TRANSNATIONAL CIVIL SOCIETY AND ECONOMIC SANCTIONS: THE CASE OF THE FREE BURMA COALITION

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Introduction

We tend to think of sanctions as instruments employed by states. If human rights activists become involved in the process, they do so as advocacy groups, persuading governments to restrict corporate activity in target states. Yet many human rights organizations have been frustrated by the limitations of this role. States are often reluctant to impose sanctions on human rights abusers who are not adversaries because of the diplomatic and economic costs of such measures or because they prefer strategies of economic engagement. In addition, the lobbying of human rights organizations is often neutralized by the greater resources commanded by corporations and foreign governments to preserve business ties with repressive regimes. Since state action generally falls short of the activists' preferences, they often opt for a strategy of nongovernmental human rights sanctions – i.e., redirecting their energies away from the central authorities and toward the corporation, either directly through consumer and shareholder pressure, or using the intermediary of government institutions not traditionally associated with foreign policy. To the extent to which they succeed, they effectively regulate overseas corporate conduct and produce the equivalent of economic sanctions without the authorization of nation-states.

The role model for such efforts is the Anti-Apartheid Movement. On the surface, the debate over South African sanctions took place in national governments between proponents of constructive engagement and economic sanctions. It was formally resolved in favor of the latter in 1986 when most countries imposed sanctions and after the U.S. Congress overrode President Reagan's veto of the Comprehensive Anti-Apartheid Act. Yet the two most dramatic forms of corporate disengagement from South

Africa – the private credit boycott, triggered by Chase Manhattan's July 1985 decision not to roll over its South African loans, and the disinvestment over 350 direct investors – were not mandated by governments. They were among the central goals of anti-apartheid activists around the world, who placed pressures on corporations to comply with them through demonstrations, boycotts, stock divestments, shareholder activism and persuading (mostly U.S.) state and local governments to condition municipal business on severing business ties with South Africa. The historian Robert K. Massie concluded that these acts represented a "revolution from below" that "steadily accumulated into a force that changed history"[1]

The aim of this paper is to examine the degree to which global civil society can replicate the experience of the anti-apartheid movement, effectively imposing human rights sanctions by securing corporate withdrawal from repressive regimes beyond what is required by governmental sanctions. The test case is the Free Burma Coalition (FBC). Like the anti-apartheid movement, the FBC is a transnational alliance between activists within Burma and sympathetic societal groups on the outside. Its preferred strategy has been to increase the economic pressures on the regime to negotiate with its democratic opposition by persuading governments to impose sanctions. Failing that, it has sought to bypass the central authorities to place pressures on corporations to withdraw. To the extent to which groups like the FBC succeed in these efforts, they establish a kind of governance without governments in which civil society, transnationally organized, can reach what many activists see as the dark side of globalization. And if they can induce

[1] Robert K. Massey, *Loosing the Bonds: The United States and South Africa in the Apartheid Years* (New York: Doubleday, 1997), pp. 695-696.

the kind of disengagement seen in South Africa in the 1980s, then economic sanctions are no longer the exclusive preserve of the nation-states.

This paper builds on an earlier study of this issue that contrasted the anti-apartheid movement with 1990s campaigns against oil company investments in Burma and Nigeria.[2] This study focuses on Burma as a test case because the Free Burma Coalition has been the most extensive campaign for nongovernmental human rights sanctions since the end of apartheid. This study also takes into account two developments in the United States not addressed in my earlier work: (1) the Supreme Court's *Crosby* decision, which invalidated the Massachusetts Burma Law, as well as the state and local sanctions that had been used extensively during the anti-apartheid campaign; and (2) the lawsuit against Unocal's activities in Burma, utilizing the Alien Tort Claims Act, which has been used increasingly to make claims against multinational corporations associated with human rights abuses abroad. Both will be examined in terms of their implications for NGO influence and the state backlash against what central decision makers increasingly see as a constraint on its control over economic statecraft.

