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Summary of Contents

Contents

Chapter I

General International and U.S. Foreign Relations Law

Overview

During 1999–2001, in the waning years of the administration of William J. Clinton, the United States remained actively engaged in the use of international law and international institutions to advance the interests of the United States. The Clinton administration focused strongly on use of international law and institutions to promote the economic interests of the United States, both in containing severe global market turmoil during this period and in aggressively fighting foreign trade barriers. The administration successfully negotiated trade agreements with Jordan, Vietnam and China, but Congress did not grant "fast-track" authority for more ambitious trade negotiations. With the World Trade Organization still in its early years, the United States pursued dispute settlement before the WTO on matters such as bananas and hormone-treated beef, while at the same time seeking to fend off challenges relating to U.S. tax benefits for its "foreign sales corporations" and other matters. The Clinton administration also sought to use multilateral institutions in a range of areas, including to provide debt relief for the most poor nations and to combat the AIDS epidemic in Africa.

Where feasible, the Clinton administration also built its foreign policy around notions of advancing the rule of law, human rights, and democracy worldwide, placing great emphasis on supporting the ad hoc international criminal tribunals; developing creative ways of compensating victims of human rights abuses that occurred during the Second World War; using the United Nations to impose economic sanctions on "rogue states"; signing treaties relating to the rights of children; and implementing existing human rights treaties through legislation and reporting. Extensive efforts were made toward the pacific settlement of disputes in areas of great tension and conflict, such as in North Korea and the Middle East. The U.S. role in advancing new techniques of international adjudication could be seen in the creation of a Scottish court in The Netherlands to try Libyan suspects implicated in the Pan Am 103 bombing over Lockerbie, Scotland, and in the arbitration established to resolve the control of Brčko in Bosnia-Herzegovina.

At the same time, the Clinton administration's fidelity to human rights was tempered. Foreign election irregularities, and even the usurpation abroad of democratically elected leaders, typically was addressed through diplomatic measures rather than economic or military sanctions. In most instances of widespread deprivation of human rights, such as in East Timor, Sierra Leone, Sudan, and the Great Lakes region of Africa, the United States refrained from projecting military force to uphold the rule of law. By contrast, military force was aggressively deployed in a NATO-authorized effort to forestall human rights abuses in Kosovo, raising difficult issues regarding the authorization for such force under international law and under the U.S. Constitution. Worried about the exposure of U.S. military forces to the jurisdiction of the proposed international criminal court, the Clinton administration sought to develop new safeguards to protect U.S. forces; when unsuccessful in doing so, President Clinton only reluctantly authorized U.S. signing of the treaty in the last days of his administration and, even then, declared that it would not be submitted to the Senate absent further modification.

Engagement of the United States in multilateral fora often altered the U.S. position on issues, such as how best to combat private sector bribery of foreign government officials, to condemn states for money laundering or unfair tax practices, and to curtail international trafficking in persons. At the same time, the status of the United States as the preeminent military and economic superpower encouraged the use of unilateral action when viewed as necessary to protect national

security interests. Further, control of the Congress by largely conservative elements of the Republican Party restrained the Clinton administration from pursuing certain initiatives. Led by conservative North Carolina Senator Jesse Helms, the Senate blocked ratification of, or failed to act upon, several important treaties, such as those relating to climate change, the law of the sea, and a comprehensive nuclear test ban. Congress continued to resist payment of U.S. arrears to the United Nations absent extensive structural and financial reforms, and viewed with deep skepticism the treaty for a permanent international criminal court. Congressional funding of the foreign affairs budget in real terms continued a long term decline, despite assertions by the Clinton administration that foreign assistance was a key means for managing conflict abroad. This skepticism about the utility of using international law and institutions initially grew stronger with the inauguration in January 2001 of George W. Bush. Yet in the aftermath of the terrorist incidents of September 11, 2001 against the World Trade Center and the Pentagon, the Bush administration undertook several steps designed to build multilateral cooperation against terrorism.

The use of international law in U.S. courts revealed both a respect for international norms and a desire to advance progressively those norms to address change. In several cases, including those in the area of immigration, U.S. courts developed standards in U.S. law through reference to standards set in international treaties and viewed U.S. adherence to treaties as relevant in preempting the laws of the several states. In reaction to terrorist incidents abroad against U.S. nationals, the U.S. Congress repeatedly expanded the jurisdiction of U.S. courts to hear cases against foreign governments found to have sponsored the terrorist activity, going so far as to develop a means for executing judgments against government assets previously immune. At the same time, U.S. courts maintained their long-standing doctrine of declining to enforce treaties not viewed as "self-executing," in many instances preventing private litigants from using U.S. adherence to treaties to alter rights and obligations otherwise present in U.S. law. Efforts by persons on death row to use technical noncompliance with the Vienna Convention on Consular Relations as a means of setting aside their convictions were unsuccessful in U.S. courts, spawning two cases against the United States at the International Court of Justice. U.S. courts also declined to play a strong role in curtailing the power of the president to conduct U.S. foreign relations, such as by challenging his ability to conduct the air campaign in support of Kosovo; or in forcing the president and the Congress to hew closely to the structure of the Constitution on matters of foreign relations law, such as by declaring the NAFTA unconstitutional.

U.S. Influence on International Law

Secretary of State Albright on the Rule of Law in U.S. Foreign Policy

The spirit of the Clinton administration's approach to international law and international institutions was captured in a speech at the University of Washington School of Law in Seattle on October 28, 1998, by U.S. Secretary of State Madeleine K. Albright, where she discussed the relevance of the rule of law to U.S. foreign policy:

> Law is a theme that ties together the broad goals of our foreign policy. It is at the heart of virtually everything we do at the Department of State from the negotiation of arms control treaties to seeking a fair deal for our salmon fishermen to guaranteeing that the intellectual property rights of our software companies are protected. And one of the great lessons we have learned is that the rule of law and global prosperity go hand in hand.
>
> Five years ago, in this city, President Clinton brought together for the first time the leaders of the Asia-Pacific Economic Cooperation Council. Those leaders agreed to pursue economic rules of the game that would bring down barriers to trade, increase investment, promote growth, and open new opportunities from Seattle to Singapore and from Santiago to Seoul. There followed,

in our country, a period of sustained growth that has created record numbers of jobs, boosted wages, and enabled our people to look forward with confidence and hope.

. . . .

