States' Rights v. International Trade: The Massachusetts Burma Law

The Committee on International Trade

I. INTRODUCTION

On October 13, 1999, the Association's Committee on International Trade co-sponsored, with the Center for International Trade of New York Law School and the Customs and International Trade Bar Association, a symposium entitled "States' Rights v. International Trade: The Massachusetts Burma Law." The subject of the symposium was the litigation brought by the National Foreign Trade Council (NFTC) to challenge a statute adopted by the Commonwealth of Massachusetts that restricts state agencies from purchasing goods or services from any person or company "doing business" with Myanmar (formerly known as Burma).[1] The speakers at the symposium were Thomas A. Barnico, Assistant Attorney General of Massachusetts, Professor Peter J. Spiro, Hofstra University Law School, Professor Joel P. Trachtman, Fletcher School of Law and Diplomacy and Professor Paul R. Dubinsky, New York Law School. The panel was moderated by Professor Sydney M. Cone of New York Law School. This report presents a summary of the litigation and the presentations at the symposium.

1. General Laws of Massachusetts, Chapter 7, Sections 22G-M.

In the Massachusetts Burma Law, the restriction on procurement takes the form of a ten-percent price handicap or "negative preference" for a bid or offer by bidders doing business in Burma.[2] The dispute also has broad significance beyond the specifics of the Massachusetts statute. A bill almost identical to the Massachusetts Burma Law has been introduced in the New York State legislature, and a similar law already exists in New York City. Legislation relating to Myanmar and, in some cases other countries, has been enacted or is pending in other state legislatures and city councils.

On November 24, 1998, the federal District Court in Boston issued an order declaring the Massachusetts Burma Law to be unconstitutional and enjoining its enforcement. In reaching its decision, the court relied entirely on its analysis that the Massachusetts Burma Law "is an unconstitutional infringement on the federal government's exclusive foreign affairs power." On June 22, 1999, the Court of Appeals for the First Circuit upheld the District Court's decision. However, the First Circuit substantially expanded the basis for its holding that the statute was unconstitutional. On September 17, 1999, Massachusetts submitted a petition for certiorari to the United States Supreme Court seeking review of the First Circuit's decision. The National Foreign Trade Council filed a rather curious brief formally opposing the State's petition, but closing by urging the Court to accept the case if it had reason to believe that the authority of a state to legislate in this area is unclear. The Supreme Court agreed to hear the case on November 29, 1999. Under the Court's Rules, Massachusetts's brief is due 45 days following the acceptance of certiorari, and the respondents' brief is due 40 days after Massachusetts's brief. Oral arguments would then be held either in March or April 2000. The Supreme Court's decision would probably come before the end of its term in late-June 2000.

II. SUMMARY OF THE FIRST CIRCUIT'S DECISION

The decision of the Court of Appeals for the First Circuit in *National*

2. The statute provides in pertinent part that "the awarding authority may award the contract to a person who is on or who meets the criteria of the restricted purchase list [i.e., a person who is doing business in Burma] only if there is no comparable low bid or offer by a person who is not on the restricted purchase list." Id. § 22H(d). The law defines a "comparable low bid or offer" as "a responsive and responsible bid or offer which is no more than ten percent greater than the lowest bid or offer submitted for goods or a service." Id. § 22G. The restriction on procurement from companies doing business in Burma does not apply if "the procurement is essential" or if it "would eliminate the only bid or offer, or would result in inadequate competition." Id. § 22H(b).

Foreign Trade Council v. Natsios[3] (1) affirmed the district court's determination that the Massachusetts Burma Law interfered with the foreign affairs power of the federal government and is thus unconstitutional; (2) held that the market participant exception to the domestic Commerce Clause does not extend to the Foreign Commerce Clause and that the Massachusetts Burma Law does, indeed, violate the Foreign Commerce Clause; and (3) further held that Congress did not implicitly permit the Massachusetts Burma Law and that the law was preempted by federal sanctions against Burma. The First Circuit's reasoning is summarized below.

