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Naomi Roht-Arriaza

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From Country-Based to Corporate-Based Campaigns

By
Naomi Roht-Arriaza*

I. THE FUTURE OF LEGISLATIVE SANCTIONS

I was asked not to focus on the case *per se*, but to try to put myself in the role of an advisor to a municipality or a state post-*Crosby* and say, "Well now what?" I am going to try to do that very briefly. A couple of preliminary points. Picking up on Professor Caron's point, that the way these things happen is not because a city councilperson has a good idea one morning, these things happen as a result of constituent pressure, mostly from organized constituencies in NGOs and in local groups who are usually running campaigns that extend beyond a certain municipality and that are done on either a state or national level. I think that tempers a little bit the pressures coming from, "Well, let's clean up the streets first." The only reason these initiatives get on the agenda in the first place is because there is a fairly well orchestrated and organized campaign that is pushing them onto agendas, usually in more than one place at a time.

What that means is that, first, there will not tend to be a whole lot of these campaigns because it is hard to do. There have been, as Professor Spiro mentioned, attempts to do this with Tibet, Cuba, Nigeria, and five or six other places, and they have not really taken off as national campaigns. They have not gotten the weight behind them to do so. Second, I do not think these kinds of movements are going away. I think the idea that our purchases, our investments, our economic might as states and as localities should reflect our values, is a very powerful idea. I think it is one that grabs the imagination of a fair number of people, so, one way or another, you are going to keep getting attempts to align how states use the significant amount of resources that they have at their disposition with what at least these organized groups of constituents think should be done with that money. So, *Crosby* or no *Crosby*, there are going to be continuing attempts to try to do this sort of thing.

* Professor of Law, University of California at San Francisco, Hastings College of the Law. The author has been a principal co-investigator on a multidisciplinary project looking at corporate accountability and public policy, from which these ideas are borrowed. See "Beyond Good Deeds," available at <http://www.nautilus.org/cap> (last visited Apr. 16, 2003).

II. SANCTIONS AS A FORM OF CORPORATE CONTROL?

Now that leads me to the theme of what I am going to say. Post-*Crosby*, the movement that has focused up until now on specific countries, like South Africa and Burma, and the movement that is bubbling up throughout the world around corporate accountability, will start coming together. I think you will start seeing more and more of a push to use the purchasing and investing power of states and localities framed in terms of what we want our corporations to do generally, rather than what we want our corporations to do *vis-à-vis* a particular country. In practice, these can come out to be exactly the same thing, but the way they are framed will start moving away from this rather problematic focus on Burma, because that raises all the *Crosby* flags, to a focus on forced labor in pipelines. By focusing primarily on the corporate behavior and only incidentally on whatever country may happen to be at the end of the line where the effects are found, you end up in the same place, but without raising the same kind of preemption or foreign affairs problems.

So let me talk a little bit about a couple of ways that this could be done. First, I will address what the Burma case is about—procurement. One thing that I think you will start seeing—and you are already starting to see this in the state of California—is that rather than conditioning procurement on companies not investing in or producing for certain countries, states and localities will start conditioning procurement on companies not engaging in certain specified unethical behaviors. Notice that these can be framed in two ways: first, they can be framed as a preference, like the Burma law; or second, they can be framed more strongly as a prohibition. Either way you get to the same place. The easiest example would be the use of child labor, or the use of forced labor. You see prohibitions on the federal level and you see them on the state level. The state of California just passed legislation on child labor abroad this past year, and a number of other states are looking at or passing similar ordinances.

Notice that they do not single out any particular country, and so you avoid the “one voice” idea, and the ordinance becomes much more incidental to foreign affairs. You could do a fair amount with this method. For example, you could have a purchasing preference for companies that have adequate environmental or social monitoring with independent verification systems in place. You could tie it to recognized principles; for instance, the CERES [Coalition for Environmentally Responsible Economies] principles, the OECD [Organization for Economic Co-Operation and Development] guidelines on multinationals, or the work being done in the U.N. Sub-Commission on Human Rights on a code of conduct for multinationals. There are a number of places you could tie it to, and going back again to something that Professor Caron said, from the point of view of a municipal officer or state official, this has the added advantage of being a “quick-and-dirty” screen: there is an on/off, did they sign/did they not sign. It is much less expensive to do this than to go into the actual underlying behavior of corporations, and deciding whether or not to include subsidiaries and affiliates, or more than fifty percent stock ownership, or whatever other criteria. To the

extent that these screens exist, they will tend to help make the decision as to whether a certain kind of company is likely to engage in egregious, unethical behavior. I think you are going to find cities, municipalities, and states turning to them as easy screens.