At the same time, the global financial crisis requires that we focus not only on the rules governing international trade but also on the rules governing the regulation and management of economies within nations. For it is clear that an insufficient commitment to the rule of law in key countries was a major contributor to the current crisis.

In this context, the rule of law means having governments that answer to voters. It means having financial institutions that are accountable to customers, stockholders, and regulators. It means having contracts that are enforceable in courts that are impartial. It means having a system for collecting taxes that is effective and fair.

. . . .

Although we do not publicize it, we often use law enforcement and other assets to disrupt and prevent planned terrorist attacks. We use the courts to bring suspected terrorists before the bar of justice, as we have moved to do in the case of Pan Am 103 and as we have done in the Nairobi bombing. And around the world, we are pressing other nations to arrest or expel terrorists, shut down their businesses, and deny them safe haven. . . .

. . . .

Almost exactly 50 years ago, representatives from nations around the world came together to draft and sign the Universal Declaration of Human Rights. Since its unveiling, the Declaration has been incorporated or referred to in dozens of national constitutions, and its principles have been reaffirmed many times. It is a centerpiece of the argument we make today that respect for human rights is the obligation not just of some but of every government.

. . . .

As Eleanor Roosevelt's writings indicate, the drafters were deeply conscious of the Holocaust and of the many other outrages committed against conscience and law during the Second World War. Unfortunately, acts of genocide and other crimes against humanity remain, in our era, a major source of human rights abuse. I am proud that, in this decade, no nation has worked harder diplomatically, contributed more financially, assisted more legally, or made a greater commitment militarily to bring suspected perpetrators to justice.

A centerpiece of our efforts has been our strong backing for the international war crimes tribunals for Rwanda and the Balkans. . . .

. . . .

Among the most basic rights spelled out in the Universal Declaration is the right to take part in government either directly or through freely chosen representatives. Article 21 provides that "the will of the people shall be the basis of the authority of government."

The promotion of this right is a top priority of our foreign policy. We know that democracy is not an import; it must find its roots internally. But outsiders can help nourish those roots by backing efforts to build democratic institutions.

. . . .

Although the specifics of our approach to the promotion of democracy and law will vary with the country, the fundamental goals are the same. We seek to encourage where we can the

development of democratic institutions and practices. Some fault these efforts as unrealistic in their premise that democracy can take hold in less developed nations, or "hegemonic" in trying to impose democratic values.

In truth, we understand well that democracy must emerge from the desire of individuals to participate in the decisions that shape their lives. But we see this desire in all countries. And there is no better way for us to show respect for others than to support their right to shape their own destinies and select their own leaders. This is why, unlike dictatorship, democracy is never an imposition; it is, by definition, always a choice.[1]

Senator Helms on the United States and the United Nations

U.S. attitudes toward international law and institutions, however, were not uniformly enthusiastic. When in January 2000 the presidency of the Security Council rotated to the United States, the U.S. permanent representative to the United Nations, Ambassador Richard C. Holbrooke, invited Senate Foreign Relations Committee Chairman Jesse Helms to address an informal session of the Security Council, the first member of the U.S. Congress ever to do so. On January 20, 2000, Senator Helms addressed the Security Council at a session that was attended by UN Secretary-General Kofi Annan and that was open to the press and public.[1]

In his opening remarks Senator Helms stated that he hoped that his visit would mark the beginning of a "pattern of understanding and friendship" between UN representatives and both U.S. government leaders and the U.S. people. Further, he stated that his remarks were not intended to offend, but "to extend to you my hand of friendship and convey the hope that . . . we can join in a mutual respect that will enable all of us to work together in an atmosphere of friendship and hope . . . ." Nevertheless, Senator Helms proceeded to criticize the United Nations by objecting to comments made at the United Nations that the United States had become a "deadbeat" nation. He asserted that in 1999 the United States had paid US$ 10.179 billion in support of the United Nations, counting both UN assessments and the funding in the U.S. military budget for programs supporting UN activities worldwide.[2] He continued:

[A]ll of us want a more effective United Nations. But if the United Nations is to be "effective" it must be an institution that is needed by the great democratic powers of the world.

Most Americans do not regard the United Nations as an end in and of itself—they see it as just one part of America's diplomatic arsenal. To the extent that the UN is effective, the American people will support it. To the extent that it becomes ineffective—or worse, a burden—the American people will cast it aside.

The American people want the UN to serve the purpose for which it was designed: they want it to help sovereign nations coordinate collective action by "coalitions of the willing" (where the political will for such action exists); they want it to provide a forum where diplomats can meet and keep open channels of communication in times of crisis; they want it to provide to the peoples of the world important services, such as peacekeeping, weapons inspections and humanitarian relief.

. . . .

As matters now stand, many Americans sense that the UN has greater ambitions than simply

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[1] Madeleine K. Albright, *U.S. Efforts to Promote the Rule of Law*, U.S. DEP'T ST. DISPATCH, Nov. 1998, at 6.

[1] *See* Barbara Crossette, *Helms, in Visit to U.N., Offers Harsh Message*, N.Y. TIMES, Jan. 21, 2000, at A1.

[2] For information on the U.S. arrearages to the United Nations, see *infra* Ch. V.

> being an efficient deliverer of humanitarian aid, a more effective peacekeeper, a better weapons inspector, and a more effective tool of great power diplomacy. They see the UN aspiring to establish itself as the central authority of a new international order of global laws and global governance. This is an international order the American people will not countenance.[3]

Senator Helms noted—and said he agreed with—the UN secretary-general's statement that the people of the world have "rights beyond borders."[4] Although the sovereignty of nations must be respected, Senator Helms asserted, nations derive their legitimacy from the consent of those they govern, and lose that legitimacy when they oppress their people. In such situations, other nations have a right to intervene to end oppression and promote democracy. Moreover, the United Nations has no power to approve or disapprove such actions. To those who would argue that such actions by the United States violate its obligations under the UN Charter, and that Security Council approval is needed, Senator Helms asserted:

> Under our system, when international treaties are ratified they simply become domestic U.S. law. As such, they carry no greater or lesser weight than any other domestic U.S. law. Treaty obligations can be superseded by a simple act of Congress. This was the intentional design of our founding fathers, who cautioned against entering into "entangling alliances."
>
> Thus, when the United States joins a treaty organization, it holds no legal authority over us. We abide by our treaty obligations because they are the domestic law of our land, and because our elected leaders have judged that the agreement serves our national interest. But no treaty or law can ever supersede the one document that all Americans hold sacred: The U.S. Constitution.
>
> The American people do not want the United Nations to become an "entangling alliance." That is why Americans look with alarm at UN claims to a monopoly on international moral legitimacy. They see this as a threat to the God-given freedoms of the American people, a claim of political authority over America and its elected leaders without their consent.
>
> The effort to establish a United Nations International Criminal Court is a case in point. Consider: the Rome Treaty purports to hold American citizens under its jurisdiction—even when the United States has neither signed nor ratified that treaty. In other words, it claims sovereign authority over American citizens without their consent. How can the nations of the world imagine for one instant that Americans will stand by and allow such a power-grab to take place?
>
> The Court's supporters argue that Americans should be willing to sacrifice some of their sovereignty for the noble cause of international justice. International law did not defeat Hitler, nor did it win the Cold War. What stopped the Nazi march across Europe, and the Communist march across the world, was the principled projection of power by the world's greatest democracies. And that principled projection of force is the only thing that will ensure the peace and the security of the world in the future.
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> . . . .
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> No UN institution—not the Security Council, not the Yugoslav tribunal, not a future ICC—is competent to judge the foreign policy and national security decisions of the United States. American courts routinely refuse cases where they are asked to sit in judgment of our

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[3] Senator Jesse Helms, Chairman, U.S. Senate Committee on Foreign Relations, Address Before the United Nations Security Council (Jan. 20, 2000), *at* <http://www.senate.gov/~foreign/2000/pr012000.cfm>.

[4] *See* UN Press Release on Secretary-General Presents His Annual Report to General Assembly, UN Doc. SG/SM/7136-GA/9596 (Sept. 20, 1999).

government's national security decisions, stating that they are not competent to judge such decisions. If we do not submit our national security decisions to the judgment of a Court of the United States, why would Americans submit them to the judgment of an International Criminal Court, a continent away, comprised of mostly foreign judges elected by an international body made up of the membership of the UN General Assembly?

. . . .

America is in the process of reducing centralized power by taking more and more authority that had been amassed by the Federal government in Washington and referring it to the individual states where it rightly belongs.

This is why Americans reject the idea of a sovereign United Nations that presumes to be the source of legitimacy for the United States Government's policies, foreign or domestic. There is only one source of legitimacy of the American government's policies—and that is the consent of the American people.

. . . .

. . . A United Nations that focuses on helping sovereign states work together is worth keeping; a United Nations that insists on trying to impose a utopian vision on America and the world will collapse under its own weight.

If the United Nations respects the sovereign rights of the American people, and serves them as an effective tool of diplomacy, it will earn and deserve their respect and support. But a United Nations that seeks to impose its presumed authority on the American people without their consent begs for confrontation and, I want to be candid, eventual U.S. withdrawal.[5]

Most members of the Security Council spoke after Senator Helms, and many were critical of his views.[6] UK Ambassador Sir Jeremy Greenstock stated that there was "nothing more important for the United Nations than its relationship with the United States" and that UN reform is needed. He also asserted, however, that the U.S. arrearage problem had hindered reform efforts and that, to the extent the United Nations has performed badly, the United States bears some of the responsibility as a key member state. Greenstock added that the United States must be prepared to compromise with other states. The United Nations is itself "a great democracy; we have to do things here democratically, because we all have national sovereignties."

Dutch Ambassador van Walsum said that under the UN Charter, a member state cannot attach conditions to its willingness to pay its assessed contributions. He also noted that The Netherlands hopes "that one day the majority of the American people, including the Senate Foreign Relations Committee, will appreciate everything this organization has done for the spread of democratic ideas all over the world."Ambassador Dejammet of France noted that in the past there also had been doubts in France about the efficacy of the United Nations. The French government and people now understand, however, that instead of being some "kind of big beast," the United Nations is "us"; the errors or impotence of the United Nations is largely a reflection of the errors or impotence of the member states themselves. Dejammet also noted that the objectives of the United States for the United Nations include establishment of norms and sanctions against states (such as sanctions to combat terrorism), but that such norms must be universal in nature (and thus applicable to the United States as well) in order to be effective. Ambassador Fowler of Canada stated that the U.S.

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[5] Helms, *supra* note 3.

[6] Since the meeting of the Security Council was informal, there is no standard verbatim record available. The comments noted here are recorded on cassette tapes made of the session by the United Nations (on file with author). Ambassador Dejammet spoke in French.

unilateral approach to crucial UN funding and reform is unlikely to lead to useful results. With respect to the international criminal court, Fowler noted that the global community was following an approach championed by the United States at Nuremberg. Moreover, since the ICC will defer to democratic states with effective judicial systems for prosecuting war crimes, the ICC will not lead to the "prosecutorial free-for-all" feared by Senator Helms.

Senator Helms's appearance at the United Nations also raised issues of constitutional significance. Appearing before the Security Council on January 24, Secretary of State Albright noted that "only the President and the Executive Branch can speak for the United States. Today, on behalf of the President, let me say that the Administration, and I believe most Americans, see our role in the world, and our relationship to this organization, quite differently than does Senator Helms."[7]

U.S. Foreign Assistance as a Means of Conflict Management

The use by the United States of international law and institutions during 1999–2001 was constrained in part by historically low levels of financial resources in the field of international affairs. From 1985 to 1999, outlays for the U.S. international affairs budget as a percentage of total federal government outlays fell approximately 40 percent. Outlays for the international affairs budget for fiscal year 1999 were 15.2 billion, for fiscal year 2000 were 17.2 billion, and for fiscal year 2001 were estimated to be 19.6 billion.[1] Moreover, as of 1997, U.S. expenditures for nonmilitary foreign assistance had fallen to about US$ 7 billion. That amount represented only 0.08 percent of the U.S. gross national product, the lowest of any industrialized nation.[2]

President Clinton, in a speech to the Veterans of Foreign Wars on August 16, 1999, stated that increasing U.S. foreign assistance would decrease the likelihood that U.S. forces would need to fight wars abroad. He noted:

> Of course, international engagement costs money, but the costliest peace is far cheaper than the cheapest war. Ever since I became President, I've been trying hard to convince Congress of that basic truth. Our international affairs programs, which fund everything from resolving conflicts to strengthening young democracies, to combating terrorism, to fighting dangerous drugs, to promoting our exports, to maintaining our Embassies all around the world, amount to less than one percent of the Federal budget and less than one-fifteenth of our defense budget. But I regret to say that since 1985 these programs have been cut significantly. . . .
>
> Underfunding our arsenal of peace is as risky as underfunding our arsenal for war. For if we continue to underfund diplomacy, we will end up overusing our military. Problems we might have been able to resolve peacefully will turn into crises that we can only resolve at a cost of life and treasure. If this trend continues, there will be real consequences for important American interests.[3]

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[7] U.S. Dep't of State Press Release on Secretary of State Madeleine K. Albright Welcoming Remarks at the UN Security Council Session on the Democratic Republic of the Congo (Jan. 24, 2000), *at* <http://secretary.state.gov/www/statements/2000/000124.html>. On March 30, Senator Helms reciprocated by hosting the representatives of the Security Council members in Washington, D.C., for a meeting with the Senate Foreign Relations Committee. *See* Barbara Crossette & Eric Schmitt, *U.N. Ambassadors in Helms Land: Smiles On, Gloves Off*, N.Y. TIMES, Mar. 31, 2000, at A8.

[1] *See* OFFICE OF MANAGEMENT AND BUDGET, HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2001, 49 (2000) (table 3.1 on Outlays by Superfunction and Function: 1940–2005), *at* <http://w3.access.gpo.gov/usbudget/fy2001/pdf/hist.pdf>.

[2] *See* Karen DeYoung, *Giving Less: The Decline in Foreign Aid: Generosity Shrinks in an Age of Prosperity*, WASH. POST, Nov. 25, 1999, at A1.

[3] Remarks at the Veterans of Foreign Wars of the United States 100th National Convention in Kansas City, Missouri, 35 WEEKLY COMP. PRES. DOC. 1635, 1637–38 (Aug. 23, 1999); *see also* Madeleine Albright, Editorial, *Investing in Our Interests*, WASH. POST, Sept. 9, 1999, at A21; Richard Bilder, *United States Attitudes on the Role of the United Nations Regarding the Maintenance and the Restoration of Peace*, 26 GA. J. INT'L & COMP. L. 9 (1996); U.S. CONGRESSIONAL BUDGET OFFICE, ENHANCING U.S. SECURITY THROUGH FOREIGN AID (1994).

Effectiveness of U.S. Humanitarian Assistance Programs

Even when financial resources were available to address international crises during 1999–2001, in some instances the ability to deploy those resources effectively was hampered by the diffusion of legal authority within the U.S. government. One increasingly important area where this problem was apparent involved the mobilization of international humanitarian assistance. Responsibility for civilian humanitarian programs rested primarily with the U.S. Department of State and the U.S. Agency for International Development (USAID). The former's authority related to funds for refugee assistance[1] and admission of refugees to the United States;[2] the latter's related to funds for foreign disaster assistance[3] and to provision of agricultural commodities and their transportation to meet emergency needs.[4] The U.S. Department of Defense had responsibility for military humanitarian programs, including humanitarian and civic assistance provided in conjunction with military activities,[5] transportation of humanitarian-relief supplies on a space-available basis,[6] foreign disaster and other humanitarian assistance,[7] and provision of excess, nonlethal supplies for humanitarian relief.[8]

In 1999, U.S. Secretary of State Albright called for an interagency policy review of U.S. government international humanitarian programs to consider the effectiveness of the government's existing institutional arrangements. The review, which was completed in January 2000, undertook case studies of U.S. programs in key humanitarian crises, and set forth policy options for enhancing the effectiveness of those programs.[9] For instance, in considering the U.S. response to the crisis of refugees fleeing Kosovo in 1999, the report found that "[l]ack of a consistent senior humanitarian voice hindered our effectiveness. Interagency coordination of the humanitarian effort was insufficient in the lead-up to the NATO campaign, and cumbersome during the air war."[10] The events in Kosovo also "revealed the high domestic sensitivity to [U.S. government] crisis response and the need to strengthen our capacity to manage public donations and media interest."[11]

To address such shortcomings, the report considered the advantages and disadvantages of various measures to enhance the effectiveness of the U.S. government's civilian humanitarian programs—for example, creating a senior humanitarian-policy position, creating a standing policy-and-planning task force, and intensifying outreach to Congress, nongovernmental organizations, and the media. The report also considered more dramatic steps, such as whether Department of State and USAID programs should be consolidated within one or the other agency, or as part of the creation of an entirely new agency.[12] Although the report developed few firm recommendations, it concluded, in part:

> Overall, the current split between State and USAID's civilian emergency programs has impeded

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[1] Migration and Refugee Assistance Act of 1962, 22 U.S.C. §§2601–06 (1994 & Supp. IV 1998).

[2] 8 U.S.C. §§1101–59 (1994 & Supp. IV 1998).

[3] Foreign Assistance Act of 1961, 22 U.S.C. §§2292–92(b) (1994).

[4] Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, §§201–305, 68 Stat. 454, 457–59; *see also* Foreign Assistance Act of 1961, 22 U.S.C. §2318(2)(A) (1994 & Supp. IV 1998) (authorizing the drawdown of articles and services from any U.S. agency, up to a specified aggregate value per year, for purposes of either the refugee- or disaster-assistance program).

[5] 10 U.S.C. §401 (1994 & Supp. IV 1998).

[6] 10 U.S.C. §402 (1994 & Supp. IV 1998).

[7] 10 U.S.C. §§404, 2551 (1994 & Supp. IV 1998).

[8] 10 U.S.C. §2547 (1994).

[9] Interagency Review of U.S. Government Civilian Humanitarian and Transition Programs (Jan. 2000), *at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB30/index.html> [hereinafter Interagency Review]. The report was released pursuant to a Freedom of Information Act (FOIA) request from the National Security Archive, a group that specializes in collecting government documents through FOIA requests and lawsuits. *See* Jane Perlez, *State Dept. Faults U.S. Aid for War Refugees As Inept*, N.Y. TIMES, May 9, 2000, at A8.

[10] Interagency Review, *supra* note 9, Annex 1, at 2.

[11] *Id.* at 5.

[12] *Id.* §2, at 15–29.