A. Interference with the Foreign Affairs Power of the Federal Government

In order to determine whether or not the Burma Law interfered with the foreign affairs power of the federal government, the court turned to *Zschernig v. Miller*,[4] which it described as having "most directly considered the boundaries of permissible state activity in the foreign affairs context."[5] The *Zschernig* decision struck down an Oregon statute that barred nonresident aliens from taking property by will or succession unless U.S. citizens had a reciprocal right to take property on the same terms in the alien's country. In its decision, the Supreme Court wrote that the Oregon statute would lead probate courts "into minute inquiries concerning the actual administration of foreign law" and that such inquiries would "affect international relations in a persistent and subtle way" and "may well adversely affect the power of the central government to deal with . . . problems [of international relations]."[6]

Massachusetts argued that the *Zschernig* decision recognized the need to "balance state interests against possible harm resulting from state intrusion in foreign affairs"[7] and that the Burma Law did not constitute an impermissible intrusion into the federal government's foreign affairs power. The court rejected this argument. It ruled that the *Zschernig* decision did not call for a balance between state and national interests in foreign policy but, instead, stood for "the principle that there is a threshold level of involvement in and impact on foreign affairs which states may not exceed."[8]

3. 181 F.3d 38 (1st Cir. 1999).

4. 389 U.S. 429 (1968).

5. National Foreign Trade Council, 181 F.3d at 51.

6. Zschernig, 389 U.S. at 435, 440, & 441.

7. National Foreign Trade Council, 181 F.3d at 52.

8. Id.

The court concluded that the mechanism by which Massachusetts carried out the Burma Law crossed this threshold level of involvement: "The Massachusetts law creates a mechanism for an ongoing investigation into whether companies are doing business with Burma . . . . By investigating whether certain companies are doing business with Burma, Massachusetts is evaluating developments abroad in a manner akin to the Oregon probate courts in *Zschernig.*"[9] The court also identified the following factors to show that the Burma Law had more than an "incidental or indirect effect" on the nation's foreign relations: (1) the intent of the Burma Law is to affect the affairs of a foreign country; (2) Massachusetts, with its $2 billion in annual purchasing power, has the wherewithal to implement the intent of the Burma Law; (3) the effects of the Burma Law would be greatly magnified if other states and governments followed suit, as they already have; (4) other countries such as those belonging to the Association of South East Asian Nations and the European Union have lodged protests against the Burma Law; and (5) the Burma Law diverges from federal law in dealing with the current government in Burma. Because the Burma Law goes far beyond the limits of permissible state activity in foreign affairs under *Zschernig* and has more than an incidental or indirect effect in foreign countries, the court ruled that the law intruded on the foreign affairs power of the federal government and is, thus, unconstitutional.

Massachusetts also argued that *Barclays Bank PLC v. Franchise Tax Board*[10] allowed only Congress, not the courts, to determine whether a state law interferes with the foreign affairs power of the federal government. In *Barclays*, the Supreme Court upheld the worldwide combined reporting requirement in California's corporate tax system against Commerce Clause and due process challenges. Barclays had argued that the system burdened foreign-based multinationals. Barclays also argued that the law impeded the federal government's ability to speak with one voice when regulating commercial relations with foreign governments. The First Circuit rebuffed the state's reliance on *Barclays*, finding that unlike the present Burma Law case: (1) *Barclays* did not involve a state law that targeted any foreign nation, and (2) there was no claim in *Barclays* that California was engaging in foreign policy via its tax system. In contrast, the present case involves a law affecting a foreign nation, and also involves a claim that the Burma Law violates the foreign affairs power of the federal government.

9. Id. at 53.

10. 512 U.S. 298 (1994).

B. Nonapplicability of the "Market Participant Exception" under the Foreign Commerce Clause and Violation of the Foreign Commerce Clause

Massachusetts argued that the Burma Law did not violate and was, in fact, exempt from the Commerce Clause because the state acted as a market participant. The Commerce Clause gives Congress the power to regulate commerce with foreign nations, and among the States. Massachusetts cited *South-Central Timber Dev., Inc. v. Wunnicke*,[11] where the Supreme Court established that "if a State is acting as a market participant, rather than a market regulator, the dormant Commerce Clause places no limitation on its activities." Massachusetts then argued that the market participant exception should also extend to the Foreign Commerce Clause (which forbids state laws from discriminating against or burdening foreign commerce) and that even if the exception did not apply, the Burma Law still did not violate the Foreign Commerce Clause.

