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Lessons From The Dispute Over The Massachusetts Act
Regulating State Contracts With Companies Doing Business
With Burma (MYANMAR)

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INTRODUCTION

The recent dispute between the United States and the European Union over a Massachusetts procurement statute that, in essence, imposed a 10% negative preference against companies active in Burma involved a combination of two of the worst irritants in U.S.-EU economic relations.¹ First, the Massachusetts law involves action by sub-federal governments in the United States in possible contravention of international obligations. It was the EU that insisted during the Uruguay Round negotiations concluded in 1994 that GATT Article XXIV(12), the so-called federal state clause, and analogous clauses in other major WTO agreements, be clarified in a manner that makes crystal clear that federal states are fully responsible for the actions of their component units.² The EU's member states, most of which are unitary states, have long been concerned with the possible imbalance in trade agreement obligations that can be created if federal state clauses are drafted and interpreted to excuse federal state's from responsibility for actions by their sub-federal governments.³ Moreover, state procurement policies affecting market access by EU companies have historically concerned the EU as evidenced by their continual citation in the annual trade barrier reports issued by the EU Commission. However, the EU frustration with sub-federal behavior in the United States is not limited to the trade arena. For instance, Germany continued to pursue a case before the World Court against the United States because Arizona did not notify a German national, charged with murder, of his right to meet with a consular official, even though the German national had already been executed.⁴ Indeed, many European countries view the imposition of the death penalty by U.S. states, irrespective of the nationality of the convict and consular notification issues, as a violation of international human rights norms.

Second, the Massachusetts statute had an extraterritorial regulatory effect. Similar to a secondary boycott, the Massachusetts statute sought to influence the dealings of foreign companies (as well as U.S. companies) with Burma. Extraterritorial application of laws by the United States has created friction with European countries at least since the 1960's.⁵ These frictions are particularly notable in (but not exclusive to) the area of economic sanctions for foreign policy goals, such as the so-called Soviet Pipeline controversy in the mid-1980's, and the more recent example of the Helms-Burton Act seeking to penalize economic dealings with Cuba.⁶

The Massachusetts law was challenged in the WTO by the EU and in U.S. domestic courts by the National Foreign Trade Council (NFTC), an association first created in 1914, and now including over 580 multinational corporations as members.⁷ NFTC members include most of the largest U.S. manufacturers and banks and account for 70% of U.S. non-agricultural exports.⁸ The WTO case

never reached an examination of the Massachusetts law by a dispute settlement panel. Instead, the law was held unconstitutional at all three levels of the U.S. federal court system: the federal district court,⁹ the federal appeals court,¹⁰ and the U.S. Supreme Court.¹¹ Yet, it is unclear what impact the Supreme Court's decision will have on future state and local sanctions efforts because many groups are reading the opinion quite narrowly. Thus, future disputes over similar measures can by no means be ruled out. This begs the question of what can be done to avoid similar disputes, or what is the best way to resolve similar disputes, if they cannot be avoided. Fortunately, the dispute over the Massachusetts Burma law points the way towards several methods for preventing and resolving future disputes between the EU and the US over not only state procurement sanctions laws enacted for foreign policy reasons but state and local laws more generally.

Part I of this paper briefly examines the human rights situation in Burma that prompted not only Massachusetts but also the U.S. federal government and the EU to impose sanctions. Part II gives statistics regarding foreign investment in Burma as of 1998 when the EU-US dispute over the Massachusetts Burma law reached its peak. Part III describes the process by which Massachusetts became bound to the Government Procurement Agreement (GPA). Part IV explains the history and nature of sanctions imposed against Burma by the U.S. federal government, the EU, and the state of Massachusetts. Part V explains the rationale behind the diplomatic and procedural maneuvers in the EU's WTO case and also analyzes the substantive claims of the EU under the GPA. Part VI analyzes the motivations and procedures regarding the NFTC's domestic court challenge to the Massachusetts Burma law. It proceeds to examine the constitutional claims the NFTC based its suit upon and the results in U.S. courts. Part VII looks at the future of state procurement sanctions laws enacted for foreign policy reasons in light of the U.S. court rulings. Part VIII explores the implications of the Massachusetts Burma law dispute for EU-US dispute prevention and resolution and gives several recommendations regarding state foreign policy-related procurement sanctions laws. These recommendations for dispute prevention and settlement carry over to other forms (i.e. non-procurement manifestations) of state foreign policy-related sanction laws. Finally, this part turns to look at protectionist motivated state legislation, finding that the recommendations for dispute prevention remain the same in this context, but the recommendations for dispute resolution change.

I. BURMA'S HUMAN RIGHTS RECORD

Burma, a country of nearly 42 million people, gained independence in 1948.¹² It was ruled by a democratically elected civilian government until a military coup d'état in 1962.¹³ The military leadership has prevented the reinstatement of

democracy through the intimidation, arrest, and killing of persons in the pro-democracy movement throughout the last four decades. In 1988, massive democracy demonstrations were held but this resulted in the arrest of the leaders of the movement and the killing of over 3,000 civilians by the military.¹⁴ The military regime promised and held elections in May 1990.¹⁵ However, the military regime feared losing the elections and placed soon-to-be Nobel Peace Prize winner Daw Aung San Suu Kyi, the leader of National League for Democracy (NLD), under house arrest nine months prior to the elections.¹⁶ The NLD won 392 out of 474 seats in the Parliament (with the military party winning only eleven seats) but the military regime rejected the results.¹⁷ Throughout the 1990's, the military continued to detain NLD members to prevent them from organizing and attending party conventions, including several large scale detentions in 1996 and 1997. Burma also has grave problems relating to forced labor.¹⁸ It is estimated that as many as 800,000 persons may be involved in coerced labor in Burma, producing as much as 10% of its gross domestic product.¹⁹

II. FOREIGN INVESTMENT IN BURMA

In 1998, the year the EU asked for establishment of a WTO panel on the Massachusetts Burma law and the year the NFTC challenged the law in U.S. federal court, the United States was among the top five countries in terms of foreign investment in Burma.²⁰ Two EU member states, the United Kingdom and France, were the two largest foreign investors.²¹ Oil and gas companies are the largest foreign investors in Burma, accounting for roughly two-thirds of all foreign investment in Burma since 1988.²² Without any government action, pressure by stakeholders, including human rights organizations, led several major companies, including Pepsi, to withdraw from Burma prior to 1998.

III. BINDING MASSACHUSETTS AND OTHER STATES TO THE GOVERNMENT PROCUREMENT AGREEMENT

The original GATT 1947 largely exempted government procurement practices from its major non-discrimination obligations of national treatment and most-favored-nation treatment.²³ During the Tokyo Round negotiations of the 1970's that addressed non-tariff barriers (NTBs) for the first time in a significant manner in the GATT system, a Government Procurement Agreement (GPA) was negotiated in an effort to curb protectionist procurement policies. Like the other NTB "codes" concluded during the Tokyo Round, ratification of the GPA was done on an a la carte basis.²⁴ Only a select group of industrialized countries elected to join the GPA in 1979. The agreement did not cover the procurement practices of sub-national governments.

When the EU and the United States sought to expand coverage of the agreement during the time of the Uruguay Round negotiations, the EU made clear that coverage of U.S. state-level procurement was a priority matter.²⁵ The U.S. federal government originally contemplated binding all states to the renegotiated GPA. However, in response to political (not constitutional) limitations, the federal government elected for a more flexible approach in which it would bind only those states whose governors submitted a voluntary “letter of commitment” agreeing to be bound. The “letters of commitment” could limit the state agencies bound or carve out exceptions for certain goods or services and these were included in the annex to the GPA elaborating state coverage. The Governor of Massachusetts at the time, Bill Weld, was one of thirty-seven state governors that submitted a letter of commitment to the United States Trade Representative agreeing to be bound to the GPA. The degree to which a particular state’s legislature was involved in the process depended largely on inter-branch cooperation in the state. However, the National Conference of State Legislatures (NCSL), a D.C.-based organization, was informed of and apprised of the negotiations.

In order to determine whether a particular state-level procurement is covered under the GPA, a five-part analysis must be undertaken. First, the state must be listed in the U.S. schedule annexed to the agreement. Second, the particular state agency undertaking the procurement must be listed under the state’s name. Third, the contract must exceed the thresholds established by the agreement for state-level procurement, roughly \$500,000 for goods and services, and \$6.5 million for construction. Fourth, the particular good or service being procured must not be exempted from coverage. For instance, pre-existing preferences for domestic autos, steel and coal were exempted for all states covered. Additionally, individual states exempted other products of particular sensitivity, such as beef for South Dakota or boats for Washington. Fifth, other general exemptions must not apply, such as those for small and minority business set-asides. No state commitment forced a change in current state law, perhaps one reason why state legislatures were not involved to a significant degree by governors in the crafting of the letters of commitment. As a result, the GPA creates essentially a standstill obligation against new protectionist legislation by the states for covered procurements.²⁶ However, the coverage of 37 states to this degree under the agreement allowed the U.S. to gain coverage of EU sub-national governments and EU heavy electrical and telecommunications procurements to a degree. The GPA entered into force on January 1, 1996. The agreement was an exception to the largely “single package” approach to ratification of the Uruguay Round agreements.²⁷ The a la carte approach to ratification led to only 23 countries becoming party to the agreement.

There is no exception in the agreement for foreign policy-related procurement sanctions statutes at the state-level. No state asked for such an exception (and the federal government almost certainly would not have negotiated one even if a state did make such a request). Indeed, at the time states were not focused on foreign policy sanctions laws in the procurement area because South Africa sanctions laws were eliminated several years earlier with the ending of apartheid and the transition to democracy in South Africa.

IV. SANCTIONS AGAINST BURMA PRIOR TO THE EU-US DISPUTE

A. U.S. Federal Sanctions Against Burma

The United States government cut off direct financial assistance to Burma as early as 1988.²⁸ In July 1989, in response to the house arrest of Suu Kyi, the U.S. government suspended tariff preferences under the Generalized System of Preferences.²⁹ The United States government followed these measures with an arms embargo, downgrading its representation in Burma from an Ambassador to Charges D’Affairs, and imposing visa restrictions on senior Burmese officials.³⁰

In response to crackdowns against the pro-democracy movement, the U.S. Congress imposed additional sanctions in September 1996. The 1996 federal law³¹ continued the ban on bilateral assistance, directed the Secretary of the Treasury to instruct the U.S. Executive Directors of the international financial institutions to oppose any loans to Burma, banned visas for Burmese government officials, and authorized the President to ban new investments in Burma if the Burmese government re-arrested Suu Kyi or committed large scale repression or violence against the Democratic opposition. In April of 1997, President Clinton announced his intention to impose a ban on new investment. Subsequently, on May 20, 1997, an Executive Order was issued making the ban on *new* investment.³² The ban applied to all U.S. persons. The Executive Order specifically exempted the sale of goods to Burma and non-profit activities. The Executive Order was issued not only pursuant to the federal Burma sanctions law but also the International Economic Emergency Powers Act (IEEPA).³³ IEEPA is a framework law delegating authority to the Executive to impose economic sanctions in response to “any unusual and extraordinary threat ... to the national security, foreign policy or economy of the United States.”³⁴ Several U.S. multinational corporations voiced criticism of the sanctions, including United Technologies and Unocal.