The Free Burma Coalition as Transnational Actor

The Free Burma Coalition emerged in response to international concern regarding the suppression of democracy and denial of human rights in Burma. Burma became a priority to the human rights community after a 1988 coup in which a military regime – the State Law and Order Council (SLORC) - seized power following the violent

[2] Kenneth A. Rodman, "Think Globally, Punish Locally: Non-State Actors, Multinational Corporations and Human Rights Sanctions," *Ethics & International Affairs* (1998), pp. 19-41; An expanded and updated version of the article is in Rodman, *Sanctions Beyond Borders: Multinational Corporations and U.S. Economic Statecraft* (Boulder, Colorado: Rowman & Littlefield, 2001), ch. 7.

suppression of a student-led democracy movement. In 1990, the regime canceled the results of national elections that would have brought to power its democratic opposition, the National League of Democracy (NLD). It also placed the NLD's leader, Aung San Suu Kyi, who would receive the 1991 Nobel Peace Prize, under house arrest without formal charges until July 1995; the quarantine was reimposed in 1996 until her release in May 2002. While the SLORC was renamed the State Peace and Development Council (SPDC) in November 1997 in order to improve its international image, it has consistently used violent repression against its political opponents and has been characterized by one specialist as the "most authoritarian and rigid of all the Southeast Asian states."[3]

Beyond the suppression of democracy, Myanmar has been condemned by NGOs, international organizations, the U.S. State Department, and the European Union (EU), as one of the world's worst abusers of human rights. Reports by Amnesty International and Human Rights Watch have documented the use of torture, extrajudicial executions, and cruel and degrading practices against political prisoners and ethnic minorities, and the International Committee of the Red Cross was barred from interviewing political detainees until 1999. The International Labor Organization (ILO) issued several reports documenting gross violations of core labor standards, such as the routine conscription of labor for infrastructure projects and of children as young as 14 serving as porters for the military. In October 1998, the UN's Special Rapporteur for Human Rights in Burma found the abuses to be so pervasive and systematic that they can only be the "result of policy at the highest level entailing legal responsibility."[4]

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[3] David I. Steinberg, *Burma: The State of Myanmar* (Washington, D.C.: Georgetown University Press, 2001), p. 85.
[4] Investor Responsibility Research Center (IRRC), Social Issues Service (SIS), 2001 Background Report B-2, "U.S. Business in Burma," p. 7. See pp. 7-10 for a summary of human rights reports on Burma.

These events and practices triggered the creation of the Free Burma Coalition (FBC) to press for the restoration of democracy in Burma. The FBC was formally established in 1995 by a Burmese graduate student at the University of Wisconsin, coordinating the human rights activism on Burma that had been growing since the 1988 coup. Its strategy was to use modern communications technology, particularly the internet, to enable Burmese opposition and exile groups to link themselves to sympathetic elements of global civil society – i.e., human rights and environmental groups, churches, labor unions, and socially responsible investors. The purpose of this "solidarity in cyberspace" was to educate and mobilize transnational coalitions through bypassing the editing and filtering of the traditional media, which paid scant attention to Burma during the 1990s. This enabled activists to coordinate campaigns involving geographically dispersed and functionally diverse organizations in order to concentrate external pressure on the regime.[5]

As in the case of the anti-apartheid movement, the FBC tried to promote political change through a strategy of economic disassociation, lobbying states to impose sanctions and pressing MNCs not to do business with Burma – a position endorsed by the NLD and by Aung San Suu Kyi.[6] While economic sanctions have become increasingly controversial to many in the human rights community, the FBC views them as the only credible external source pressure on the regime. The alternative strategy of engagement is opposed as doing little more than prop up the dictatorship since all foreign investments are joint ventures with the state or the elites identified with the regime. Foreign trade and investment also encourage human rights abuses since they benefit from and reward the

[5] *Economist,* August 10, 1996, p. 28.
[6] *Washington Post*, January 27, 1997, p. A14.

regime's use of forced labor. Finally, foreign business with Burma confers legitimacy on the regime by telling it that whatever governments might say about human rights, Myanmar would still be treated as a normal business partner.[7]