> coherent leadership on humanitarian matters, domestically and abroad, and complicated the coordination of civilian and military humanitarian efforts. The humanitarian voice in senior [U.S. government] policy-making has often been absent at critical moments, such that the humanitarian implications of political-military choices in crisis situations do not receive adequate consideration. Overlapping bureaucratic mandates and duplication of effort hinder both the operational efficiency of our humanitarian programs, especially with respect to internally displaced persons, and the interlinkage of programs.[13]

The report also noted that unified leadership of the government's civilian humanitarian programs is relevant to the issue of U.S. military intervention in humanitarian crises. The report stated:

> [T]he central aim of creating unified leadership is to strengthen consideration of the humanitarian implications of political-military choices in crisis situations, including the mandate and role of external military interventions. This essential step will not, it must be said, necessarily guarantee there is always adequate high-level political will to take the appropriate political-military decisions necessary to advance [U.S. government] humanitarian interests. Ultimate decision responsibility rests with political authorities above the officials who manage our humanitarian programs. This reality notwithstanding, our top political authorities will be far better equipped to reach decisions that best advance U.S. humanitarian interests when they are served by unified humanitarian leadership.[14]

U.S. Department of State 1999 Reorganization

The perception of overlapping or ineffective U.S. government programs relating to foreign affairs led to an initiative from the Congress to reform some of those programs. The Foreign Affairs Reform and Restructuring Act of 1998[1] provided for the abolishment of the U.S. Arms Control and Disarmament Agency (ACDA), the International Development and Cooperation Agency (IDCA), and the U.S. Information Agency (USIA), and the transfer of their functions to the Department of State.[2] On December 29, 1998, President Clinton submitted to the Congress a plan and report for this reorganization, which indicated that the transfer would occur by no later than April 1, 1999.[3] Pursuant to a delegation of authority from the president, the secretary of state submitted a revised plan and report on March 31, 1999. The reorganization was intended to eliminate duplication in foreign affairs policymaking and administrative services, and was expected to expand vastly the power of the secretary of state over the policies, budgets, and staffs of U.S. government operations worldwide.[4]

Under the plan, most personnel of the General Counsel's offices of ACDA and of USIA were integrated in two new sections of the Department of State Office of the Legal Adviser. Those sections are headed respectively by an Assistant Legal Adviser for Arms Control and Non-Proliferation and an Assistant Legal Adviser for Public Diplomacy.

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[13] *Id.* §1, at 4.

[14] *Id.*

[1] Foreign Affairs Reform and Restructuring Act of 1998, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2761 (1998). The Act also called for the transfer of certain functions of the Agency for International Development (AID) to the Department of State, but otherwise maintained AID's status as an independent agency.

[2] Functions of USIA relating to international broadcasting, however, are transferred to a new independent agency, the Broadcasting Board of Governors, including functions associated with the Voice of America, Radio and TV Marti, and Radio Free Europe.

[3] For the president's transmittal notice, see Letter to Congressional Leaders Transmitting a Plan and Report on Reorganization of the Foreign Affairs Agencies, 34 WEEKLY COMP. PRES. DOC. 2537 (Jan. 4, 1999). For the executive order implementing the act, see Exec. Order No. 13,118, 64 Fed. Reg. 16,595 (Mar. 31, 1999).

[4] *See* Thomas W. Lippman, *USIA and ACDA Workers All to Retain Employment*, WASH. POST, Jan. 5, 1999, at A9.

International and Foreign Relations Law Influences on the United States

Interpretation of Treaty Obligations in Light of Foreign Court Decisions

In various cases in U.S. courts during 1999–2001, U.S. courts showed sensitivity to norms emanating from international treaties to which the United States was a party, pursuing interpretations that, among other things, were consistent with opinions rendered by foreign courts. For instance, in 1999, the Supreme Court in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*[1] reaffirmed the exclusivity of the types of damages that may be sought against air carriers as a result of U.S. obligations under the Warsaw Convention.[2] In that case, the plaintiff, Tsui Yuan Tseng, sued for alleged psychological injuries stemming from being subject to an "intrusive security search" before flying on the defendent airline.[3] Because there was no bodily injury involved, however, the damages did not relate to an "accident" as defined by the Warsaw Convention, and Tseng could not recover under the Warsaw Convention regime.[4] Consequently, Tseng sought relief based on New York tort law. While the Second Circuit Court of Appeals allowed the action, the Supreme Court reversed, finding that if relief is not available under the Warsaw Convention regime, it is not available at all. The Court stated:

> Our inquiry begins with the text of Article 24 [of the Warsaw Convention], which prescribes the exclusivity of the Convention's provisions for air carrier liability. "[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S., at 399, 105 S.Ct. 1338. "Because a treaty ratified by the United States is not only the law of this land, see U.S. Const., Art. II, §2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties." *Zicherman*, 516 U.S., at 226, 116 S.Ct. 629.
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> Article 24 provides that "cases covered by article 17"—or in the governing French text, "les cas prévus à l'article 17"—may "only be brought subject to the conditions and limits set out in th[e] [C]onvention." 49 Stat. 3020. That prescription is not a model of the clear drafter's art. We recognize that the words lend themselves to divergent interpretation.
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> In Tseng's view, and in the view of the Court of Appeals, "les cas prévus à l'article 17" means those cases in which a passenger could actually maintain a claim for relief under Article 17. So read, Article 24 would permit any passenger whose personal injury suit did not satisfy the liability conditions of Article 17 to pursue the claim under local law.
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> In El Al's view, on the other hand, and in the view of the United States as *amicus curiae*, "les cas prévus à l'article 17" refers generically to all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking, and simply distinguishes that class of cases (Article 17 cases) from cases involving damaged luggage or goods, or delay (which Articles 18 and 19 address). So read, Article 24 would preclude a passenger from asserting any air transit personal injury claims under local law, including claims that failed to satisfy Article 17's liability conditions, notably, because the injury did not result from an "accident," see *Saks*, 470 U.S., at

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[1] 525 U.S. 155 (1999).

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 LNTS 11, *reprinted in note following* 49 U.S.C. §40105 (1994) [hereinafter Warsaw Convention].

[3] 525 U.S. at 160.

[4] *Id.*

405, 105 S.Ct. 1338, or because the "accident" did not result in physical injury or physical manifestation of injury, see *Floyd*, 499 U.S., at 552, 111 S.Ct. 1489.

Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). We conclude that the Government's construction of Article 24 is most faithful to the Convention's text, purpose, and overall structure.

. . . .