Over the past several years, pressure has been brought to bear on both the Clinton Administration and subsequently the Bush Administration to impose additional sanctions on Burma. Much of this pressure arises from a November 2000 International Labor Organization (ILO) recommendation under Article 33

of the organization's charter, unprecedented in the 81 year history of the organization, calling on members of the ILO to review their relations with Burma and ensure that the Burmese government cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labor.³⁵

B. EU Sanctions Against Burma

The EU also took action in 1996 to sanction Burma. Specifically, the EU expelled Burmese military personnel, banned the export of all armaments and military equipment to Burma, suspended financial assistance other than humanitarian, and banned visas for high ranking Burmese officials and their families.³⁶ In March 1997, the EU suspended tariff preferences for Burmese agricultural products and five months later extended the suspension to cover industrial products.³⁷

C. Massachusetts (and other sub-national government) Sanctions Against Burma

On June 25th, 1996, three months prior to the passage of the federal Burma sanctions law and six months after entry into force of the GPA, Massachusetts Governor Weld, surrounded by Burmese activists, signed a law instituting procurement sanctions against companies active in Burma. Governor Weld, in the midst of a U.S. Senate race at the time and originally against the legislation, was reportedly influenced somewhat by the fact that his opponent John Kerrey had been slow to endorse the idea of sanctions against Burma. Aggressive lobbying by human rights activists and NGOs and the lack of any significant opposition by the business community at the time also apparently helped change Governor Weld's mind.

The principal sponsor in the Massachusetts legislature was Byron Rushing. Representative Rushing was inspired in part by a 1993 talk by Desmond Tutu indicating the effectiveness of sanctions in changing the policies of the South African government. He was also lobbied by Simon Billenness, an analyst for an asset management firm specializing in socially responsible investments and a prominent figure in the Free Burma Coalition, a coalition of NGOs including the Massachusetts Burma Roundtable, promoting action against Burma.³⁸ The Free Burma Coalition used an internet and e-mail campaign very successfully to push for boycott of products of companies active in Burma (such as campus boycotts of Pepsi products) and to place pressure on governments to impose sanctions.³⁹ Their website was established with the support of the Soros Foundation and the Open Society Institute.⁴⁰ Representative Rushing and Billenness originally met at a conference marking the end to the boycott of companies doing business in South Africa.⁴¹ It was there that Billenness first

suggested to Rushing the possibility of a new target: Burma.⁴² After familiarizing himself with the situation in Burma, Rushing pulled the bill Massachusetts' legislature drafted a decade earlier regarding South Africa, struck the words South Africa from the bill, replaced them with the word Burma, and introduced the bill.⁴³ The state of Massachusetts, and indeed the groups pushing for the sanctions, does not have a large ethnic Burmese or Burmese-American contingents.⁴⁴ The Massachusetts Burma law was not an instance in which a particular ethnic group influences foreign policy legislation.

Representative Rushing was not even aware at the time of drafting the bill that Massachusetts was bound to the GPA. After learning of the GPA, Rushing was quoted as referring to the agreement as the "Government Procurement blah blah."⁴⁵ Rushing claimed the "identifiable goal (of the law) is free democratic elections in Burma."⁴⁶ Upon signing the bill into law, Governor Weld called upon other states and the U.S. Congress to "follow (Massachusetts) example and make a stand for the cause of freedom."⁴⁷ While the bill passed by a handy margin, some in the Massachusetts legislature did criticize the bill as an effort by the state to engage in "its own little version of foreign policy" and that the legislature should instead "focus its efforts on creating jobs here at home and not try to dabble in foreign affairs."⁴⁸

The statute required the Secretary of the Massachusetts' Department of Finance and Purchasing to maintain a "restricted list" of all companies "doing business" in Burma.⁴⁹ Companies on the list were given the opportunity to rebut the information. In preparing the list, the Secretary was to rely on information from the United Nations and non-governmental human rights organizations. The statute prohibited the state from procuring from entities on the restricted list but made exceptions in cases in which the procurement was essential, for certain medical supplies, and when there was no "comparable low bid or offer."⁵⁰ The statute defined "comparable bid" as an offer equal to or less than 10% above the low bid from a company on the restricted purchase list.⁵¹ Therefore, the statute did not act as an outright ban on all purchases from companies on the restricted list, but rather operated to impose a 10% negative preference against companies on the restricted list.

V. THE EU'S WTO CASE

A. Diplomacy and Procedures

The EU first formally protested the Massachusetts measure in a demarche to the State Department in January 1997. A month later, the EU complained of the Massachusetts law at a WTO Government Procurement Committee meeting.⁵² In June of 1997, the EU formally requested consultation under the WTO Dispute

Settlement Understanding.⁵³ However, Massachusetts found an ally in the form of the European Parliament. The EU parliament condemned the Commission's decision to bring a WTO case and urged the EU to impose more stringent sanctions against Burma.⁵⁴

Japan joined the WTO consultations a month later.⁵⁵ Several trilateral consultations were held over the course of the next year. The EU also sought to make an overture directly to Representative Rushing.⁵⁶ This was initially done through the UK consul in Boston. However, the EU sought and obtained approval from the State Department to consult directly with Rushing. EU officials together with the UK consul met with Rushing. At the meeting, the EU offered to drop their WTO complaint if Massachusetts amended their measure so as to exempt WTO-covered procurements, i.e., procurements above the threshold of \$500,000 for goods and services. However, Representative Rushing asked what additional measures the EU would take to place pressure on the Burmese regime. The EU took a pass on this conversation seeking to avoid a situation in which it might have to negotiate state-by-state as states considered and adopted sanctions measures of this type. Moreover, Rushing ultimately became unwilling to consider amendment of the measure because of a domestic court challenge to the measure lodged by the National Foreign Trade Council. While amending the law to apply only to contracts below the GPA threshold would have eliminated the possibility of the WTO challenge, it would not have protected Massachusetts from challenge on domestic constitutional grounds.

The issue of extraterritorial sanctions also was a key issue of discussion at the May 1998 EU-US Summit. In addition to an agreement specifically relating to the Helms-Burton law, the EU and US arrived at a general agreement, albeit in a non-binding political commitment, on the extraterritorial application of foreign policy-related sanctions. Specifically, they agreed to “not seek or propose, and (to) resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own operators” and that sanctions would be targeted “directly and specifically against those responsible for the problem.”⁵⁷ Given the EU's concern with the Massachusetts Burma law it is unsurprising that the declaration also included a statement regarding state and local sanctions. Specifically, the document stated that “the policies of governmental bodies at other levels should be consonant with (the principles applicable to federal government sanctions) and avoid sending conflicting messages to countries engaged in unacceptable behavior.”⁵⁸

In August 1998, Ambassador Barshefsky announced her intention to defend the Massachusetts law in any WTO panel proceeding.⁵⁹ A coalition of labor unions, religious groups and non-profits had lobbied the Administration to

defend the law. The potential challenge to the Massachusetts law also created a stir in Congress. Rep. Dennis Kucinich (D-Ohio) introduced a bill in August that would have barred the U.S. Department of Justice from using funds to challenge state laws inconsistent with trade agreements. The implementing bill of the Uruguay Round, similar to many previous trade agreement implementing bill, prohibits private parties from suing states based on trade agreements but allows the federal Executive Branch to do so.⁶⁰ The implementing bill also declares that any dispute settlement panel report shall not be considered as binding nor otherwise accorded deference in such a proceeding.⁶¹ Instead, the court will consider the matter de novo. The Kucinich bill would have effectively eliminated the one avenue for ultimately forcing state compliance and thus undermined U.S. Executive credibility at the negotiating table when dealing with state measures. The Kucinich bill was defeated by a margin of 228-200.⁶²

In September of 1998, the EU together with Japan requested establishment of a dispute settlement panel.⁶³ The motivation for elevating the dispute was not only Massachusetts' ultimate unwillingness to amend the measure, but at least equally important, the proliferation of measures at the local level, including some consideration by Massachusetts to extend its measure to companies active in Indonesia.⁶⁴ A Commission spokesperson described the request for a panel as a "shot across the bow."⁶⁵ In recent decades, state and local sanction measures were enacted in surges. In the mid-1970's, thirteen states enacted laws sanctioning companies trading with Arab countries that imposed a boycott on Israel. In the 1980's, more than 30 states enacted sanctions against companies active in South Africa. In fact, Massachusetts was the first state to impose sanctions against South Africa.

The city of Berkeley, California became the first sub-national government to sanction companies active in Burma.⁶⁶ While Massachusetts was the only state to follow suit, twenty-two other cities, including New York City and Los Angeles also passed ordinances affecting procurement from companies active in Burma.⁶⁷ NGOs circulated the Massachusetts legislation to legislators in other states and cities and lobbied for its passage. At the time of the WTO challenge, state and city governments were considering or already passed measures imposing sanctions seeking to punish other countries' behavior, including not only Indonesia but also Nigeria, Switzerland and China.⁶⁸ Ironically, this proliferation of state and local sanctions measures was occurring at the same time that the Congress and Executive Branch were engaged in serious discussions over reforming the use of sanctions.⁶⁹ Key elements in these discussions were the desirability of conducting cost-benefit analysis, including consideration of the effectiveness of sanctions, granting the president "waiver" authority, automatic "sunset" provisions, and strongly encouraging attempts to multilateralize sanctions prior to imposing unilateral sanctions.

The WTO approved establishment of the panel in November 1998.⁷⁰ However, in accordance with WTO dispute settlement rules, the EU and Japan suspended their WTO claim in February 1999 because a U.S. district court invalidated the Massachusetts measure on U.S. constitutional grounds in November of 1998.⁷¹ While the EU made clear it would re-open the WTO case if the district court ruling was reversed on appeal, invalidation of the Massachusetts law was upheld by the First Circuit Court of Appeals and ultimately by the Supreme Court. Accordingly, the parties to the WTO case never issued formal briefs nor did a panel rule on the consistency of the Massachusetts measure with the GPA. It is nevertheless possible to examine, based on public statements and writings, some of the arguments that would have been made by the two sides in the case.