While the FBC has pushed for the withdrawal of all foreign companies from Burma, its central target has been the oil companies, who have been active in energy exploration since the SLORC opened its natural resources to foreign development in the early 1990s. The most significant and controversial deal is a $1.2 billion joint venture between UNOCAL (U.S.), Total (France) and the state-owned Myanmar Oil and Gas Enterprise (MOGE) to develop the offshore Yadana natural gas field and construct at 260-mile pipeline through the Tenasserim region of southeast Burma to supply a power plant in Thailand. Activists charge that the project is the most significant source of foreign exchange for a regime that has staked its future on the rapid expansion of gas exports. They also hold the companies responsible for forced labor in the construction of infrastructure associated with the project and the coercive uprooting of villagers to clear out land for the pipeline.[8]

In playing a traditional advocacy role vis-à-vis states and international organizations, the FBC has had some limited success. The strongest sanctions were imposed by the United States. In 1995, Senator Mitch McConnell (R-Ky) introduced the Burma Freedom and Democracy Act, which would have imposed a comprehensive embargo and the mandatory disinvestment of US companies until there was a

[7] For a summary of these arguments, see IRRC, "U.S. Business in Burma," pp. 13-14; Also see the FBC's website at www.freeburmacoalition.org.
[8] IRRC, SIS, 2002 Company Report I, "UNOCAL – Link Executive Compensation to Social Performance," April 26, 2002, pp. 5-6.

democratically elected government.[9] The introduction of the bill triggered a corporate lobbying campaign to oppose its passage. This led to the passage of the more moderate Cohen-Feinstein amendment. Its mandatory sanctions were limited to a ban on non-humanitarian aid, visa denials to members of the regime, and instructions to Treasury to vote against loans from international financial institutions and multilateral development banks.[10] It did include investment sanctions, but they applied only to new investments, not pre-existing ones, such as the Yadana joint venture. Even this provision was discretionary, subject to a Presidential determination every six months that repression had increased or that Aung San Suu Kyi had been harmed, imprisoned, or exiled.[11]

President Clinton waived the sanctions in October 1996, but invoked them in April 1997.[12] Their contribution to the FBC's sanctions strategy was modest. UNOCAL did drop plans to explore two offshore fields, but its Yadana operations were unaffected. In fact, it announced an expansion of its operations the day the State Department released a harsh report on "rolling repression" in Burma.[13] Moreover, the legislation did not explicitly define the injection of new capital into existing ventures as a new investment and the Office of Foreign Assets Controls routinely issued licenses for this kind of activity.[14] Finally, the administration let it be known it planned to apply the sanctions several months before their actual imposition. Companies considering investments in Burma saw this as a window of opportunity to get in ahead of the new law. The

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[9] Ernest Preeg, *Feeling Good or Doing Good with Sanctions: Unilateral Economic Sanctions and the U.S. National Interest* (Washington, D.C.: Center for Strategic and International Studies, 1999), p. 120.

[10] For an overview of sanctions imposed since the 1988 coup, see Institute for International Economics (IIE), "Hot Topics in Economic Sanctions," Case Study 88-1 (Myanmar); www.iie.com/topics/sanctions/myanmar1.htm. Previous executive orders had already banned eligibility for trade preferences, Export-Import Bank loans, and political risk insurance through the Overseas Private Investment Corporation.

[11] *Ibid.*

[12] *Ibid.*

[13] Financial Times, January 31, 1997, p. 4.

Financial Times reported that February 1997 alone witnessed $339 million in new U.S. investments, primarily in the energy sector, more than doubling U.S. foreign direct investment in Burma.[15]

The EU was less restrictive in employing economic instruments. It did agree to diplomatic sanctions (visa denials to members of the regime and a suspension of high-level diplomatic contacts), and a suspension of arms sales and non-humanitarian aid. In response to an official report on the use of forced labor, the EU also suspended Burma's eligibility for trade preferences – the first time it had linked trade access to labor conditions. Beyond that, however, there were no restrictions on trade and investment.[16] Canada, Australia, and Japan enacted comparable measures, though Japan broke with an international ban on foreign aid in April 2001.[17]