The First Circuit found that Massachusetts was not a market participant when it enacted the Burma Law. When the state created a selective purchasing list as required under the law, it also created a mechanism to monitor the ongoing activities of private actors. Furthermore, the state attempted to regulate unrelated activities of its contractors once a contract was signed but before its performance was completed. Thus, in enacting the Burma Law, Massachusetts had "crossed over the line from market participant to market regulator"[12] and was, therefore, subject to Foreign Commerce Clause scrutiny.

The court ruled, further, that even if Massachusetts had acted as a market participant, it did not necessarily mean that the market participant exception applied at all to the Foreign Commerce Clause. Noting that the Supreme Court had never resolved the issue of whether the market participant exception applied to the Foreign Commerce Clause, the court decided to leave its "resolution to another day and another case," but left a cautionary note that "the risks inherent in state regulation of foreign commerce . . . weigh against extending the market participation exception to the Foreign Commerce Clause."[13]

Having decided that the Burma Law is subject to Commerce Clause scrutiny, the court then turned to whether it actually violated the Foreign Commerce Clause. Massachusetts argued that its law did not discriminate

11. 467 U.S. 82, 93 (1984).

12. National Foreign Trade Council, 181 F.3d at 63.

13. Id. at 66.

against foreign commerce because it made no distinction between foreign and domestic companies. But the court concluded that the Burma Law violated the Foreign Commerce Clause because it facially discriminated against foreign commerce. The court stated that "[w]hen the Constitution speaks of foreign commerce, it is not referring only to attempts to regulate the commerce of foreign companies; it is *also* referring to attempts to restrict the actions of American companies overseas."[14] The court also ruled that the Burma Law violated the Foreign Commerce Clause because it impeded the federal government's ability to speak with one voice in foreign affairs and also attempted to regulate conduct outside of Massachusetts and outside the country's borders.

C. Lack Of Implicit Congressional Authorization and Federal Preemption

Massachusetts argued that the Burma Law did not violate the Supremacy Clause because Congress was fully aware of the law when it enacted federal sanctions against Burma and failed to preempt the Burma Law explicitly. The state again relied on *Barclays*, arguing that Congress's failure to preempt a law explicitly shields the law from constitutional scrutiny. The First Circuit rejected Massachusetts's claim and held that the Burma Law violated the Supremacy Clause. It ruled that "the discussion of preemption in *Barclays* came as part of a Commerce Clause inquiry" and therefore *Barclays* "did not discuss how courts should address Supremacy Clause challenges to state laws that impact foreign affairs such as the Massachusetts Burma Law."[15]

The state also argued that federal sanctions did not preempt the Burma Law because "state procurement is a traditional area of state power reserved to the states by the Tenth Amendment" of the US Constitution. It cited *Will v. Michigan Dep't of State Police*,[16] which held that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute" which, according to Massachusetts, it did not. The court rejected the state's argument and cited *Hines v. Davidowitz*,[17] where the Supreme Court found that Pennsylvania's Alien Registration Act was preempted by the federal Alien Registration Act. Ac-

14. Id. at 68 (italics in original).

15. Id. at 72.

16. 491 U.S. 58, 65 (1989).

17. 312 U.S. 52 (1941).

cording to the court, *Hines* and other subsequent decisions established that "when Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern."[18] Using this decision, the court found that federal sanctions against Burma preempted the Burma Law. In its analysis, the court said that Congress constructed a reasonably comprehensive statute enacting sanctions against Burma and also attempted to balance various goals and interests by choosing a set of carefully calibrated tools to carry out the sanctions. In contrast, the court argued, the Massachusetts Law had "chosen a blunt instrument to further only a single goal, making judgments different from and contrary to the judgments made by Congress and the President."[19] In citing another example, the court said that Congress chose to limit only new investments in the development of resources while the Burma Law applied to virtually all investment in Burma.

III. SUMMARY OF THE SYMPOSIUM PRESENTATIONS

A. Thomas A. Barnico, Assistant Attorney General Of Massachusetts

The first speaker was Thomas A. Barnico, Assistant Attorney General of Massachusetts, who represented the state in the District Court and Court of Appeals, and who filed the petition for certiorari with the Supreme Court. Mr. Barnico explained the claims and defenses maintained by the state in the case decided by the First Circuit Court of Appeals. He followed with an outline of the issues he hoped to present to the U.S. Supreme Court and the hopes which he and the State of Massachusetts share for what the Supreme Court will say in its opinion. He closed with some general comments on international trade agreements and the issues they present for state governments.