B. Substantive Claims

1. Violation Claims

The EU's first violation claim is based on GPA Article VIII(b) that deals with conditions for qualifying suppliers.⁷² It states that "qualification procedures shall be consistent with the following: ... (b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question." The EU argument must be that the activity in Burma has nothing to do with a firm's capability to fulfill a contract in Massachusetts. Massachusetts rebuttal is that the Article VIII only applies to pre-qualifying bidders for selective tender procedures and that a 10% negative preference statute is not relevant to pre-qualifying bidders.⁷³ Additionally, the examples given of conditions that can be imposed, such as a bid bond requirement, only relate to the right to bid and not to the "actual factors that (one) looks at to decide who gets" the contract.⁷⁴

The second violation claim of the EU concerned Article XIII(4)(b). Article XIII(4) is titled "Award of Contracts." It requires the procuring entity to make "the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which *in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.*" The critical question is whether the evaluation criteria can only be related to cost and quality factors or can relate to non-economic political factors.⁷⁵

The final violation claim is based on the national treatment obligation found in GPA Article III. It provides that with respect to procurement laws, each covered entity "shall provide immediately and unconditionally to the products

and services and suppliers of other Parties offering products or services of the Parties, treatment no less favorable than (a) that accorded to domestic products, services, and suppliers....” The EU’s argument under this article is hampered by the fact that, unlike GATT and GATS national treatment obligations, the GPA obligation does not contain the language of “like” products, services and suppliers. The “likeness” criteria has been interpreted by GATT panel’s to preclude consideration of factors unrelated to the product itself in determining whether two products are like. For instance, if two products are similar in natural properties and qualities, end uses and consumer tastes, they will be found like even if they are made by dissimilar processes. With the language “like” suppliers, the EU could argue by analogy that an EU supplier involved in Burma should not be discriminated against versus a US supplier not involved in Burma since a suppliers dealings with a third country do not make the suppliers unlike. Even without the language “like”, however, the EU could make the same argument. Massachusetts response is that EU suppliers are treated equally with U.S. suppliers.⁷⁶ If the supplier is active in Burma, a negative preference is imposed regardless of origin of the supplier. In other words, Massachusetts claims the relevant comparison is not between treatment afforded an EU company active in Burma and a US company not active in Burma but rather between an EU company active in Burma and a US company active in Burma.

The GPA Article III continues that each covered procuring entity “shall not treat a locally-established supplier less favorably than another locally-established supplier on the basis of degree of foreign affiliation or ownership.” The EU might additionally argue that the Massachusetts law potentially discriminates against a U.S company, for example, on the basis that it is owned by a European company with investments in Burma.

2. The Realpolitik of WTO Dispute Settlement

While Massachusetts may have colorable textual arguments, at least with respect to some of the EU’s claims, and the WTO Appellate Body and panels, consistent with the WTO Dispute Settlement Understanding, place primary emphasis on the textual method of interpretation, it is undeniable that “shared community expectations” come into play behind the face of opinions.⁷⁷ WTO panels have been traditionally and historically hostile to extraterritorial regulations (or those measures seeking to have extraterritorial effect).⁷⁸ While recent interpretations of exceptions to GATT allow some leeway in extraterritorial protection of the environment,⁷⁹ the realpolitik of WTO dispute settlement probably means there is a good chance that a panel would find a Massachusetts-type measure inconsistent with the GPA. Indeed, former USTR Ambassador Yeuter predicted in strong terms that a WTO panel would rule against the Massachusetts measure were they ever to examine its consistency with the GPA.⁸⁰

3. Non-Violation Nullification and Impairment Claim

Just as the GATT does, the GPA allows for the possibility that a successful claim can be brought against a measure, that while not a violation of the GPA, nullifies and impairs benefits a party expected to accrue under the agreement.⁸¹ These so-called non-violation nullification and impairment cases have been very rare under the GATT.⁸² The test established by GATT panels is whether the party could reasonably have anticipated such a measure being instituted subsequent to the tariff concession. In this case, the question is whether the EU could reasonably have anticipated a measure that limits the access of EU suppliers to the Massachusetts procurement market, subsequent to the binding of Massachusetts to the GPA. Massachusetts might argue that it, along with many other states, enacted such legislation less than a decade earlier with respect to South Africa. Thus, the EU could reasonably have anticipated future human rights violations and moral concerns of state citizens rising to such a level as to lead to the enactment of such measures again. However, again, realpolitik suggests that a WTO panel may be sympathetic to the plight of the EU.

VI. U.S. DOMESTIC COURT CASE

A. Motivations and Procedures

In April 1998, the National Foreign Trade Council filed its complaint against the constitutional validity of the Massachusetts law in U.S. district court. Many other prior state foreign policy-related sanctions laws were not challenged by businesses for fear of a public backlash or consumer boycott of the company bringing such a suit.⁸³ With the NFTC filing suit, and the organization's name on the court papers, the risks of a backlash against an individual company were minimized.⁸⁴ Additionally, by acting in concert businesses were able to spread the costs of litigation.⁸⁵ As of April 1998, 44 U.S. companies and over 300 foreign companies were listed on the restricted purchase list maintain by the Massachusetts Department of Administration and Finance.⁸⁶ Thirty-four members of the NFTC were on the restricted list, including Atlantic Richfield, Federal Express, Procter and Gamble, Unocal and Halliburton.⁸⁷ The NFTC claimed that at least 3 companies severed ties with Burma in response to the Massachusetts law but many more did not and thus faced potential procurement sanctions.⁸⁸ Among the companies withdrawing from Burma, at least in part due to the Massachusetts law and consideration by other states of similar laws, were Apple Computer, Phillips Electronics, Hewlett-Packard, and Eastman Kodak.

The possibility of a WTO dispute settlement panel examining the measure under the GPA or the possibility of Massachusetts amending their law so as to only apply to non-GPA covered contracts did not dissuade the NFTC from

bringing the challenge. First, even if the EU were successful in bringing a WTO case, the federal government may not have the political will to force a change in Massachusetts law. Thus, the EU could retaliate against U.S. suppliers in its own procurement further harming NFTC members. Second, even if Massachusetts amended its law, either voluntarily or in response to a suit by the federal government, the law would continue to apply to all procurements below the GPA threshold of one-half million dollars (or the bulk of all procurements). Third, the NFTC hoped for a broad constitutional ruling that would act as a deterrent to all states from engaging in foreign policy-related sanctions, whereas the WTO case could only act as a deterrent to GPA-covered states and only with respect to procurement manifestations of sanctions laws.

B. Claims

The NFTC challenge was based on three constitutional claims: preemption, the dormant foreign affairs doctrine, and the dormant foreign commerce clause. Prior to discussing the results of the court cases, some background and context on these three types of claims is necessary.

1. Preemption

Preemption claims are based on Article VI of the U.S. constitution, that make federal law supreme to state law, and an affirmative act by the U.S. federal government. Preemption can occur in several different ways.⁸⁹ First, the federal government can expressly preempt state activity in a field (termed “express” preemption).⁹⁰ Second, preemption can be implied, either because federal regulation in the field is so extensive (occupation of the field or simply field preemption)⁹¹ or because the federal interest in the area is dominant (dominant federal interest preemption).⁹² Third, preemption can arise because the state measure conflicts with the federal act, either because it is physically impossible to comply with both (direct conflict preemption) or because the state act stands as an obstacle to the achievement of the full purposes of the federal act (obstacles conflict preemption).⁹³

The NFTC could not base its preemption claim directly on the GPA. Again, the Uruguay Round implementing act precludes private parties from bringing claims in U.S. courts alleging the inconsistency of state laws with WTO agreements.⁹⁴ Instead, the NFTC based its claim on the federal Burma sanctions law.

Additionally, there are strong arguments that the federal government has occupied the entire field of sanctions. In addition to federal laws sanctioning individual countries, the Congress passed more generalized framework laws,

most prominently the IEEPA,⁹⁵ delegating broad authority to the Executive to impose sanctions. Combined with the President's own powers in the foreign affairs field and the Executive Branch's constant monitoring of events and diplomacy around the world, one could easily find preemption of three kinds: field, dominant federal interest, and obstacles conflict (since the federal government must be presumed to have properly calibrated the degree of sanction, if any, taken against any given country).

2. *Dormant Foreign Affairs Doctrine*

The Constitution does not grant a general foreign affairs power to the federal government.⁹⁶ Instead, the Constitution allocates certain foreign affairs powers to the federal branches and denies other such powers to the states. No one questions that the federal government's foreign affairs powers are plenary and supreme. Further, the Supreme Court has declared on numerous occasions throughout history that foreign affairs powers are "exclusive" to the federal government.⁹⁷ A dormant doctrine flows necessarily from an exclusive power.⁹⁸ In other words, even if the federal government does not act or utilize these powers, i.e., the powers lie dormant, the states are prevented from taking actions in the area. It was not until the 1969 *Zschernig* case that the so-called dormant foreign affairs doctrine was utilized by the Supreme Court to strike down a state action (specifically, the application of an Oregon escheat statute that state judges utilized to criticize communist regimes).

In *Zschernig*, the Supreme Court appeared to establish a threshold effects test for determining the validity of state actions under the doctrine, specifically asking whether the state action has "more than some incidental or indirect" effect on U.S. foreign relations or a foreign country.⁹⁹ However, there is some evidence that the Court was concerned with the motive or purpose of the law as well.¹⁰⁰ Lower courts relied on the *Zschernig* doctrine on several occasions over the past several decades to invalidate state actions. Many of these lower courts, while according due respect to the threshold effects test, nonetheless placed considerable emphasis on the motive or purpose of the state action.¹⁰¹ This is no surprise because motive or purpose review, that would ask whether the primary purpose of the state law is to change a foreign government's policy, better suits the competence of the courts and better ensures their role as independent arbiters of constitutional questions. Courts recognize they have little ability to independently gauge the impact of a particular state action on foreign relations. Thus, under the threshold effects test, they turn to Executive Branch submissions, foreign government amicus briefs and diplomatic protests, and even the existence of disputes within international organizations such as the WTO for indications of the impact of a state measure on foreign relations, all the while denying such views are dispositive.