Decisions of the courts of other Convention signatories corroborate our understanding of the Convention's preemptive effect. In *Sidhu*, the British House of Lords considered and decided the very question we now face concerning the Convention's exclusivity when a passenger alleges psychological damages, but no physical injury, resulting from an occurrence that is not an "accident" under Article 17. See 1 All E.R., at 201, 207. Reviewing the text, structure, and drafting history of the Convention, the Lords concluded that the Convention was designed to "ensure that, in all questions relating to the carrier's liability, it is the provisions of the [C]onvention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action." *Ibid.* Courts of other nations bound by the Convention have also recognized the treaty's encompassing preemptive effect.The "opinions of our sister signatories," we have observed, are "entitled to considerable weight." *Saks*, 470 U.S., at 404, 105 S.Ct. 1338 (internal quotation marks omitted). The text, drafting history, and underlying purpose of the Convention, in sum, counsel us to adhere to a view of the treaty's exclusivity shared by our treaty partners.[5]

Treaty Obligations as Evidence of Federal Preemption

During 1999–2001, the international obligations of the United States at times conflicted with the laws of several U.S. states. An example of such conflict may be seen in *United States v. Locke*, decided by the U.S. Supreme Court in 2000.

In the wake of the 1990 *Exxon Valdez* oil spill off the coast of Alaska (the largest oil spill in U.S. history), both the U.S. federal government and the State of Washington enacted more stringent laws and regulations directed at preventing—and providing remedies for—future oil spills by oceangoing oil tankers. In 1990, Congress passed the Oil Pollution Act (OPA),[1] which supplemented the Ports and Waterways Act of 1972 (PWSA).[2] The State of Washington enacted certain statutes and created an Office of Marine Safety,[3] which produced regulations affecting all vessels (including foreign-flag vessels) transporting oil through U.S. territorial waters within the State of Washington. The regulatory scheme addressed tanker equipment, staffing, personnel qualifications, reporting, and operating.[4]

Following the passage of the State of Washington's regulatory scheme, the International Association of Independent Tanker Owners (Intertanko) sued in an effort to have the scheme struck down as an unlawful intrusion into an area preempted by federal law, charging that the scheme differed from national and international standards developed for the same purpose. The

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[5] *Id.* at 167–69, 175–76 (footnotes omitted). For other cases in U.S. courts relating to the Warsaw Convention, see *infra* ch. VII.

[1] 33 U.S.C. §§2701–61 (1994 & Supp. IV 1998).

[2] 33 U.S.C. §§1221–36 (1994 & Supp. IV 1998).

[3] WASH. REV. CODE §88.46.040(3) (1994).

[4] WASH. ADMIN. CODE §§317-21-130 to 317-21-540 (1999).

district court rejected Intertanko's arguments and upheld the State of Washington's regulatory scheme.[5] The Ninth Circuit Court of Appeals—despite intervention by the U.S. government on behalf of Intertanko for the purpose of raising foreign affairs concerns—also upheld the regulatory scheme, with the exception of one regulation requiring certain towing and navigation equipment.[6]

The Supreme Court granted certiorari. In its principal brief, the United States detailed the historic role of the federal government in regulating international and interstate commerce, and asserted that federal law preempted the State of Washington's regulatory scheme.[7] In addition to preemption by federal statute, the United States argued that "to the extent an international agreement creates a standard embodied in Coast Guard regulations or is formally recognized by the Coast Guard as applicable, that standard will preempt a contrary state law."[8] Indeed, the government argued that an "international treaty can have just as much preemptive force as a federal statute."[9] Further, international practice, as reflected in the Vienna Convention on the Law of Treaties,[10] demonstrated that international agreements are binding on political subdivisions of nations.[11] The brief continued:

> Because international agreements reflect the intentions of nation-states, this Court has emphasized that any concurrent power held by States in fields that are the subject of international agreements is "restricted to the narrowest of limits." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941). Thus, where the United States has exercised the authority of the Nation, a State "cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities." *Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961). Accordingly, whether viewed through the lens of preemption by treaty or interference with the federal government's exclusive authority to conduct the foreign affairs of the United States, this Court has repeatedly struck down state laws that conflict with duly promulgated federal law touching on matters of international concern. *See, e.g., Zschernig v. Miller*, 389 U.S. 429 (1968); *United States v. Pink*, 315 U.S. 203, 232 (1942); *United States v. Belmont*, 301 U.S. 324, 327 (1937).
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> Those considerations have particular force in this case, because Congress has long recognized the importance of international rules in promoting safety and environmental protection in vessel operations. For example, although the Tank Vessel Act of 1936 contained a provision requiring vessels to carry a certificate of inspection evidencing compliance with the terms of the Act, it specifically provided that "the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States." 49 Stat. 1890. Congress included similar language in the PWSA . . . .
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> As a result, under current law, a foreign vessel's compliance with international standards will satisfy domestic requirements for entering United States ports or waters.[12]

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[5] Int'l Ass'n of Indep. Tanker Owners (Intertanko) v. Lowry, 947 F.Supp. 1484 (W.D.Wash. 1996).

[6] Int'l Ass'n of Indep. Tanker Owners (Intertanko) v. Locke, 148 F.3d 1053 (9th Cir. 1998).

[7] Brief for the United States at 18–28, United States v. Locke, 529 U.S. 89 (2000) (Nos. 98-1701, 98-1706) [hereinafter U.S. Brief]. The United States asserted that Coast Guard regulations issued under the Ports and Waterways Act of 1972 (PWSA) preempted the State of Washington's laws and regulations. The principal brief was filed on October 22, 1999. A U.S. reply brief was filed on November 30, 1999.

[8] U.S. Brief, *supra* note 7, at 28. To support its position on preemption both by federal statute and by treaty, the United States cited *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). In *Ray*, the Court considered the issue of preemption of state laws and regulations enacted after the 1967 *Torrey Canyon* oil spill off the coast of the United Kingdom.

[9] U.S. Brief, *supra* note 7, at 28.

[10] Vienna Convention on the Law of Treaties, May 23, 1969, Arts. 27, 29, 1155 UNTS 331, 339, *reprinted in* 8 ILM 679, 690–91 (1969).

[11] U.S. Brief, *supra* note 7, at 28.

[12] *Id.* at 29–30.