III. SANCTIONS AND TRADE

There is an issue that came up a couple of times, and I want to flag it. It is that the trade issue still persists in these behavior-based screens, but again it is attenuated. There may also be problems with these kinds of conditionalities under the WTO [World Trade Organization] procurement code. However, there are a couple of ways out from under these problems. First, the WTO Code only applies to states and not to localities; so one way would be to have every city in California pass requirements instead of having the state do it. Another easy way out of it is by saying, "Well, this does not apply to countries that have ratified the procurement code." It turns out that there are twenty-some-odd countries that have done so; almost all of them are OECD countries. They are generally not the countries that you are interested in targeting, and then you do not have a problem and there is no issue. I did want to flag, however, that the trade issues are still there.

IV. ALTERNATIVES TO SANCTIONS

A. *Disclosure as a Tool for States and Municipalities*

Another thing that you could do, and that there is been some talk about doing, is to use disclosure as a tool for states and municipalities. The idea here is that information is a powerful tool to consumers; you get consumer market movements on the basis of disclosure, at least in industries where branding is important, where there is a consumer product at the end of the line, or industries that are in a supply chain where there is a consumer product at the end of the line. You can also use disclosure as a way of influencing investors, bankers, insurers, lessors, etcetera. You could use disclosure as a way of getting corporate management itself to sit up and wonder what they are doing. For instance, you could require companies to publish a list of countries where they have operations or where their subsidiaries or major suppliers have operations. You are not singling out any one country, you are not saying, "Tell us which companies do business in Burma." Instead, you are just saying, "Tell us where you do business, where your operations are," and then you leave it to the NGO networks to publish the report that says, "Top ten companies doing business in Burma." There is no state action there, because it is the NGOs doing the report, but the disclosure requirement comes from the state or the municipalities.

B. *Requiring the Creation of Human Rights Policies*

You could also have a very interesting policy that has been implemented over the last year and a half in the United Kingdom regarding public pension funds. All they have to do is to disclose whether or not they have human rights policies—not what they are, or even if they are good—but just whether they have them. This is a very minimal requirement. What has ended up happening, according to people who work with companies in the U.K., is that all of a sudden you have a bunch of people running around going “Oh my goodness, do we have a human rights policy, and if not, why not?” and, “What is our human rights policy?” and, “What should it be?” It started a ball rolling and you have banks going to companies and saying, “Well, do you have a human rights policy?”. So you start creating movements within the companies themselves, as well as within the larger society, simply through a disclosure requirement. It is very non-invasive, it does not require you to take a long time, and it does not cost a lot of money, etcetera.

C. *Strengthening Laws on Unfair Trading Practices*

Another thing that states might do particularly is to beef up the unfair trading practice laws to make it easier for consumers to challenge misleading or deceptive statements made by corporations about these policies. This would provide a check against what has affectionately been called “greenwashing” by the NGO community. It is the “people do” sort of idea, with no particular content to it. I cannot go into this issue here except to say it is now before the California courts.

D. *Divestment Ordinances*

The other way in which I think you are going to start seeing much more activity is in the “state-as-investor” kind of idea. This of course is not a new idea—it goes back to long-standing South African divestment ordinances. I think you are going to see a renewed, probably more focused, effort at looking at divestment as a tool. Let me give a couple of examples. In the wake of *Crosby*, a number of municipalities have passed divestment-related ordinances concerning Burma. Minneapolis, in October of 2000, passed a resolution prohibiting new investment and the retention of investments in companies that engage in economic development of resources located in Burma. This is not concerned with companies doing business, and this is not about the sales office. Rather, this is aimed specifically at resource extraction industries. The Los Angeles City Council voted to recommend to the management of the city’s pension funds that they sell the stock of all companies that invest in Burma. CalPERS [California Public Employees’ Retirement System], which is the largest U.S. pension fund and is for California state public employees, passed a rule in November that said when investing in emerging markets, the managers had to take into account the human rights situation and political stability of the countries they were investing in, so as not to invest in certain companies. It was framed in

economic terms; such as, we do not want risky investments in counties that are going to go blow up. The net effect is that you have a kind of human rights screen on the investments of CalPERS. All of this, of course, feeds into a much larger socially responsible investment movement that now controls anywhere from one in every ten dollars to one in every seven dollars, depending on which study you look at in the U.S.

The other part of investment is the use of stock ownership as a way of requesting information from management and changing management practices. This not just divestment because, of course, once you have divested, you are out of the game with respect to this company's shareholder resolutions. The resolutions are not a new idea, but one that goes back at least a hundred years. I think you are going to see more municipalities in more states, to the extent that they have investments in publicly traded companies, using that leverage as part of large, existing coalitions to try and influence corporate behavior. In short, what you end up getting is a confluence with the people who have worked on country-specific actions focused on the economic power of states and municipalities coming together with a movement that tries to use the economic power of consumers, investors, banks, insurers, etcetera, to try and influence corporate behavior. You start getting campaigns that are focused on specific aspects of corporate behavior rather than focused on countries.

Thank you.