More recently, revisionist scholars are questioning the continued viability of the *Zschernig* doctrine and believe that today's Supreme Court may be receptive to their arguments given the revival of states' rights by the Court in general.¹⁰² However, the two central foundations of this revisionist scholarship are dubious.¹⁰³ The first claim of the revisionist scholars is that the dormant foreign affairs doctrine is a relic of the Cold War.¹⁰⁴ In short, when our very existence was at stake, we could not afford any intrusions by states and localities into the foreign affairs field. However, the Cold War had a certain rationality (if one will forgive the use of that term). The mere fact that consequences would be draconian under "mutually assured destruction" meant neither side was likely to overreact to a state or local measure. Today, foreign affairs are more complicated. The adversaries are not always as clear and these adversaries have many more quivers in their arrow, such as cyberwar and rumors to destabilize financial markets, than the ultimate destructive act. The second claim of revisionist scholars is that one of the central policies behind the dormant foreign affairs doctrine, namely ensuring that the act of a one state does not lead to retaliation against the nation as a whole, no longer holds since there are instances in which nation's have targeted retaliation against a particular sub-national entity.¹⁰⁵ However, this argument ignores the possible forms of retaliation, including hidden and subtle retaliation, the possibility of spill-over effects even from so-called targeted retaliation, and other functional arguments against state and local sanctions measures.¹⁰⁶ Moreover, other countries understand that the federal government has the ability to control state actions in the area and thus may direct retaliation against the state represented by the chair of an important Congressional committee or a state important to an upcoming Presidential election.¹⁰⁷

3. Dormant Foreign Commerce Clause

The Constitution allocates to the Congress the power to regulate interstate and foreign commerce.¹⁰⁸ However, for well over 150 years the Supreme Court has interpreted the Commerce Clause to not only act as a grant of power to the Congress, but also to act as a bar to state actions that discriminate against or unduly interfere with foreign commerce even when Congress has not acted to preempt the state measure, i.e. when the commerce power lies dormant. The Court appears to apply a balancing test under the dormant Commerce Clause, weighing the burden on commerce created by the state measure against its achievement of a legitimate, non-protectionist local purpose. However, some view this balancing that occurs on the face of opinions to simply be a way to tease out a protectionist purpose.¹⁰⁹ In cases involving foreign commerce, the Court applies the additional test of whether the state action "prevents the federal government from speaking with one voice."¹¹⁰ This test as stated on one level

makes little sense since a state measure can never really prevent the federal government from speaking with “one voice” as the federal government could preempt all state activity in the field. Instead, state activity can prevent the federal government from speaking with a “quiet voice” or exercising quiet diplomacy. The state action will force the federal government to be viewed as either allowing or curbing the state action and thus force it to send some kind of signal to the foreign government. In applying the test, the Court has stated the real risk it seeks to prevent is retaliation against the United States as a whole for actions by a state.¹¹¹ This concern, at least in part, also underlies the threshold effects test of the dormant foreign affairs doctrine and thus the additional prong of analysis under the dormant foreign commerce clause (as courts often recognize) ends up looking quite similar to the dormant foreign affairs doctrine.¹¹²

The other question that arises is whether something less than explicit approval of the federal government can remove a state measure from scrutiny under the dormant commerce clause. The Court has held that strongly inferred toleration, e.g. specific consideration by the Congress of the state measure and a rejection of preempting the state measure, can allow a state measure to clear the “one voice” hurdle but not other portions of the dormant commerce clause analysis. The Court has reasoned in such cases that “nothing requires the federal government to speak with any particular voice.”¹¹³ However, what many have misunderstood, is that a simple failure to preempt does not constitute inferred toleration. The Congress must specifically (and perhaps on numerous occasions) turn its attention to and considered preemption of a particular state measure and ultimately decided against preemption for the inferred toleration to arise.¹¹⁴ Massachusetts attempted to argue inferred toleration of their measure as a result of the ban on private causes of action based on the GPA and the failure of the federal Burma sanctions act to explicitly preempt the state sanctions law. However, with respect to the GPA, it does preempt state laws but only the federal government can bring such a case. The simple failure to explicitly preempt the Massachusetts Burma law in the federal Burma sanctions law cannot arise to inferred toleration because Congress did not turn sufficient attention and consideration to the possibility of preemption and must be assumed to know of the doctrines of implied and conflict preemption.

4. Market Participant Exception

One question that arises under both the dormant Commerce Clause and the dormant foreign affairs doctrine is whether these doctrines only apply to state regulatory conduct or also apply when the state acts as a market participant, i.e. a buyer or seller of goods. It is well-settled law that there is a market participant doctrine to the dormant interstate Commerce Clause.¹¹⁵ The market participant

exception was created on several grounds. First, the text of the Commerce Clause refers to the power to “regulate.”¹¹⁶ Second, the state when acting as a market participant can be analogized to a private actor in the market.¹¹⁷ Third, the budgetary expense of engaging in protectionist behavior when acting as a buyer or seller reduces the risk to constitutional values protected by the dormant Commerce Clause.¹¹⁸ The Supreme Court has strongly hinted that the market participant exception is available under the dormant foreign Commerce Clause and most lower courts have followed this strong hint.¹¹⁹ Indeed, it would be hard to preserve the exception in the interstate context without allowing it in the foreign commerce context. In today’s globalized economy a state action that affects interstate commerce will in most instances also affect foreign commerce. A state measure does not have to specifically target or discriminate against foreign commerce in order to be subject to the dormant foreign commerce clause constraints. Indeed, in the case in which the Supreme Court strongly hinted the exception would apply, only 10% of the commerce affected by the state measure was foreign trade.¹²⁰

Much less certain is whether the market participant exception applies to the dormant foreign affairs doctrine. While a Maryland state court examining that state’s South Africa sanctions in the mid-1980’s found the exception was available, the justifications for the exception appear not to apply in the context of the dormant foreign affairs doctrine. First, the textual basis disappears. The dormant foreign affairs doctrine is implied not from a particular clause granting the federal government power to “regulate” a particular matter but rather an amalgam of clauses and the structure of the Constitution relating to foreign affairs. Second, the analogy to the private actor does not hold. The Supreme Court, in a discussion of surrounding federal preemption of a state procurement law sanctioning labor law violators, found that “government occupies a unique position of power in our international society, and its conduct, regardless of form, is rightly subject to special restraints” and “in our system, states are simply different from private parties and have a different role to play.”¹²¹ Third, procurement sanctions for foreign policy purposes are likely to be significantly less expensive in budgetary terms than procurement preferences for protectionist reasons.

Additionally, the market participant exception does not apply when a state’s action has a regulatory effect on conduct in a downstream or upstream market in which it is not a direct participant. For example, the state of Alaska did not qualify for the market participant exception when they included in their contracts selling raw logs from state lands a condition that processing of the logs be done within the state.¹²² Since the Massachusetts Burma law has a regulatory effect on its suppliers relationships with Burma, the market participant exception, even if theoretically available, should not apply.

C. Results In Federal Court

1. Federal District Court

The federal district court struck down the Massachusetts law on the basis of the dormant foreign affairs doctrine in November of 1998,¹²³ leading to the EU and Japan suspending their WTO complaint a few months later. With respect to the other two claims by the NFTC, the district court found they had failed to carry the burden of proof with respect to preemption and that it was not necessary to rule on the dormant foreign Commerce Clause claim.¹²⁴

In reaching its conclusion on the dormant foreign affairs doctrine claim, the court applied the threshold effects test most evident in the *Zschernig* opinion. Specifically, the Court asked, quoting the *Zschernig* case, whether the law had “more than some indirect or incidental effect, in foreign countries” or a “great potential for disruption or embarrassment.”¹²⁵ Nonetheless, the federal district court first engaged in motive review, as most lower courts have done in applying the *Zschernig* test. The court highlighted that the only purpose of the Massachusetts Burma law was to sanction Burma for its human rights violations and to change these practices.¹²⁶ After engaging in motive review, the court returned to applying the threshold effects test. One of the factors the court looked to in determining whether the law violated the threshold effects test was the concerns the EU and Japan raised in the WTO.¹²⁷ Thus, the mere existence of the WTO dispute (irrespective of any finding of a WTO violation) had a minimal influence on the constitutional finding of a violation of the dormant foreign affairs doctrine. While the threshold effects test allows some minimal interplay in this regard, it should be kept in proper context. The holding of the federal district court would have been the same even if Massachusetts had never agreed to become bound to the GPA such that the EU and Japan could never have raised WTO compliance issues with the United States with respect to the Massachusetts law. Nevertheless, a motive review test under the dormant foreign affairs doctrine better respects the nature of international agreements, such as the WTO, that cannot be directly invoked in a U.S. court by a private party.

2. First Circuit Court of Appeals

The First Circuit Court of Appeals affirmed the district court’s ruling but expanded the basis of the ruling to all three doctrines: preemption, dormant foreign affairs doctrine, and dormant foreign Commerce Clause.¹²⁸ The First Circuit began its dormant foreign affairs doctrine analysis by applying the *Zschernig* test. However, like the district court, the initial factor the First Circuit cited in drawing its conclusion that the law had more than some incidental effect

on foreign relations was that the “*design and intent* of the law is to affect the affairs of a foreign country.”¹²⁹ As did the district court, the First Circuit proceeded to consider the protests of foreign countries to the law. Although it did not mention specifically the presence of the WTO dispute in this context, it is clear from the opinion the court was aware of the proceedings. However, the First Circuit relied on the numerous other forms of protest to the law outside the WTO. For example, the EU lodged diplomatic protests with the State Department and filed an amicus brief in the case.¹³⁰ The grounds for the protest went beyond alleged WTO-inconsistency of the Massachusetts Burma law to include its extraterritorial regulatory effect. Thus, the WTO dispute played some role, but clearly a non-essential one, in the First Circuit’s ruling on the dormant foreign affairs doctrine claim. The U.S. Executive Branch, as it did before the district court, declined to file an amicus brief in opposition to the state law, to the chagrin of many in the business community.

The First Circuit also invalidated the law under the dormant Foreign Commerce Clause for three reasons. First, it found that the statute facially discriminated against foreign commerce, even though it applied equally to foreign and domestic companies, because it attempted to regulate both sets of companies in their dealings with Burma.¹³¹ Second, the court found that the law violated the additional prong of analysis in foreign Commerce Clause cases, the “one voice” test, stating that this test was similar to, but distinct from the dormant foreign affairs doctrine.¹³² Third, the court found that the state law essentially attempted to regulate conduct outside its territory, namely companies’ dealings with Burma.¹³³ Previous Commerce Clause decisions found that states were precluded from regulating commerce that takes place wholly outside of the state’s borders, regardless of whether the commerce has effects within the state, and that the critical inquiry was whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.¹³⁴ The court refused to find “inferred toleration” of the bill by the failure to explicitly preempt the state law in the federal Burma sanctions law. The court found that a much higher degree of “clarity and frequency of the refusal of Congress to act” to preempt is required to find inferred toleration.¹³⁵ In any event, inferred toleration of Congress would only save the law under the “one voice” portion of the dormant foreign Commerce Clause doctrine (i.e., it does not save laws that have been found unconstitutional under that doctrine for other reasons, such as facial discrimination against foreign commerce or extraterritorial regulatory effect).¹³⁶

Finally, the First Circuit found that the Massachusetts Burma law was preempted by the federal sanctions on Burma. It highlighted that preemption is more readily implied in the foreign affairs field and that the state law “veered from the carefully balanced path that Congress constructed” by “imposing

distinct restrictions different in scope and kind from the federal law.”¹³⁷ For example, the federal law (combined with the Executive Order) only prohibited new investment by U.S. companies whereas the Massachusetts law sought to terminate existing investment by both U.S. and foreign companies through the leverage of the state’s procurement market.