The constitutional issues fall into three categories: (1) a claim that the 1996 federal sanctions law against Burma preempts Massachusetts from enacting laws in this area; (2) a claim under the Foreign Commerce Clause of the U.S. Constitution that the Massachusetts Burma Law and other similar state and local laws hinder the ability of the United States to speak with one voice on foreign matters and, also, discriminated against foreign commerce; and (3) a claim under the Foreign Affairs Clause that the Massachusetts Burma Law interferes with the ability of the federal government to conduct foreign affairs.

18. National Foreign Trade Council, 181 F.3d at 76.

19. Id.

Mr. Barnico noted that the federal sanctions law does not expressly preempt Massachusetts from taking any action in this area. Citing the *Barclays* case, he argued that Congress had implicitly permitted state action in this area. Mr. Barnico further argued that, by implicitly permitting Massachusetts to take action by enacting a selective purchasing law against Burma, Congress had also insulated the law against claims under the Foreign Commerce Clause.

Further addressing the Foreign Commerce Clause, he noted that the law does not apply to purchases by private parties, but is solely directed at state procurement. Thus, the law does not restrict the right of any private citizen or corporation to do business or trade with Burma as they may see fit. Under the domestic Commerce Clause, state laws have been held to be insulated from Commerce Clause review, where the state laws are intended to govern the state's activities as a participant in the market, rather than intended to regulate the conduct of private parties in the market. The question here is, first, whether Massachusetts is acting as a market participant or a market regulator, and second, whether the market participant doctrine applies to the Foreign Commerce Clause, an issue which has not yet been determined by the Supreme Court.

Addressing the final constitutional argument, that selective purchasing laws of this type interfere with the ability of the United States to conduct its foreign policy with respect to Burma, Mr. Barnico pointed out that the Foreign Affairs power had been asserted in only one case decided by the United States Supreme Court to invalidate a state law: the *Zschernig* decision. In addition to asserting that *Zschernig* raised very different issues from those raised by the Massachusetts Burma Law, Mr. Barnico also argued that the Court should extend the market participation exception to the Foreign Affairs issue as well.

Mr. Barnico then turned to the issue of certiorari to the U.S. Supreme Court and why he believed this case merits the attention of the Justices.[20] First, he points out, this law is not all that different from the issues raised by the various state and local laws in the 1980's regarding purchases from companies doing business in South Africa and state and local laws regarding divestment of securities from state and local pension funds. Those laws were hotly debated at the time, but the Supreme Court never determined the validity of those laws. More generally, he believes that it is inevitable, in light of the enormous growth of international trade and the increase in international trade agreements, that foreign firms are likely

20. As noted above, the Court has now granted certiorari.

to cite conflicts with foreign commerce or international treaties whenever they believe they have been disadvantaged by state or local regulations. And, he asks, should these complaints form the basis of a ruling that these state and local laws are unconstitutional?

He believes that this case presents a good opportunity for the Supreme Court to clarify the law in several areas:

> (1) Is the *Zschernig* case still good law? That is, will state laws of this type continue to be seen as in conflict with the Foreign Affairs power?
>
> (2) What about *Barclays Bank*? Does this case truly stand for the proposition that failure to preempt constitutes implicit permission by Congress to the states to enact legislation of this type?
>
> (3) Is the market participation exception applicable to this type of case? Is it applicable at all to cases involving the Foreign Commerce Clause?

Mr. Barnico closed his presentation with a summary of the policy issues that concern state and local lawmakers as the state's petition for certiorari was being considered by the Supreme Court:

> This is a threat to traditional state law making. We're talking about laws that generally speaking satisfy things like our commerce clause. I'm not talking just about Burma here. I'm talking about other state laws that may be subject in the future to complaints under the GATT and so forth. The threat is they will come under increasingly common review by international agencies or bodies, and further, that they'll become under additional Constitutional attack, such as this case, in which those claiming that state law is unconstitutional cite the fact of the trade complaints as evidence that we're roiling the foreign waters.

