that:
10	L	1. Does business in Burma.
11	L	2. Does business with military government of Burma.
		B. Direct Connection. Sell stock of a company that:
12	L	1. General sector - trades in sector with human rights violations.
13	L	2. Specific project - has project with human rights violations.
IV. Shareholder Resolutions - that require a company to:		
14	VL	A. Develop human rights standards.
14	VL	B. Evaluate cost and benefits of business in Burma.
14	VL	C. Evaluate executive leadership and compensation re: business in Burma.
IV. Political Speech		
15	VL	A. Publish names of companies doing business in Burma.
16	VL	B. Adopt resolutions condemning human rights violations.

Menu of Options to Replace Burma Boycott Laws

I. Procurement

A. Secondary Boycott

This is the option that the Supreme Court preempted in Crosby v. NFTC. Like the Massachusetts Burma law that was struck down by the Court, these laws require that state or local agencies avoid purchasing goods or services from companies that either do business in Burma or, more directly, do business with the government of Burma. In order to comply with the Court's decision, the options are to:

1. *Suspend* the existing law until such time as Congress may remove the preemption of the law under federal Burma sanctions.
 - a. Suspend indefinitely.
 - b. Suspend for a period of three years, after which time the law is repealed.
2. *Repeal* the existing law.

B. Primary Boycott

1. *Goods made in Burma.* *This option is not available as it carries a high risk of preemption.*
2. *Companies connected to human rights violations.* Avoid doing business with companies that are themselves connected to violation of human rights.
 - a. *General sector.* Do not purchase goods made in sectors where violation of human rights is often part of the production or development process.
 - (1) *Avoid all business.* Do not purchase any goods or services from such a company.
 - (2) *Avoid product or service from that sector.* Do not purchase from such a company the particular product or service from the economic sector that benefits from violation of human rights.
 - b. *Specific product or project.* Do not purchase from companies that benefit from a production or development process that violates human rights.
 - (1) *Avoid all business.* Do not purchase any goods or services from such a company.
 - (2) *Avoid specific product or service.* Do not purchase from such a company the particular product or service that benefits from violation of human rights.

II. Disclosure as an Alternative to a Primary Boycott

As an alternative to a primary boycott, do not impose any limit on eligibility to bid for procurement contracts except the following: Before a contract can be awarded, certain companies must first disclose the nature of their business in Burma and whether or not it is connected with violation of human rights. Once a company discloses the information, the state or local government must sign the contract. The scope could be sector-specific or company-specific as follows:

A. General Sector

Require disclosure by companies that invest or trade within a general sector that benefits from violation of human rights or where violation of human rights is often part of the production or development process. Disclosure would be triggered by:

1. *General*. Any procurement from a company that invests or trades in such a sector.
2. *Sector-specific*. Procurement only in the same sector that benefits from violation of human rights.

B. Specific Project

Require disclosure by companies that directly participate in or benefit from a project or product that has been developed or produced with violation of human rights. Disclosure would be triggered by:

1. *General*. Any procurement from a company that makes or sells the product.
2. *Sector-specific*. Procurement only of that specific product.

III. Divestment

A. Indirect Connection

Sell the stock of companies that:

1. Do business in Burma.
2. Do business with the military government of Burma.

B. Direct Connection

Sell the stock of companies that benefit from violation of human rights:

1. *General sector*. Because that company trades in a sector where violation of human rights is often part of the production or development process. *Examples*:
 - a. Oil and gas pipeline construction and operation.
 - b. Hydroelectric dam construction and operation.

- c. Logging of tropical hardwoods.
- d. Shrimp farming.
- 2. *Specific product or project.* Because that company participates in a project or specific product that has been developed or produced with violation of human rights.

IV. Shareholder Resolutions

Require [or authorize] the managers of public pension funds to vote [and cosponsor] shareholder resolutions that require the company to:

- A. *Adopt human rights standards*, for purposes of avoiding business relationships in countries where all commerce indirectly supports repression of human rights or with particular partners, contractors or suppliers that benefit from violation of human rights or participate in projects or products that were developed or produced with violation of human rights.
- B. *Evaluate business in Burma*, which weighs the benefits against the costs of risking consumer boycotts, lobbying expenses to oppose federal, state or local policies on doing business in Burma, and damage to the company's reputation and good will.
- C. *Evaluate executive leadership*, which raises the company's business in Burma in the context of executive compensation and evaluation of managers' performance.

V. Political Speech

- A. *Publication of the names of companies* doing business in Burma, with which the state or local government must now do business.
- B. *Adoption of a legislative resolution* that condemns human rights violations by the government of Burma and the complicity of corporations that support the military government.