

2003

Association of American Law Schools (AALS) 2001 Annual Meeting - Section on International Law Friday, January 5, 2001 in San Francisco, California

Recommended Citation

Association of American Law Schools (AALS) 2001 Annual Meeting - Section on International Law Friday, January 5, 2001 in San Francisco, California, 21 *BERKELEY J. INT'L LAW*. 144 (2003).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol21/iss1/5>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

PANEL

Cities, States, and Foreign Affairs: The Massachusetts Burma Case and Beyond

Association of American Law Schools (AALS)
2001 Annual Meeting—Section on International Law
Friday, January 5, 2001 in San Francisco, California

I.

EDITORIAL PREFACE

The following essays are drawn from a panel discussion taped live on January 5, 2001 at the Annual Meeting of the American Association of Law Schools in San Francisco. The Panel was convened to discuss the involvement of both states and municipalities in the foreign affairs of the United States and assess the significance of the U.S. Supreme Court's decision in 2000 in *Crosby v. National Foreign Trade Council*.¹

The general question examined concerns the manner and degree to which the municipalities and States of the United States may take actions that are intended to have effect on particular foreign policies of the United States. It is a question that has arisen for other countries. It is a question that had arisen for the United States before the *Crosby* case, particularly during the 1980s. At that time, many States and municipalities adopted statutes and ordinances similar to the one present in the *Crosby* case, though in that instance they concerned South Africa.

The *Crosby* case considered by the Panel concerns a Massachusetts statute² that was, in the terminology of this arena, an anti-procurement statute. It restricted the awarding of contracts by state agencies to particular bidders if those bidders had certain specified ties to Burma.

Awareness of and protest of human rights violations by Myanmar (formerly known as Burma) had increased in 1988 when the military government of Burma refused to relinquish power despite its defeat in a democratic election.³

1. 530 U.S. 363 (2000).

2. MASS. GEN. LAWS ch. 7, § 22G-M (2002).

3. *Myanmar: 1988 to 1998—Happy 10th Anniversary? A Chronology of Events* (Jan. 5, 1998), at <http://www.web.amnesty.org/802568F7005C4453/0/7C11AD2A90BD83CA802569A5007>

While the U.S. Department of State, Congress, and President Clinton implemented federal sanctions against Burma,⁴ Massachusetts enacted the anti-procurement statute at issue in *Crosby*. In essence, the Massachusetts statute placed bidders at a disadvantage in securing state government contracts if they had certain specified relationships with Burma.⁵ The Massachusetts statute thus arguably situated a state of the United States as an actor in the foreign affairs of the United States. U.S. trading partners launched a variety of protests on behalf of those of their nationals whose business affiliations with Burma prevented or would prevent Massachusetts from purchasing from them. The European Union and Japan asked the World Trade Organization to resolve the matter, claiming that the Massachusetts law violated multilateral trade agreements signed by the United States.⁶ Meanwhile, within the United States, the National Foreign Trade Council brought suit against Massachusetts in federal court.⁷ The District Court and the U.S. Court of Appeals for the First Circuit both found that the Massachusetts law unconstitutionally violated the federal government's power over foreign policy.⁸ The Supreme Court in 2000 affirmed the Massachusetts statute's invalidity under the Supremacy Clause.⁹

Four panelists addressed various aspects of the following topic: *Cities, States, and Foreign Affairs: The Massachusetts Burma Case and Beyond*. They are in the order of their presentation here: First, Professor Spiro of Hofstra University; next, Professor David Golove of Cardozo University, Visiting Professor at the University of Texas School of Law; then, Professor David D. Caron of the University of California at Berkeley, Visiting Professor at New York University; and finally, Professor Naomi Roht-Arriaza of the University of California at San Francisco, Hastings College of the Law.

1935B?Open&Highlight=2,Burma. See also *U.N. Resolution on Human Rights Violations in Burma*, U.N. Economic and Social Council, 57th Sess., Agenda Item 9, U.N. Doc. E/CN.4 (2001).

4. See Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009-121 (enacted by the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 101(c), 110 Stat. 3009 (1996)).

5. See *id.*

6. See *Panel Established in Government Procurement Dispute, DSB Considers Three New Panel Requests* (Oct. 29, 1998), at <http://wto.org/english/newse/news98e/wdsboct.htm>.

7. *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998), *aff'd* by *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, (1st Cir. 1999).

8. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

9. *Id.* at 388.