B. Professor Peter J. Spiro, Hofstra Law School

Professor Spiro discussed the Massachusetts Burma Law within the context of a new understanding of states' role in foreign relations. In Professor Spiro's view, the world is beginning to hold political subdivisions (e.g., states) directly accountable for violations of international obligations. In the course of his presentation, Professor Spiro outlined how this trend represents a retreat from the traditional rule of federal

exclusivity over foreign affairs. According to Professor Spiro, the traditional rule, well founded in the Constitution and in the context in which it evolved, may be less important today than it was prior to the end of the Cold War or creation of the World Trade Organization (WTO). International diplomatic dynamics and international trade are more stable than they were in the past. Moreover, in today's world, international actors are capable of ascribing actions to political subdivisions, and targeting a response at those subdivisions. Recent cases suggest that the international community is leaning towards targeted retaliation. Thus, the traditional rule of federal exclusivity should no longer prevent Massachusetts from promulgating its own international-related legislation, but Massachusetts will have to face targeted retaliation if it does so.

The traditional rule of federal exclusivity requires that the federal government conduct the nation's foreign affairs. This rule can be traced to Article I, Section 10 of the United States Constitution, which prohibits states from entering into treaties, engaging in warfare, granting letters of marque and reprisal, and imposing import or export taxes. The requirement that the nation "speak with one voice" avoids inefficiencies which may arise when individual decision makers do not bear the burden of their decision. Further support stems from the democratic notion that decision making is legitimate only when those affected by a decision have some say in it. Finally, the traditional rule made sense within the context in which it evolved. Most particularly, during the Cold War, the balance and tensions between superpowers warranted a strict prohibition on the ability of political subdivisions to act in any way which might cause an international conflict. Thus, in *Zschernig*, the Supreme Court blocked an Oregon escheat law which barred inheritance by aliens of East Bloc nations. Given the changed circumstances since *Zschernig*, a retreat from the traditional rule may be in order.

Professor Spiro explained that the international community now differentiates between the international legal personality and subdivisions of that personality such that it can, and does, target retaliation. Moreover, Professor Spiro sees the current climate as far less sensitive than the preceding climates in which the doctrine evolved. In terms of security, the Cold War is over and the likelihood that a political subdivision will create an international incident which might lead to nuclear war has diminished. In terms of trade, the WTO has replaced the General Agreement on Tariffs and Trade (GATT). The WTO's dispute resolution mechanism provides greater trade stability than that of the GATT. Professor Spiro admits that although the political and global context has changed, one could

still argue that in the Burma case, it may or may not be Massachusetts that would bear the retaliation of a nation for its decision making. To the extent that New York bore the burden of a retaliation by another country for the Massachusetts Burma Law, the policies underlying the traditional rule would still be present.

Nevertheless, cases of actual targeted retaliation have already occurred. The controversy surrounding *Barclays* involves such an example. California passed a corporate tax which offended the United Kingdom, as well as other countries, and the United Kingdom targeted its response at California.[21] Likewise, the international community has begun to challenge individual states in their application of the death penalty, recognizing that the death penalty issue stems from state law.

Professor Spiro posited that the international community knows that it is Massachusetts which passed the Burma law. If the international state actors target Massachusetts and Massachusetts bears the burden of its law, there should be no reason why the rest of the nation should care. Professor Spiro sees international society as moving in a direction where subnational actors are recognized as having some limited form of international legal personality. In such a situation, Massachusetts will not be able to avoid the retaliation which might come through the WTO if that case goes forward and if the EU or Japan fashions, and the WTO authorizes, a remedy which targets Massachusetts.

C. Professor Joel P. Trachtman, The Fletcher School of Law and Diplomacy

Citing "creative ambiguity" in the system as it stands now, Professor Trachtman spoke of confessed ambivalence over, and apprehension of, the ultimate efficacy of a U.S. Supreme Court determination in the Massachusetts Burma Law matter. His presentation contrasted the national desire to speak with one voice in the international trade arena with our desire to have a federal system, and the impact of the WTO on those values.