The government then detailed specific conflicts between the State of Washington's regulatory regime and international standards that are enforced through federal statute or Coast Guard regulations.[13] Those international standards arose from international instruments such as: the UN Convention on the Law of the Sea;[14] the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers[15] and its associated regulations; the International Safety Management Code;[16] the International Convention for the Safety of Life at Sea;[17] the International Convention for the Prevention of Pollution from Ships (MARPOL);[18] and assorted resolutions of the International Maritime Organization.

The United States also argued that upholding the State of Washington's regulatory scheme would hinder the government's ability to be effective in promoting environmentally sound practices in the international arena. First, "the existence of state regulations that conflict with international standards raises the distinct possibility that other nations that are parties to international conventions and agreements will regard the United States as in violation of its obligations and thus take actions that will undermine international uniformity."[19] Second, leaving the State of Washington's regulatory scheme in place would create uncertainty regarding state compliance with federally negotiated agreements, thereby undermining the credibility of the United States in its efforts to negotiate agreements that promote the safe operation of tankers internationally. Third, upholding the regulatory scheme would allow each of the several U.S. states to establish and enforce its own maritime regulatory regime—which would not only interfere with interstate commerce, but "frustrate the substantial international interest in uniform vessel standards. . . ."[20]

In its decision, the Supreme Court focused on the well-established history of federal regulation in the field of interstate navigation. Under the doctrine of "field preemption," the Supreme Court found that the federal government's overall regulation in this area clearly invalidated State of Washington regulations on crew training, English-language proficiency, restricted-visibility navigation, and marine-casualty reporting.[21] The Court remanded the case to allow the district court or the court of appeals to determine if the remaining regulations were also preempted either under "field preemption" or due to specific conflicts with federal laws or international agreements. Finding that there existed sufficient preemption based on federal statutes and regulations, the Court deemed it unnecessary to address the U.S. argument that international treaties and instruments have a direct preemptive effect on the State of Washington's regulatory scheme. The Court noted, however, that "the existence of the treaties and agreements on standards of shipping is of relevance, of course, for these agreements give force to the longstanding rule that the enactment of a uniform

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[13] *Id.* at 33–40 & app.

[14] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, *reprinted in* 21 ILM 1261 (1982).

[15] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, July 7, 1978, S. EXEC. DOC. EE, 96-1 (1980), 1361 UNTS 190 [hereinafter STCW Convention]. The government argued that the State of Washington statutes and regulations imposed requirements that were either more stringent than, or conflicted with, those of the STCW Convention with regard to drug and alcohol testing and reporting, crew-training policies, language-proficiency requirements, operating procedures for restricted visibility, and emergency procedures.

[16] International Management Code for the Safe Operation of Ships and for Pollution Prevention, IMO Res. A/741(18) (1993), *obtainable from* <http://www.uscg.mil/hq/g-m/psc/miscpages/ismpg.htm>.

[17] International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 UST 5577, 1184 UNTS 278.

[18] International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 ILM 1319 (1973), *as amended* Feb. 17, 1978, S. EXEC. DOC. E, 95-1 (1978), 1340 UNTS 184.

[19] *See* U.S. Brief, *supra* note 7, at 47. The government supported this contention by noting it had received diplomatic notes from Canada and from thirteen other nations and the Commission of the European Communities expressing concerns about differing regimes within the United States. *Id*. Further, on October 22, 1999, fourteen nations submitted to the Supreme Court a combined *amicus curiae* brief that argued against upholding the Washington regulatory scheme. *See* Brief for the governments of Belgium, Denmark, Finland, France, Germany, Greece, Italy, Japan, The Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom as Amici Curiae in Support of Petitioners, United States v. Locke, 529 U.S. 89 (2000) (Nos. 98-1701, 98-1706).

[20] U.S. Brief, *supra* note 7, at 49–50.

[21] *See* United States v. Locke, 529 U.S. 89, 112–16 (2000). For a more detailed discussion of the Supreme Court's decision, see Patrick O. Gudridge, Case Report: United States v. Locke, 94 AJIL 745 (2000).

federal scheme displaces state law, and the treaties indicate Congress will have demanded national uniformity regarding maritime commerce."[22]

Federal Foreign Relations Law Preemption of State Law

During 1999–2001, the conduct of the federal government in the field of foreign relations law also had preemptive effect on U.S. state laws. For example, in 1996, the Commonwealth of Massachusetts enacted "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)."[1] The law prohibited the Commonwealth, its government agencies and authorities, from purchasing goods or services from individuals or companies that engage in business with or in Myanmar, except in certain limited situations. The purpose of the law was both to express disapproval of the human rights abuses of the nondemocratic, military government of Myanmar, and to inhibit companies wishing to do business with the Commonwealth of Massachusetts from also doing business with or in Myanmar, thereby placing economic pressure on the government of Myanmar to reform. Massachusetts purchases approximately US$ 2 billion in goods and services annually.[2]

After hundreds of U.S. and non-U.S. companies were placed by Massachusetts on a "restricted purchase list," the National Foreign Trade Council (NFTC)[3] on April 30, 1998, filed a suit in the U.S. District Court for the District of Massachusetts charging that the law was unconstitutional. The NFTC contended that the law interfered with the federal foreign relations power, violated the foreign commerce clause,[4] and violated the supremacy clause,[5] given the existence of federal laws that impose sanctions on Myanmar.[6] Because of the scope of the Massachusetts law, the existence of similar laws in other U.S. states and localities (i.e., laws that target foreign states, such as China, Cuba and Nigeria, for social and political injustices), and concerns about the role of U.S. states in foreign affairs,[7] the Massachusetts case attracted considerable interest in the United States and abroad, within both the business and academic communities.[8] Several entities, including representatives from other states, the U.S. Congress, and the European Union, appeared as amici curiae.[9]

On November 4, 1998, the district court found that the U.S. Constitution grants the federal government exclusive authority over foreign affairs and that the Massachusetts law impermissibly

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[22] United States v. Locke, 529 U.S. at 103.

[1] MASS. ANN. LAWS ch. 7, §§22G-22M, 40F 1/2 (Law. Co-op.1998).

[2] *See Voiding Of Burma Boycott Upheld: Mass. Overstepped Authority, Court Says*, WASH. POST, June 24, 1999, at A16.

[3] The NFTC is a nonprofit corporation founded in 1914 that advocates, on behalf of its member companies, in favor of open international trade and investment.

[4] U.S. CONST. Art. I, §8, cl. 3.

[5] U.S. CONST. Art. VI, cl. 2.