3. U.S. Supreme Court

The Supreme Court unanimously (9-0) affirmed the First Circuit’s decision but only on the grounds of preemption.¹³⁸ The Court found that the Massachusetts law stood as an obstacle to the achievement of the full purposes of the federal sanctions law, essentially basing its ruling on “obstacles conflict” preemption. The Court held that the Massachusetts law “undermines the intended purposes and natural effect of at least three provisions of the federal act, that is its delegation of effective discretion to the President to control economic sanctions against Burma, its limitations of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma.”¹³⁹ It explicitly declined to consider a broader sense of preemption, namely “field preemption” (i.e. that the entire field of economic sanctions against foreign countries was occupied by the federal government).¹⁴⁰ The Court also found it unnecessary to address the dormant foreign Commerce Clause and dormant foreign affairs doctrine claims.¹⁴¹

The WTO dispute settlement proceedings played a very small, non-dispositive role in the Court’s analysis, even though preemption was not based on the WTO agreements and the Court did not even undertake dormant-type analysis. The Court only mentioned the WTO case in its obstacles conflict preemption analysis with respect to one of the three relevant provisions in the federal act, namely the Congressional directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma.¹⁴² But the analysis regarding this provision of federal law also mentioned the formal diplomatic protests filed by the EU and Executive Branch statements indicating that the Massachusetts law was complicating efforts to build coalitions with allies with respect to Burma.¹⁴³ Moreover, the Court had already found as a matter of logic that the state law was a threat to the President’s diplomatic efforts.¹⁴⁴

As it did before the lower courts, Massachusetts argued that the Court should ignore the evidence of a WTO dispute because of the ban on private causes of action within the Uruguay Round legislation. Massachusetts argued that acknowledging evidence of the dispute effectively violated the ban on private causes of action. However, the Supreme Court rejected the argument

because the claim in this case was preemption based on the federal Burma sanctions and not on the basis of the GPA.¹⁴⁵ The Court also rejected for the same reason Massachusetts' argument that the ban on private causes of action plus the federal government's decision to decline to bring its own suit on the basis of the GPA was evidence of inferred toleration.¹⁴⁶ Lastly, the court rejected the argument that failure to expressly to preempt the state law in the federal Burma sanctions law constituted implicit permission. The Court stated that a "failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply..."¹⁴⁷

Unlike the case before the lower courts, the U.S. Executive Branch did submit an amicus brief to the Court asking that it declare the Massachusetts law unconstitutional on all three grounds.¹⁴⁸ Indeed, the list of amici in opposition to the law included six U.S. Senators, fourteen representatives, a host of business and agricultural groups such as the Chamber of Commerce and the American Farm Bureau, and a group of former government officials, featuring former President Gerry Ford and several former Secretaries of States, U.S. Attorney-Generals, and U.S. Trade Representatives. However, the number of amici supporting the Massachusetts law was also extremely large, including four U.S. Senators, roughly sixty U.S. representatives, 22 states, 16 municipalities, numerous state and municipal organizations, and numerous NGOs, such as Human Rights Watch and the Sierra Club.

D. The Future of U.S. Sub-Federal Procurement Sanctions Laws

The proliferation of state sanction laws seems to have subsided somewhat with the Supreme Court's ruling against the Massachusetts Burma law. Indeed, proposals in numerous state legislatures, including California, Connecticut, New York, North Carolina, and Texas, to enact parallel laws died in committees or were otherwise abandoned even as the NFTC case worked its way through the lower courts.¹⁴⁹ However, any re-emergence of these laws or continued enforcement of laws similar to the Massachusetts Burma law will lead to further EU-US tensions. Thus, it is critical how state legislators and officials read the Supreme Court's opinion.

Many proponents of state sanctions laws are referring to the Supreme Court's opinion as narrow and maintain they have considerable flexibility to adopt sanctions laws in the future.¹⁵⁰ For example, the deputy executive director of the NCSL has stated that the "narrow decision leave as many questions as answers on the appropriate role for states and localities in foreign affairs."¹⁵¹ The opinion has been referred to as narrow because the Supreme Court scaled back the grounds for invalidating the state law from those relied upon by the

First Circuit. The First Circuit opinion was comprehensive and, it should be remembered by Massachusetts officials and other state officials in the First Circuit, that its rulings on the dormant foreign affairs doctrine and the dormant foreign Commerce Clause, remain “good law” in that Circuit. Additionally, it is not unusual for the Supreme Court to limit its opinions to the most narrow grounds and it was unanimous in ruling the Massachusetts law unconstitutional. More importantly, its opinion, properly read, leaves little to no room for state foreign policy-related sanctions measures.

Most federal sanctions laws, whether general or specific to a particular country or group of countries, contain features identical or similar to those found in the federal Burma sanctions act. First, most federal sanction statutes give the President discretion to control economic sanctions and, in fact, the sanctions reform effort of the past several years (that has not been wholly successful as of yet) highlighted the need to give the President “waiver” authority with respect to sanctions. Even where an individual sanctions act does not include waiver authority, one can argue Congress has set the exact level of sanction it desires. Moreover, in nearly all instances, a more generalized statute (e.g., IEEPA¹⁵²) will be available to impose additional sanctions against the country and, in this sense, the President has discretion to control the level of sanctions. Second, in the case of any individual country, the Congress together with the President will have calibrated a particularly level of sanction, the types of persons affected and the types of trade and investment covered, and so forth. State and local sanctions almost by necessity will change what must be assumed to be the careful calibration of sanctions. In the Burma case, federal sanctions were limited to U.S. companies and to new investment. The Massachusetts law affected foreign companies and existing investment. Third, state and local sanctions will typically undermine the President’s capacity to engage in effective diplomacy. While the federal Burma sanctions act gave a Congressional directive to the President to develop a “comprehensive, multilateral strategy” with regard to Burma, the Court highlighted the President’s own powers in foreign affairs field as well. Thus, an express command by Congress in a particular instance is not essential to finding state sanctions laws an obstacle to Presidential diplomacy.

Finally, there is nothing in the Supreme Court opinion to suggest that state foreign policy-related procurement sanctions laws would survive scrutiny under the dormant foreign Commerce Clause or the dormant foreign affairs doctrine, even in cases in which the Court is unwilling or unable to find preemption. The dormant foreign Commerce Clause is well-established law and the market participant exception, while available for “Buy American” or protectionist procurement laws, will not apply to foreign policy-related sanctions laws that mirror the Massachusetts Burma law, i.e., that constitute secondary boycotts. The dormant foreign affairs doctrine, while under increasing academic

criticism,¹⁵³ has never been rejected by the Supreme Court. In fact, the Court did consider a claim under the dormant foreign affairs doctrine subsequent to *Zschernig*, and implicitly admitted the continuing vitality of the doctrine, although it ultimately rejected the claim because the state measure had “insignificant international consequences.”¹⁵⁴

VIII. IMPLICATIONS FOR EU-US DISPUTE PREVENTION AND RESOLUTION

A. Dispute Prevention

1. Enhancing State Legislators and Governors Fealty to their Constitutional Oath

Conscientious state legislators and governors will apply constitutional constraints as they develop and vote on (or consider signing, in the case of governors) legislation.¹⁵⁵ Indeed, state legislators and governors are required to apply these constraints and not simply leave the application of such constraints to the courts should the measure be challenged after its enactment. The U.S. Constitution requires that all state legislators take oaths or affirmations to uphold the federal Constitution.¹⁵⁶ When applying these constraints, a state legislator is not allowed to arrive at his or her own interpretation of the Constitution. Instead, a state legislator is bound to follow or, at the very least, give substantial deference to, U.S. Supreme Court decisions. Thus, state legislators and governors should apply the doctrines of preemption, dormant foreign affairs doctrine, and dormant Commerce Clause prior to passing or signing legislation. The incorporation of these considerations into initiation programs for new legislators, and training programs for counsel to the legislature and governor, may encourage legislators and governors to act in a conscientious fashion.

Importantly, state legislators and governors, as part of their preemption analysis, should be asking whether the laws they craft are in conformity with trade agreements, including the WTO. The fact that the implementing acts for the WTO agreements only allow the federal Executive but not private parties to bring suits against the states based on non-compliance with the agreements, a mechanism described as “weak preemption,”¹⁵⁷ does not eliminate this duty. The conscientious legislator and governor must apply these constraints and not simply think in a tactical fashion by merely assessing the possibility of suit by the federal Executive, an act that may be politically difficult.¹⁵⁸ There is some recent anecdotal evidence that state officials are increasingly considering trade agreement constraints as they consider proposed legislation. For example, Ohio state senators introducing legislation to stiffen penalties for violation of state law

requiring the use of domestically-produced steel in public works projects requested that the Ohio Legislative Service Commission prepare an analysis of the consistency of the bill with the GPA.

2. Enhanced and Regularized USTR/State Department Outreach

Since a significant number of state officials still lack awareness and familiarity with constitutional and international agreement constraints on their actions, or fail to give sufficient consideration to these constraints, it is important for the federal government to maintain a proactive outreach effort to both educate and cajol state officials.¹⁵⁹ Indeed, awareness needs to be raised not just with respect to legal constraints but also non-binding political constraints, such as the EU-US Summit agreement with respect to extraterritorial sanctions.

The outreach effort primarily should be the responsibility of the Office of the United States Trade Representative (USTR) and the U.S. State Department. This outreach effort can begin through the national associations of state and local elected officials, such as the National Conference of State Legislatures (NCSL), the National Governors' Association (NGA), and the National Conference of Mayors. However, it should extend to the grassroots level with links to individual state legislatures and governors offices. These outreach efforts should be regularized. The outreach efforts can extend to not only educating states on constraints on their activities but also elaborating on the federal efforts that are being made to resolve foreign policy problems that are of concern at the grassroots level. For instance, when asked why Massachusetts did not limit itself to simply passing a non-binding resolution on Burma, Representative Rushing stated responded that "for years we passed resolutions on a lot of international issues, and we never even once got a letter back from the State Department. That's why we pass selective purchasing bills, because that gets (the federal government's) attention."