Initially, he remarked that there is actually a certain congruity between federal values and state values: that is, in the "New Federalism," our federal value in speaking with one voice is balanced by our federal value in having "live" states. As such, the *Zschernig* case, the *Barclays* case, the Burma Law case and others are instances in which the underlying conflicts between these competing interests are being worked out. The

21. It could be argued that the action taken by the United Kingdom was more in the nature of reciprocity than retaliation (Ed. Note).

question, he contends, is whether one of these two values should prevail automatically.

Professor Trachtman suggested that it is deficient to presume that a "foreign affairs, one voice" value should automatically prevail, especially given the multiple issues going on in foreign affairs. He warned that if we allow "foreign affairs, one voice" values to dominate, "we'll soon find ourselves with states that don't mean very much."

Turning to the market participant doctrine, he stated that it has thus far largely been confined to the domestic commerce clause circumstance, addressing the rights of states to speak as independent voices in domestic commerce. In the context of the Burma Law conflict, the question arises as to whether this market participant doctrine should be extended to allow states to speak as persons in international relations. According to Professor Trachtman, this begs an understanding of the position in which the WTO, the government procurement agreement and international law are located within the federal system. He commented that "[t]he quick answer to this topic is that it really is not located within the federal system in a very powerful way."

Professor Trachtman explained that the WTO and the Uruguay Round Agreements were accepted by the United States through the Fast Track process. Moreover, there was no formal state role in the Uruguay Round Agreements process.[22] What brings a WTO issue into this case is the Government Procurement Agreement, the agreement under which the Burma Law has been challenged by the European Union and by Japan. When the Government Procurement Agreement was being negotiated, the federal government polled the states, asking whether they wanted to be covered by the agreement, and Massachusetts answered yes. However, Professor Trachtman commented that while there was consultation, there was no direct state role. In the international relations context, the states have access, but not control over the operation of these laws. This, he reasoned, is a direct contrast to the rights of member states in the European Union, our "interlocutor in international trade," which do have a direct role in making international agreements. Noting that Professor Lawrence Tribe of Harvard Law School voiced concern in the 1994 Uruguay Round Agreements about what would happen in a dispute settlement proceeding about a state law like the Burma Law, Professor Trachtman challenged,

22. Section 102(b)(1)(B) of the Uruguay Round Agreements Act provides that USTR has to consult with the states as to implementation of U.S. obligations. Trachtman noted that although Massachusetts representatives are consulted, "there's still a sense that in Geneva, things are happening which are outside the control of states."

"How is it that the European Union can manage to allow Italy and France and the other member states to have some voice and the United States can't?"

The Supremacy Clause, the Commerce Clause, and the Foreign Affairs power allocate much power to the federal government, especially to make federal law. While there is a very strong argument that these agreements have a direct effect within the federal system, that effect is self-limited by the fact that only one plaintiff is permitted in this context: the U.S. government.[23] Significantly, the U.S. government has been reluctant to attack Massachusetts in this case. The U.S. government has not brought its own case here, and therefore questions exist as to supremacy and preemption, as well as the standing of the NFTC to assert WTO-related arguments. Supremacy is the right of the federal government to act to deny Massachusetts the right to have this law. That right has not been exercised. Secondly, there are questions of preemption regarding whether Massachusetts has the right to engage in this activity, despite the fact that there is no clear federal legislation stopping them.

Turning to the "ambiguous" nature of international law and the WTO Government Procurement Agreement, Professor Trachtman proceeded to examine the attack on the Burma Law initiated by the European Union (EU) and Japan in their request for a WTO dispute resolution panel. That action within the WTO preceded the initiation of the Burma Law suit by the NFTC. The EU and Japan set forth three main arguments, each of which is problematic: (1) Massachusetts violated Article VIII(b) of the Government Procurement Agreement, which provides constraints on the ability to disqualify bidders in the context of government procurement[24]; (2) Massachusetts violated Article XIII(4)(b) of the Agreement, which holds that the bid has to be awarded to the person who comes up with the best price and the best compliance with non-price factors, because political and non-economic factors should not be considered[25]; and (3) Massachu-

23. Under Section 102(b)(2)(A) of the Uruguay Round Agreements Act, no state law may be declared invalid by reason of being inconsistent with a WTO Agreement, except in a lawsuit commenced by the United States. Notably, WTO decisions are accorded no deference in the litigation.

24. Article VIII(b) provides in relevant part that "any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capacity to fulfil the contract in question."