[6] The federal government imposed certain foreign assistance sanctions and other measures on Myanmar three months after the Massachusetts law was enacted. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, §570, 110 Stat. 3009-166 to 3009-167, as contained in the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §101(c), 110 Stat. 3009-121 to 3009-181 (1996). In addition, in May 1997, President Clinton imposed certain trade sanctions on Myanmar. Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997); *see* 31 C.F.R. pt. 537 (1998).

[7] *Compare* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997) (favoring involvement of U.S. states in foreign affairs), *with* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (taking the opposite view).

[8] *Compare* Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443 (1998), *and* David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar),* 30 VAND. J. TRANSNAT'L L. 175 (1997) (finding such laws unconstitutional), *with* Lynn Loschin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws,* 39 SANTA CLARA L. REV. 373 (1999), *and* Jay A. Christofferson, Comment, *The Constitutionality of State Laws Prohibiting Contractual Relations with Burma: Upholding Federalism's Purpose*, 29 MCGEORGE L. REV. 351 (1998) (finding such laws constitutional).

[9] Moreover, the European Union and Japan filed complaints at the World Trade Organization (WTO) claiming that the Massachusetts law violated certain provisions of the WTO agreement on government procurement. The complaints were suspended at the request of the European Union and Japan after issuance of the district court decision and, thereafter, automatically lapsed.

burdened U.S. foreign relations. As such, the law was unconstitutional. The Court found that NFTC had not shown that federal law preempted the Massachusetts law; it did not reach the issue relating to the foreign commerce clause.[10] On June 22, 1999, the First Circuit Court of Appeals affirmed the district court's finding that the Massachusetts law unconstitutionally infringed on the foreign affairs power of the federal government. After noting that the "Constitution's foreign affairs provisions have been long understood to stand for the principle that power over foreign affairs is vested exclusively in the federal government,"[11] the Court carefully analyzed the Supreme Court's holding in *Zschernig v. Miller*[12] to assess the boundaries for permissible state activity in the foreign affairs context. The Court found that the Massachusetts law had more than an "incidental or indirect effect in foreign countries" (evidenced by the intent of the law, by Massachusetts' purchasing power, by protests from foreign countries, and by the law's divergence from federal law which creates the potential for federal embarrassment) and therefore is impermissible even if it advances a strong state interest.[13]

Further, the Court found the Massachusetts law unconstitutional as a violation of the foreign commerce clause. The Court doubted that the "market participant exception," which is part of the U.S. constitutional doctrine concerning the "dormant" domestic commerce clause,[14] extended as well to the foreign commerce clause. Even if this exception did extend to foreign commerce, the Court found that, in passing its law, Massachusetts did not act as a market participant but, rather, as a market regulator. The Massachusetts law violated the foreign commerce clause because it facially discriminated against foreign commerce without a legitimate local justification and because it attempted to regulate conduct beyond its borders.[15]

Unlike the district court, the court of appeals also found the Massachusetts law unconstitutional under the supremacy clause, given the federal sanctions against Myanmar. The Court found that Congress had not implicitly approved of or permitted the Massachusetts law and that the law tried to regulate conduct (trade with Myanmar) already addressed by federal law, yet through different means in scope and kind.[16] The court noted that the passage of the Massachusetts law resulted in significant attention being brought to the Burmese government's human rights record, and may have been a catalyst for federal sanctions. Nevertheless, "the conduct of this nation's foreign affairs cannot be effectively managed on behalf of all of the nation's citizens if each of the many state and local governments pursues its own foreign policy. Absent express congressional authorization, Massachusetts cannot set the nation's foreign policy."[17]

In a decision rendered on June 19, 2000, the Supreme Court agreed with the court of appeals that the Massachusetts law was preempted by federal law, and thus its application was unconstitutional under the supremacy clause.[18] The Court noted that there was no express preemption provision in the federal laws on sanctions against Burma, but nevertheless found that state law must yield to a federal statute if Congress intends to occupy the field or to the extent that there is any conflict with the federal statute. Further, the Court stated that it would find preemption where it is impossible

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[10] Nat'l Foreign Trade Council v. Baker, 26 F.Supp.2d 287, 293 (D. Mass. 1998), *aff'd sub nom.* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999). For an analysis of the decision, see Recent Case, 112 HARV. L. REV. 2013 (1999).

[11] 181 F.3d at 49.

[12] 389 U.S. 429 (1968).

[13] 181 F.3d at 52-53 (quoting Clark v. Allen, 331 U.S. 503, 517 (1947)). Further, the court rejected Massachusetts' effort to extend to the foreign affairs power the "market participant" exception to the dormant domestic commerce clause and found that neither the first nor tenth amendments protected the Massachusetts law.

[14] *See, e.g.,* White v. Mass. Council of Constr. Employers, 460 U.S. 204 (1983) (holding that when the state is acting as a market participant, not as a market regulator, the dormant domestic commerce clause places no limitation on its activities).

[15] 181 F.3d at 61–70.

[16] *Id.* at 71–77.

[17] *Id.* at 77–78.

[18] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000). For a more detailed discussion of this case, see Brannon P. Denning & Jack H. McCall, International Decisions, 94 AJIL 750 (2000).

for a private party to comply with both state and federal law, and where the state law is an obstacle to the accomplishment and execution of Congress's full purposes and objectives.

In this case, the Court found that the Massachusetts law undermined the intended purpose and natural effect of at least three provisions of the federal law. First, the Massachusetts law was an obstacle to the federal law's delegation of discretion to the president to control economic sanctions against Burma. While Congress initially imposed sanctions, it also authorized the president to terminate the sanctions upon certifying that Burma had made progress in human rights and democracy, or to suspend sanctions in the interest of national security. The Court found it implausible to think that Congress would have gone to such lengths to empower the president had it been willing to compromise his effectiveness by allowing state or local laws to blunt the consequences of his actions.[19] Second, by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions, the Massachusetts law interfered with Congress's intent to limit economic pressure against the Burmese government to a specific range of measures.[20] Third, the Massachusetts law was at odds with the president's authority to speak for the United States in dealing with other countries to develop a comprehensive, multilateral Burma strategy, an approach specifically called for by Congress.[21] According to the Court, "We need not get into any general consideration of the limits of state action affecting foreign affairs to realize that the president's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics."[22]

[19] *Id.* at 374–77.
[20] *Id.* at 377–80.
[21] *Id.* at 380–86.
[22] *Id.* at 381.