Even on a limited, ad hoc basis, prior outreach efforts have shown positive results. For example, shortly after the EU raised concerns over the Massachusetts Burma law, USTR officials met with the NGA to urge states to consult with the USTR before considering sanctions legislation.¹⁶⁰ However, it appears that such consultations were only to focus on having state foreign policy-related sanctions proposals conform to the GPA, rather than the constitutionality and wisdom of such laws.¹⁶¹ Nevertheless, federal government consultations with the states did prevent sanctions legislation from being passed in some states (e.g., sanctions against Nigeria being considered by the Maryland legislature).¹⁶²

3. Experiment with the Inclusion of State Legislators and/or Governors in Meetings of the EU-US Summit and the Transatlantic Business Dialogue

To further invest state officials in the process, and to further hammer home the complications of unilateral foreign policy-related sanctions by the states, the EU and U.S. federal government could experiment with including a representative of the state legislators and a representative of the governors (e.g. the lead legislator and lead governor on trade issues in their respective national associations) in meetings connected with the EU-US Summit. This would include meetings of EU-US trade officials as well as the TransAtlantic Business Dialogue (and perhaps the other dialogues too). Presumably, the lead state legislator and governor will be better equipped and motivated to stem the tide of state foreign policy-related sanctions through their leadership positions in their national associations after attending the Summit meetings.

4. Continuous and Active Monitoring and Lobbying by Businesses

One of the reasons cited by commentators for Governor Weld's shift in position on the Burma sanctions law was the lack of strong, active business opposition to the law. Indeed, a group of businesses under the organizational heading USAEngage that has lead the sanctions reform lobbying effort, admitted that the business community failed to realize in time the growing proliferation of state and local foreign policy-related sanctions laws.¹⁶³ It is clear that the internet increased the ability of NGOs and human rights activists to lobby multiple jurisdictions throughout the country and the world even with limited resources. The business community cannot cede the field to such groups and must highlighted the limited effectiveness and costs of unilateral sanctions, particularly at the state and local level. However, the business community must not find itself simply in an antagonistic relationship with the NGOs, if for no other reason that consumer boycotts against particular companies can also be organized. Instead, the business community must show some outreach and responsiveness to the concerns of these organizations without ceding principles of importance. Industry wide and/or individual corporate codes of conduct may be one means to address concerns of NGOs.

B. Dispute Resolution

1. Avoid Use of WTO Dispute Settlement Panels to Challenge State Foreign Policy-Related Procurement Sanctions Laws

The use of WTO dispute settlement is likely to be ineffective in stopping state foreign policy-related procurement sanctions laws. GPA obligations only apply to thirty-seven states and only for contracts on goods and services above

\$5000,000. Thus, even a successful WTO complaint would only partially cure the problem of state procurement sanctions legislation enacted for foreign policy-reasons (and this assumes the state would amend its measure or the federal government would sue the state to come into compliance with the ruling). Given that future international trade negotiations need to further constrain state behavior in areas such as procurement and trade-in-services, it is probably wise to avoid unnecessarily raising the ire of state officials with a WTO dispute settlement case. This is particularly true when a constitutional claim in domestic courts will be more effective at eliminating state procurement sanctions enacted for foreign policy reasons, as well as other manifestations of state foreign policy-related sanctions.¹⁶⁴ It is true, however, that the existence of a WTO dispute can minimally influence a domestic constitutional claim. But, at most, this supports proceeding with WTO consultations and does not require proceeding with a dispute settlement panel.

2. Litigation in Domestic Courts Provides A More Effective & Comprehensive Constraint on State Foreign Policy-Related Procurement Sanctions Laws

As seen in the case of the Massachusetts Burma law, domestic litigation is likely to be quite successful in challenging state procurement sanctions laws enacted for foreign policy purposes. The real problem is finding a plaintiff to bring the cases. Businesses had traditionally been hesitant to challenge such laws fearing they would create consumer backlashes or boycotts. Indeed, in the South Africa sanctions era the only case was brought against a divestment measure by the city of Baltimore, Maryland. Businesses were finally able to overcome this fear by acting collectively in the form of an organization, the National Foreign Trade Council, in the Massachusetts Burma case. However, if state officials misread the Supreme Court's decision, then a proliferation of state sanctions measures could occur again. Affected businesses will have to be ready and must continue to act collectively to bring future challenges in such instances.

Amicus briefs by the Executive Branch opposing such laws will be taken into account by courts in such cases. Thus, it will be important for the Executive Branch to take the sometimes politically difficult position of opposing these state laws. Democratic Administrations often share close links to human rights and environmental organizations that support such laws. However, they must make the honest case that these goals are damaged by divergent state and local measures that distract other countries attention away from the problem country and towards the sanctions. Republican Administrations often are strong protectors of states rights. However, they must make the honest case that the field of foreign affairs is not like other fields in the constitutional division of powers.

Similarly, amicus briefs and diplomatic protests by foreign governments have some influence in these cases. As long as U.S. courts continue to apply a threshold effects test under *Zschernig*, and even as courts engage in obstacles conflict preemption analysis, foreign governments can benefit their cause by submitting amicus briefs. Thus, business lobbying of, and coordination with, the Executive Branch and foreign governments in such cases can be helpful.

C. Looking Beyond State Procurement Sanctions Laws to Other State Foreign Policy-Related Sanctions and Protectionist Behavior Potentially Causing EU-US Frictions

1. Other Sanctions Measures

Prior to the Massachusetts Burma case, procurement sanctions had become the preferred mode of foreign policy-related sanctions for state and local governments. It is viewed by many state and local officials as the most effective mode given the tremendous buying power of state and local governments. The procurement mode of sanction was apparently first introduced in the era of South Africa sanctions in 1985 by the city of Pittsburgh, Pennsylvania. However, the predominant sanction in the era of South Africa sanctions was divestment measures, e.g. prohibitions on the state pension funds being used for investments in companies active in South Africa. Some state officials are suggesting a return to divestment measures in light of the Supreme Court's decision concerning the Massachusetts Burma law. Other recent sanctions measures focus on the elimination of so-called "sweatshops" and seeking reparations for past human rights violations. Domestic constitutional challenges to these types of sanctions measures are explored below.

a. Divestment

State and local divestment measures concerning South Africa arose from state legislatures, governors actions, pension-fund investment board actions, and even citizen initiatives. In its amicus brief to the Supreme Court in the Massachusetts Burma case, the U.S. Executive Branch suggested that divestment measures might survive constitutional scrutiny without taking any formal position on the issue.¹⁶⁵ The brief argues that divestment statutes would not have as "direct a regulatory effect" as the Massachusetts Burma law.¹⁶⁶ The discussion in the brief is certainly one factor state proponents of sanctions will take into account as they determine what, if any, measures to take in response to human rights concerns in foreign countries. Indeed, the discussion in the brief is regrettable because it was unnecessary to the case at hand and proponents of state sanctions legislation are likely to read it with "rose colored glasses." Indeed, the Executive Branch appears in its brief to be uncomfortable to some degree with leaving the

door open with respect to divestment statutes. For example, the brief states that “even if the Court were to hold that States have the latitude under the dormant Foreign Commerce Clause to adopt a policy of mandatory divestment from companies doing business in another country, it would not necessarily follow that states would have the same latitude to adopt a policy of mandatory divestment from companies doing business in another State.”¹⁶⁷ The brief makes this qualification even though the Supreme Court has indicated that measures affecting foreign commerce are to receive stricter scrutiny than those affecting interstate commerce.¹⁶⁸

The constitutionality of a state divestment measure was only addressed in one case in the era of South Africa sanctions. In 1988, the Maryland Court of Appeals (the highest state court in Maryland) upheld the divestment ordinance of the City of Baltimore, rejecting challenges on the grounds of preemption, dormant foreign affairs doctrine and dormant Commerce Clause.¹⁶⁹ However, the court’s analysis can be criticized on several grounds. First, the court did not give sufficient attention to all the possible bases of preemption, including obstacles conflict, dominant federal interest, and field. Second, the court found that the market participant exception applied to the dormant foreign affairs doctrine. As noted previously, the rationales for the exception have little force in the dormant foreign affairs doctrine context. It also found that the city measure had little impact on the South African government but it did not take sufficient account of the cumulative effect of state and local ordinances. It also failed to take account of the impact on relations between the U.S. and other countries seeking change in South Africa. Moreover, in the Massachusetts Burma law case, the First Circuit hinted that it would have ruled differently than the Maryland Court of Appeals had it been called upon to review a divestment measure.¹⁷⁰

b. Anti-Sweatshop

Another mode of sanction that states and localities are considering in response to the Supreme Court’s decision, is to focus procurement sanctions against those companies “benefiting” from human rights or labor rights violations. For example, the New York City Council considered a measure that would prohibit the city from buying uniforms from apparel companies that pay wages below a “non-poverty” level in foreign countries.¹⁷¹ The ordinance was drafted and promoted by the Union of Needletrades, Industrial, and Textile Employees (UNITE).¹⁷² Although the measure does not target a specific country (or companies operating in a specific country), the measure may still be subject to successful challenge on preemption, dormant foreign affairs and dormant foreign commerce clause grounds.

c. Allowing Claims/Seeking Reparations for Prior Human Rights Violations

California passed a law in 1999 allowing WWII prisoner's of war to file suit in California courts against companies that used them as forced labor or that are affiliated with such companies.¹⁷³ While originally targeted at Germany, an agreement between the United States and Germany led to the establishment of a settlement fund for claims against German companies. Instead, claims are being filed largely against Japanese companies and affiliates. A federal district judge has ruled that such suits are preempted by the allies Peace Treaty with Japan, at least with respect to POWs from the 48 allied countries signing the treaty.¹⁷⁴ Subsequently, a federal district court judge ruled that claims by POWs from non-allied countries could not be allowed because the statute violated the dormant foreign affairs doctrine.¹⁷⁵

In 1999, California also passed the Holocaust Victim Insurance Relief Act that requires insurers that do business in California and that sold policies in Europe during the Holocaust-era to report information concerning those policies and the payment of benefits to the state insurance commissioner.¹⁷⁶ The reporting requirement also applies to insurance companies that do business in California and are "related" to a company that sold-Holocaust era policies.¹⁷⁷ Two foreign insurance companies challenged this reporting statute in federal court.¹⁷⁸ Two other related laws were also originally challenged but standing problems lead to review of those laws being dropped. These laws allow California residents to bring claims for the payment of Holocaust-era insurance policies (extending the statute of limitations to 2010) and require the state insurance commissioner to suspend the certificate of authority of any insurer to has failed to pay on valid Holocaust-era policies.