25. Article XIII(4)(b) provides in pertinent part that "the [procuring] entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender . . . is either the lowest tender or the tender which in terms of the

setts violated the requirement in Article III of the Agreement for nondiscrimination in government procurement.[26] The EU further argued that the Burma Law nullifies or impairs the concessions made by the United States in the Agreement.

Regarding the Article VIII(b) issue, Professor Trachtman stated that it does not apply to the Burma Law because it applies to establishing a selective tender when pre-qualifying bids, and the Burma Law does not disqualify a bidder; rather, it provides for a 10 percent negative preference. Moreover, Article VIII(b) speaks of conditions to qualify for participation, which, he opines, is different from the Burma Law, which speaks to determining the best bid. Professor Trachtman also questioned the EU interpretation of Article XIII(4)(b), which requires that the business be given to the best bid. He pointed to Article XII(h), which specifically contemplates non-price factors that are separate from price-affecting cost factors.

The most difficult issue posed by the EU relates to national treatment and the most favored nation nondiscrimination obligation articulated in Article III of the Agreement. The question ultimately is what parameters are to be looked at in determining discrimination. Massachusetts takes the position that they are not discriminating at all because they are treating local firms the same as they are treating the EU or Japanese firms—if they do business with Burma, they are subject to the 10 percent negative preference. In other words, if products are treated like suppliers, and the Burma Law is interpreted as discriminating among suppliers from different states rather than between foreign states and the United States, it should not violate the discrimination language of Article III.[27]

Regarding whether the Burma Law amounts to nullification of U.S. concessions under the agreement, Professor Trachtman referred to the recently decided Kodak/Fuji WTO dispute resolution case. In that decision,

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specific evaluation criteria . . . is determined to be the most advantageous." The United States also has procurement laws that do consider non-economic factors known as "green procurements"(e.g., Iran).

26. Article III(1) provides that "[w]ith respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than: (a) that accorded to domestic products, services and suppliers; and (b) that accorded to products, services and suppliers of any other Party."

27. Articles VIII(b), X and XII specifically do permit this distinction among suppliers based upon the identity of the supplier.

the WTO panel took a very limited view of what legitimate expectations of the complaining state were being frustrated.

In view of the pending litigation in the U.S. courts, the case before the WTO Dispute Resolution panel was suspended in February 1999. The EU and Japan took the position that their interests would be best served by following along with the litigation brought by the NFTC. Professor Trachtman commented:

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

Noting that although we do not know how the WTO dispute resolution panel will solve that problem, Professor Trachtman concluded "we can expect that the international litigation will be restarted if the domestic litigation doesn't get our trading partners what they want."

D. Professor Paul Dubinsky—New York Law School

Paul Dubinsky, Associate Professor at New York Law School, was charged with responding to the remarks of the first three speakers. He opened his remarks by predicting, or at least hoping, that the Supreme Court would deny certiorari.[28] Professor Dubinsky's first reason for this "hope" is his belief that the current state of affairs regarding selective purchasing laws is actually useful in negotiating trade agreements. In essence, Professor Dubinsky believes that if the Massachusetts law is allowed to remain in effect, then a trade negotiator can take the position that his options are unduly limited by the Massachusetts law, even if the negotiator actually opposes some form of selective purchasing.

The other reason that Professor Dubinsky was hopeful that the Supreme Court would deny certiorari concerned the existing status of international customary law. Professor Dubinsky argued that there are many questions concerning international customary law, most notably whether

28. While events have overtaken Professor Dubinsky's "hopes" in this regard, the Supreme Court has been known, at times, to deliver opinions that do not resolve all of the outstanding issues, so Professor Dubinsky's "hopes" may yet be fulfilled by a Delphic utterance from the Supreme Court (Ed. Note).

or not customary law has the same status as U.S. federal common law. Professor Dubinsky, echoing Professor Trachtman's comments, is concerned that if the Supreme Court agrees to hear the case, the ramifications of any decision rendered may be far-reaching and unclear. If the Supreme Court does render a decision on Massachusetts Burma Law, then Professor Dubinsky's best case scenario would be a decision that draws a distinction between areas that are considered "traditional" provinces of state law, such as state procedural law and enforcement of judgments, and areas which are generally left to the federal government such as the promulgation of laws and regulations regarding trade and treaties. Even if this type of distinction were drawn by the Supreme Court, Professor Dubinsky argues that "from an intellectual perspective," the end result would be an "unsatisfactory distinction" that would "leave us adrift." In summarizing his view of what should happen next in the ongoing chronology of this case, Professor Dubinsky remarked that "whatever the Supreme Court said on it would be the beginning of a sort of difficult road of litigation to figure out where the lines of federalism currently are."

With respect to Professor Dubinsky's responses to the other speakers, most of his comments were made in response to the remarks of Professor Spiro, particularly Professor Spiro's discussion of "targeted retaliation." One of Professor Spiro's main points is that various countries are increasingly capable of targeting retaliatory actions to a specific political or geographic entity; in the instant case, Professor Spiro would argue that it would be possible for foreign countries to respond to a state's selective purchasing laws in such a manner that only the state promulgating such a law would be targeted in response. Professor Dubinsky clearly believes that targeted retaliation is unrealistic.

He argued that targeted retaliation does not work, nor will it ever work, because "we have a very interdependent economy that cuts across state lines." Furthermore, he commented that it is "impossible for any state to suffer economic consequences in a world arena without there being a trickle over effect to anyone else. Not only its neighboring states but all over the country . . . ." As an example, Professor Dubinsky posited that if a targeted retaliation against Massachusetts results in a loss of jobs in Massachusetts, then the citizens of Massachusetts will have less money to spend on something that may be imported from another state. He argued broadly that with respect to foreign affairs and interstate commerce, the framers of the Constitution believed that "we're in this together, and anything that separates how we are doing [and] how we live together, is divisive and bad."

Professor Dubinsky then made a related point regarding the perception of Americans by foreigners. Professor Dubinsky believes that any law passed by a particular state that discriminates against a specific country or targets international commerce generally will be perceived (rightly or wrongly) as an "American" law and that all Americans will suffer because of that perception. Professor Dubinsky also makes a "privileges and immunities" argument, in which he claims that if Massachusetts passes a law which invites targeted retaliation, then citizens of other states may either choose not to move to Massachusetts or may be unduly affected by the ramifications of such a law if and when they move to Massachusetts. Professor Dubinsky argued that a citizen could be adversely affected by a state law which was created without that individual having any input into the process of enacting such a law.

Finally, Professor Dubinsky discussed the area of preemption, arguing that "a standard preemption analysis just doesn't work in this area." Under such a standard analysis, one would argue that if Congress had intended to preempt a state's right to enact a selective purchasing law, then Congress would have taken some affirmative action to do so, or at least Congress would have enacted legislation in this area preventing states from enacting their own legislation. Professor Dubinsky argued that it is incorrect to merely examine what Congress may or may not have done to date. Under a standard preemption analysis, one could argue that Congress implicitly "let [the Burma Law] go forward." However, Professor Dubinsky posited that one of the "key powers" with respect to "diplomacy and negotiating in the foreign arena is the ability to be silent, the ability to say nothing, not to have your hand forced in negotiations, and to take that away from the administration is to take away a lot of what it can do." In essence, Professor Dubinsky advocated that the federal government, in dealing with countries such as Burma, Syria and Iran, among others, needs to have as many negotiating weapons as possible in its arsenal and that one of those weapons is the ability to refrain from taking legislative action. Accordingly, he noted, it would be wrong to assume that the failure to take legislative action is an implicit approval of the Massachusetts Burma Law.

IV. CONCLUSION

When the Supreme Court hears and decides the Massachusetts Burma Law case, it will be deciding whether Massachusetts and other states can pass laws which facially appear to be in conflict with trade agreements

entered into by the federal government. It may also be signaling to what extent the states may be bound by the rules and the decisions of the WTO and the trade agreements administered by that international body. But, perhaps, most importantly, it will be further defining the boundaries of the "New Federalism" that has been so much discussed as a result of other decisions of the U.S. Supreme Court.[29] Will it expand the scope of the states' authority into the international arena? Or will it stop the states' authority at the water's edge?

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29. See. e.g., The New Federalism, The Record, Vol. 54, No. 6 (1999) (report by the Committee on Federal Legislation).

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