The Ninth Circuit Court of Appeals overturned the federal district court ruling issuing a preliminary injunction against enforcement of the reporting law.¹⁷⁹ The Ninth Circuit found that the law did not have extraterritorial reach and thus it fell within Congress express delegation to the states to regulate the business of insurance.¹⁸⁰ The Court also rejected the "one voice" additional prong of the dormant foreign commerce clause challenge because Congressional approval of the state reporting measure could at the very least be inferred from the federal Holocaust Assets Commission Act of 1998.¹⁸¹ In that act, the Congress established a commission to "conduct a thorough study and develop a historical record of" Holocaust-era assets in the United States, and directs the commission to take note of the work of the national association of (state) insurance commissioners with regard to Holocaust-era insurance policies.¹⁸² The Court surmised that Congress must have expected that the insurance commissioners would be acting pursuant to state law, and that foreign affiliates of domestic insurance companies might be required to search records in order

for the objectives of the federal act to be met.¹⁸³ The Ninth Circuit took a narrow view of the *Zcshernig* doctrine, finding it inapplicable where a state law mainly involved foreign commerce and was not targeted at a particular country.¹⁸⁴ In spite of the ruling, it is important to keep in mind a different result may be reached in a case involving not just the reporting requirement but also the other laws dealing with claims for payments or suspension of a license.

d. Non-Binding Resolutions

One option that is being considered by advocates of state and local sanctions is to simply rely on non-binding resolutions to highlight issues and urge the U.S. federal government to take stronger action on a particular foreign policy matter. It is important for state and local officials to be able to communicate their views on federal issues raising local concerns to federal government officials. Indeed, this is in part why state and local officials form national associations based in Washington, D.C.

There seems little harm in most cases of state and local governments expressing their views on foreign policy issues in non-binding resolutions. Such resolutions can potentially survive either threshold effects or motive/purpose review under the dormant foreign affairs doctrine. There is also a longer historical practice of such resolutions by states and localities. Indeed, during oral argument in the Massachusetts Burma case, Justice Souter, the author of the Supreme Court opinion, suggested that “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...”. The U.S. Executive Branch amicus brief also stated that non-binding resolutions “condemning the conduct of a repressive foreign regime” or “petition(ing) Congress and the President to take action against the regime” would be constitutionally permitted.¹⁸⁵ In any event, in contrast to sanctions measures, non-binding or “sense of” resolutions are unlikely to cause significant friction in EU-US relations.

2. Protectionist State Legislation

Formal EU-US disputes over protectionist-motivated, as opposed to foreign policy-motivated, state and local legislation are likely to be rare for the foreseeable future. In the area of procurement, no state agreed to be bound in a manner that would require a change or liberalization of current procurement regimes. In essence, the EU achieved a standstill against new protectionism in state procurement done by certain entities within thirty-seven states with respect to contracts above one-half million dollars for goods and services. The other thirteen states maintain complete flexibility to enact new protectionist legislation. Indeed, at least two states, West Virginia and Ohio, have recently

considered adopting preferences for domestically-produced steel (or strengthening penalties against the use of foreign-made steel) in public works projects.¹⁸⁶ The Massachusetts Burma case has raised awareness of the GPA among state officials. Thus, both West Virginia and Ohio made sure through research and contact with the office of the USTR that their proposed measures did not violate the GPA (neither state is bound to the GPA).¹⁸⁷ Thus, it is likely that disputes under the WTO for state violations of the GPA will remain rare. Additionally, complaints over “buy-american” or “buy-in-state” provisions in state procurement laws are unlikely to find their way into domestic courts. These protectionist procurement laws have in the past, and are likely to continue to, survive any domestic constitutional challenges. Instead, state procurement preferences will continue to cause frictions mainly at the negotiating table as the EU seeks greater coverage of state and local procurement. However, should a state enact a protectionist procurement measure applicable to contracts above the GPA threshold, WTO dispute settlement will provide the best means to resolve the dispute since domestic litigation by private parties is unlikely to be successful.

States are also unlikely to violate other WTO agreements. For example, the GATS agreement creates only a “standstill” obligation against new protectionist measures¹⁸⁸ and states seem not to be pursuing new protectionism in this area. Thus, in the near term, disputes over state measures affecting trade-in-services are likely to occur primarily within the confines of WTO negotiations for further services liberalization.

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ENDNOTES

¹ Mass. Rev. Stat., Ch. 7, Sections 22G-22M.

² It should be emphasized that this was just a clarification since GATT 1947's Article XXIV(12) was already interpreted as making federal states fully responsible for action by their sub-federal governments if it was within the federal government's constitutional powers to control the behavior. See John Jackson, *World Trade and the Law of GATT* 110-117 (1969); Matthew Schaefer, *Searching for Pareto Gains in the Relationship Between Free Trade and Federalism: Revisiting the NAFTA, Eyeing the FTAA*, 23 *Canada-U.S. L.J.* 441, 462-465 (1997)

³ See Matthew Schaefer, *supra* note 2, at 465.

⁴ *LaGrand Case (Germany v. United States)*, Judgment of June 27, 2001, available at www.icj-cij.org.

⁵ See, e.g., Andrew Lowenfeld, *Trade Controls for Political Ends* 92-93 (1983).

⁶ See *Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act*, 90 *Am. J. Int'l L.* 419 (1996).

⁷ See Supreme Court to Rule on Constitutionality of Massachusetts Burma Procurement Law, 16 *Int'l Trade Rep.* 1958 (December 1, 1999).

⁸ NFTC Profile, available at www.usaengage.org/background/nftc.

⁹ *National Foreign Trade Council v. Baker*, 26 *F.Supp.2d* 287 (D. Mass. 1998).

¹⁰ *National Foreign Trade Council v. Natsios*, 181 *F.3d* 38 (1st Cir., 1999).

¹¹ *Crosby v. National Foreign Trade Council*, 530 *U.S.* 363 (2000).

¹² See U.S. Dept. of State: *Report on Human Rights Practices (Burma)*, various years.

¹³ See *id.*

¹⁴ See Terrance Guay, *Local Government and Global Politics: The Implications of the Massachusetts Burma Law*, 115 *Political Science Quarterly* (Fall 2000).

¹⁵ See *id.*

¹⁶ See Lucien Dhooge, *The Wrong Way to Mandalay: The Massachusetts Selective Purchasing Act and the Constitution*, 37 *Am. Bus. L.J.* 387, 393-94 (Spring 2001).

¹⁷ See *id.*

¹⁸ See, generally, *Business, Labor Pressure Administration over New Burma Sanctions*, *Inside U.S. Trade*, January 5, 2001.

¹⁹ See Dhooge, *supra* note 16, at 401 (citing report of the International Confederation of Free Trade Unions).

²⁰ See Guay, *supra* note 14.

²¹ See Dhooge, *supra* note 16, at 395.

²² See *id.*

²³ GATT, Art. III:8.

²⁴ See John Jackson, *The World Trading System* 76 (2d ed., 1997).

²⁵ The description that follows is drawn from Schaefer, *supra* note 2, at 472-73.

²⁶ See *id.*

²⁷ See Jackson, *supra* note 24, at 77-78; WTO Agreement, Annex 4.

²⁸ See Dhooge, *supra* note 16, at 404.

²⁹ See *id.*

³⁰ See *id.*

³¹ *Foreign Operations, Export Financing and Related Programs Appropriation Act*, Public Law No. 104-208, Section 570 (September 30, 1996).

³² Executive Order No. 13047 (May 20, 1997).

- ³³ 50 U.S.C.A., Section 1701-1706.
- ³⁴ See *id.*
- ³⁵ See Business, Labor Pressure Administration over New Burma Sanctions, Inside U.S. Trade, January 5, 2001.
- ³⁶ See Dhooge, *supra* note 16, at 403.
- ³⁷ See *id.*
- ³⁸ See Peter Fitzgerald, Massachusetts, Burma and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era, 34 Cornell Int'l L.J. 1, 3 (2001).
- ³⁹ See *id.*
- ⁴⁰ See *id.*
- ⁴¹ See *id.*
- ⁴² See *id.*
- ⁴³ Comments by Rep. Byron Rushing at the Annual Meeting of the American Society of International Law, Panel on International Law and the Work of Federal and State Legislators, April 2001.
- ⁴⁴ See Guay, *supra* note 14.
- ⁴⁵ This quote appeared in The Economist magazine.
- ⁴⁶ See Statement of Rep. Byron Rushing, July 19, 1995.
- ⁴⁷ See Natsios, 181 F.3d at 46 (1999).
- ⁴⁸ See Statements of Rep. Edward Teague and Rep. Lucille Hicks, July 19, 1995.
- ⁴⁹ Mass. Rev. Stat., Ch. 7, Section 22H-22J.
- ⁵⁰ Mass. Rev. Stat., Ch. 7, Sections 22H, 22I, & 22J.
- ⁵¹ Mass. Rev. Stat., Ch. 7, Section 22G.
- ⁵² See EU Complains Japan's Call for Bids on Satellite System Biased for U.S., 14 Int'l Trade Rep. 352 (February 26, 1997).
- ⁵³ See European Union Seeks WTO Consultations Over Massachusetts Sanctions Law, 14 Int'l Trade Rep. 1098 (June 25, 1997).
- ⁵⁴ See European Parliament, Resolution of September 17, 1998.
- ⁵⁵ See Japan Weighs Making Appeal to WTO on Massachusetts Law on Burma Sanctions, 14 Int'l Trade Rep. 1233 (July 16, 1997).
- ⁵⁶ This story was relayed directly by Rep. Rushing at the American Society of International Law Annual Meeting, Panel on International Law and the Work of Federal and State Legislators, April, 2001.
- ⁵⁷ See Fitzgerald, *supra* note 38, at 42 (citing Brief for the European Communities and Their Member States as Amicus Curiae, available at 2000 Westlaw 177175).
- ⁵⁸ See *id.*
- ⁵⁹ See Coalition Praises USTR for Supporting Massachusetts Law, 14 Int'l Trade Rep. 1403 (August 13, 1997).
- ⁶⁰ Uruguay Round Agreements Act, Section 102.
- ⁶¹ *Id.*
- ⁶² See House Defeats Amendment Aimed at Protecting State Laws from Challenge, 15 Int'l Trade Rep. 1387 (August 12, 1998).
- ⁶³ See EU, Japan Will Initiate WTO Complaint Against U.S. Over State Law on Burma, 15 Int'l Trade Rep. 1387 (September 16, 1998).
- ⁶⁴ USA-Engage, State and Local Sanctions Watch List, March 2000, available at www.usaengage.org.
- ⁶⁵ See EU Suspends Suit on Massachusetts Law Penalizing Burma Links, Warns Other States, 16 Int'l Trade Rep. 231 (February 10, 1999).

- ⁶⁶ See Sanctions Watch List, *supra* note 64.
- ⁶⁷ See *id.*
- ⁶⁸ See *id.*
- ⁶⁹ See, e.g., Eizenstat Says Administration Plans to Submit Sanctions Reform Language, 16 *Int'l Trade Rep.* 1118 (July 7, 1999); Bicameral Sanctions Process Reform Act Introduced to Slow Unilateral U.S. Measures, 16 *Int'l Trade Rep.* 535 (March 31, 1999).
- ⁷⁰ See *As High Court Reviews Case, EU, Japan Drop WTO Panel on State Law Burma Ban*, 17 *Int'l Trade Rep.* 308 (February 24, 2000).
- ⁷¹ See *id.*
- ⁷² See *id.* (also mentioning other Articles of the GPA the EU based its violation claims upon).
- ⁷³ See Comments of Joel Trachtman, *Symposium: States' Rights v. International Trade-The Massachusetts Burma Law*, 19 *N.Y.L. School J. Int'l & Comp. L.* 347 (2000).
- ⁷⁴ See *id.*
- ⁷⁵ See *id.*
- ⁷⁶ See *id.*
- ⁷⁷ See, e.g., Robert Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence in Bronckers and Quick (eds.), New Directions in International Economic Law* 187, 200 (2000).
- ⁷⁸ See *id.*
- ⁷⁹ See *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (October 12, 1998).
- ⁸⁰ See *Former USTR Predicts U.S. Will Lose If WTO Challenge to Burma Law Proceeds*, 15 *Int'l Trade Rep.* 1642 (September 30, 1998).
- ⁸¹ See John Jackson, *supra* note 24, at 115 (discussing non-violation complaints).
- ⁸² See Jackson, Davey and Sykes, *Legal Problems of International Economic Relations* 195 (1995).
- ⁸³ See Howard Fenton, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 *Northwestern J. Int'l L. & Bus.* 563 (1993).
- ⁸⁴ See Matthew Schaefer, *The Grey Areas and Yellow Zones of Split Sovereignty Exposed by Globalization: Choosing Among Strategies of Avoidance, Cooperation, and Intrusion to Escape an Era of Misguided 'New Federalism,'* 24 *Can.-U.S. L.J.* 35, 65-66 (1998).
- ⁸⁵ See *id.*
- ⁸⁶ *Natsios*, 181 F.3d at 47.
- ⁸⁷ See *id.* at 48.
- ⁸⁸ See *id.*
- ⁸⁹ See generally, Lawrence Tribe, *American Constitutional Law* 1172-1220 (3d ed., 2000).
- ⁹⁰ See, e.g., *Shaw v. Delta Airlines*, 463 U.S. 85 (1983).
- ⁹¹ See, e.g., *Fidelity Savings and Loan Association v. De la Cuesta*, 485 U.S. 141 (1982).
- ⁹² See, e.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941); *North Dakota v. U.S.*, 460 U.S. 300 (1983).
- ⁹³ See, e.g., *Florida Lime & Advocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).
- ⁹⁴ See *Uruguay Round Agreements Act, Section 102*; Matthew Schaefer, *Are Private Remedies In Domestic Courts Essential for International Trade Agreements to Serve Constitutional Functions with Respect to Sub-Federal Governments?*, 17 *Northwestern J. Int'l L. & Bus.* 609 (1996/97).
- ⁹⁵ See 50 U.S.C.A., Sections 1701-1706.
- ⁹⁶ See generally, Harold Koh, *The National Security Constitution* (1991).
- ⁹⁷ See, e.g., *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889).
- ⁹⁸ See Matthew Schaefer, *Federal States in the Broader World*, 27 *Canada-U.S. L.J.* 35, 36 (2001).

- ⁹⁹ See *Zschernig v. Miller*, 389 U.S. at 432 (1969).
- ¹⁰⁰ See *id.* at 429 and 434.
- ¹⁰¹ See, e.g., *Tayyari v. New Mexico State University*, 495 F.Supp. 1365 (D.N.M. 1980); *Springfield Rare Coin Galleries v. Johnson*, 503 N.E.2d 300, 306 (Ill. 1986).
- ¹⁰² See, e.g., Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997).
- ¹⁰³ For a critique of the revisionist view, see Schaefer, *supra* note 98.
- ¹⁰⁴ See, e.g., Peter Spiro, *Foreign Affairs Federalism*, 70 Colo. L. Rev. 1223 (1999).
- ¹⁰⁵ See *id.* at 1261-1270.
- ¹⁰⁶ See Schaefer, *supra* note 98, at 38-39.
- ¹⁰⁷ See *id.*
- ¹⁰⁸ U.S. Constitution, Art. I, Section 8.
- ¹⁰⁹ See, e.g., Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L.Rev. 1091, 1148-49 (1986).
- ¹¹⁰ See, e.g., *Japan Line*, 441 U.S. 434 (1979).
- ¹¹¹ See *id.*
- ¹¹² See *Trojan Technologies v. Pennsylvania*, 916 F.2d 903 (3d Cir., 1990)(keeping the two doctrines separate in its opinion but using a similar analysis for each); *Board of Trustees*, 562 A.2d at 752 (“[T]he concerns which underlie the foreign Commerce Clause are closely related to concerns underlying limits on a state’s authority to affect foreign policy.”).
- ¹¹³ See *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. at 12 (1986).
- ¹¹⁴ See *Barclays Bank*, 512 U.S. 298 (1994)
- ¹¹⁵ See generally, Daniel Coenen, *Untangling the Market Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395 (1989).
- ¹¹⁶ See *id.* at 436-37.
- ¹¹⁷ See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).
- ¹¹⁸ See Regan, *supra* note 109, at 1194; Coenen, *supra* note 115, at 434.
- ¹¹⁹ See *South Central Timber Development Corp.*, 467 U.S. 82 (1983).
- ¹²⁰ See *id.*
- ¹²¹ See *Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282, 290 (1986).
- ¹²² See *South Central Timber Development Corp.*, 467 U.S. 82 (1984).
- ¹²³ See *Baker*, 26 F.Supp. 287 (1998).
- ¹²⁴ See *id.* at 293.
- ¹²⁵ See *id.* at 291.
- ¹²⁶ See *id.*
- ¹²⁷ See *id.*
- ¹²⁸ See *Natsios*, 181 F.3d 38 (1999).
- ¹²⁹ See *id.* at 53.
- ¹³⁰ See *id.*
- ¹³¹ See *id.* at 67.
- ¹³² See *id.* at 68.
- ¹³³ See *id.* at 69.
- ¹³⁴ See *id.* (citing, among other cases, *Healy v. Beer Institute*, 491 U.S. 324 (1989)).
- ¹³⁵ See *id.* at 72.
- ¹³⁶ See *id.*
- ¹³⁷ See *id.* at 73-76.
- ¹³⁸ See *Crosby*, 530 U.S. 363 (2000).
- ¹³⁹ See *id.* at 373-374.
- ¹⁴⁰ See *id.* at 374, n.8.

- ¹⁴¹ See *id.*
- ¹⁴² See *id.* at 382-83.
- ¹⁴³ See *id.*
- ¹⁴⁴ See *id.* at 382.
- ¹⁴⁵ See *id.* at 386.
- ¹⁴⁶ See *id.* at 386, n.24.
- ¹⁴⁷ See *id.* at 386-388.
- ¹⁴⁸ Brief for the United States as Amicus Curiae Supporting Affirmance, Feb. 14, 2000 (available at 2000 Westlaw 194805)[hereinafter “U.S. Government Amicus Brief”].
- ¹⁴⁹ See State and Local Sanctions Watch List, *supra* note 64.
- ¹⁵⁰ See, e.g., Legal Experts Say Burma Law Opinion Leaves Sub-Federal Sanctions Options, 17 *Int’l Trade Rep.* 1092 (July 13, 2000).
- ¹⁵¹ Carl Tubbesing, Letter to the Editor: Rogue Nations Ruling Has Limited Effect, *Wall Street Journal* at A27, June 29, 2000.
- ¹⁵² 50 U.S.C.A., Sections 1701-1706.
- ¹⁵³ See, e.g., Goldsmith, *supra* note 102; Spiro, *supra* note 104.
- ¹⁵⁴ See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 180 (1978).
- ¹⁵⁵ See Paul Brest, The Conscientious Legislator’s Guide to Constitutional Interpretation, 27 *Stanford L. Rev.* 585 (1975) (discussing with respect to federal legislators); Matthew Schaefer, Conscientious State Legislators and the Cultures of Compliance and Liberalization Related to International Trade Agreements, *Proceedings of the American Society of International Law* 52-57 (2001)(discussing with respect to state legislators).
- ¹⁵⁶ U.S. Constitution, Art. VI(3).
- ¹⁵⁷ See Charles Tiefer, Free Trade Agreements and the New Federalism, 7 *Minn. J. Global Trade* 45 (1998).
- ¹⁵⁸ See *id.*
- ¹⁵⁹ See Matthew Schaefer, U.S. States, Sub-Federal Rules, and the World Trading System, in Brockers and Quick (eds.), *New Directions in International Economic Law* 525, 540-41 (2000).
- ¹⁶⁰ See USA-Engage Announces Constitutional Challenge of State Law, *Inside U.S. Trade*, Feb. 13, 1998 at 3-4.
- ¹⁶¹ See *id.*
- ¹⁶² See *id.*
- ¹⁶³ See Guay, *supra* note 14.
- ¹⁶⁴ This conclusion is in accord with that of Daniel Price and John Hannah, The Constitutionality of U.S. State and Local Sanctions, 39 *Harvard Int’l L.J.* 443 (1998).
- ¹⁶⁵ See U.S. Government Amicus Brief, *supra* note 148.
- ¹⁶⁶ See *id.*
- ¹⁶⁷ See *id.*
- ¹⁶⁸ See, e.g., *Japan Line*, 441 U.S. 434 (1979).
- ¹⁶⁹ See *Board of Trustees v. City of Baltimore*, 562 A.2d 720 (1989).
- ¹⁷⁰ See *Natsios*, 181 F.3d at 55-56.
- ¹⁷¹ See William Greider, 272 *The Nation* (May 7, 2001).
- ¹⁷² See *id.*
- ¹⁷³ See *Cal. Code Civil Proc.*, Section 354.6.
- ¹⁷⁴ *In Re WWII Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal., 2000).
- ¹⁷⁵ *In Re WWII Forced Labor Litigation*, 164 F. Supp. 1160 (N.D. Cal., 2001)
- ¹⁷⁶ See *Cal. Insur. Code.*, Sections 13800-13807.
- ¹⁷⁷ See *id.*

¹⁷⁸ See *Gerling Global Reinsurance Corp. of America v. Quakenbush*, 2000 Westlaw 777978 (E.D. Cal., 2000).

¹⁷⁹ See *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739 (9th Cir., 2001).

¹⁸⁰ See *id.* 744-746.

¹⁸¹ See Pub. L. No. 105-186, as amended by Pub. L. No. 106-155, Section 2, codified at 22 U.S.C. Section 1621 note.

¹⁸² See *id.*

¹⁸³ See *Low*, 240 F.3d at 748-49.

¹⁸⁴ See *id.* at 753.

¹⁸⁵ See U.S. Government Amicus Brief, *supra* note 148.

¹⁸⁶ See Schaefer, *supra* note 155, at 54.

¹⁸⁷ See *id.*

¹⁸⁸ See Schaefer, *supra* note 84, at 59.