By contrast, ASEAN has preferred a strategy of "constructive engagement," opposing not only punitive economic measures, but also the more symbolic diplomatic sanctions imposed by the U.S. and EU. In fact, ASEAN accepted Myanmar's application for full membership in 1997 – a clear rebuke to Western efforts to stigmatize the regime.[18] One consequence of this is what one analyst called the "Asianization of the Burmese economy."[19] In 1996, for example, Singapore replaced Great Britain as the largest foreign investor.[20] And in 2000, Burma's six largest trading partners were China, Thailand, South Korea, Japan, Malaysia, and Singapore.[21]

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[14] Anna E. Johansson, "A Silent Emergency Persists: The Limited Efficacy of U.S. Investment Sanctions on Burma," *Pacific Rim Law and Policy Journal* (May 2000), p. 334.
[15] Financial Times, April 4, 1997, p. 3.
[16] IIE, "Myanmar," Part I.
[17] *Far Eastern Economic Review*, October 10, 2001, p. 25.
[18] Preeg, *Feeling Good or Doing Good with Sanctions*, pp. 117-118.
[19] Mark Mason, "Foreign Investment in Burma: Trends, Determinants, and Prospects," in Robert I . Rotberg, ed., *Burma: Prospects for a Democratic Future* (Washington, D.C.: Brookings Institution, 2001), p. 224.
[20] EIU, *Myanmar*, Country Report, 1997, no. 1, p. 2.
[21] IRRC, "U.S. Business in Burma," p. 14.

Some international organizations also enacted sanctions. The most significant are the IMF and the multilateral development banks, such as the World Bank and the Asian Development Bank, which have frozen new loans to Myanmar. These measures are the result of a consensus between the U.S., EU, and Japan that further aid should be resumed only if there is both economic reform and political change.[22] The fact that the latter is included in this linkage strategy is due both to the relationship between SLORC/SPDC authoritarianism and corrupt and arbitrary practices that depress business confidence, and to the sustained lobbying by human rights activists.

The ILO, whose involvement in Burma was initially triggered by a complaint from the International Confederation of Free Trade Unions, suspended all cooperation with Burma in 1999 because of its systematic use of forced labor. The next year, it took the unprecedented step of calling on its members to impose sanctions on Burma "to ensure that [economic] relations do not perpetuate or extend the system forced or compulsory labor."[23] In response, Senator Tom Harkin (D-Iowa) introduced a bill to ban imports from Burma, though Congress has not yet acted on it and Secretary of State Colin Powell's testimony opposing unilateral sanctions indicates that the White House will oppose such measures.[24] In Europe, political pressure on companies to withdraw from Burma has come from the UK Foreign Office, the European Parliament, and the Foreign Affairs Committee of the French legislature.[25] While the ILO review further added to Myanmar's pariah status, no country has yet imposed new sanctions as a result of it.

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[22] EIU, *Myanmar*, Country Study, May 2002, p. 3.
[23] IRRC, "U.S. Business in Burma," p. 9.
[24] IRRC, *Corporate Social Issues Reporter*, February 2001, p. 7; Economist Intelligence Unit (EIU), *Myanmar*, Country Study, November 2001, p. 20.
[25] See *Financial Times*, April 13, 2000, p. 1; *Business Asia*, July 10, 2000; *European Report*, October 17, 2001; and Terrence Guay, "Local Government and Global Politics: The Implications of the Massachusetts Burma Law," *Political Science Quarterly* (Fall 2000), p. 361.

In sum, the FBC had some limited success in lobbying Western states to enact symbolic sanctions designed to stigmatize the regime and to cut off aid and preferential economic relationships. It was unsuccessful in persuading governments to restrict business with Burma except for the U.S. ban on new investments. As a result, the FBC has attempted to emulate the anti-apartheid movement, circumventing the state and confronting the corporation – either directly through consumer or shareholder pressure, or through venues not traditionally associated with foreign policy, such as state and local governments and the federal judiciary in the United States. Through each of these strategies, it has used a mix of economic coercion and public shaming in order to persuade MNCs that their self-interest coincides with withdrawal from Burma. The following sections will evaluate how successful each of these strategies has been in eliciting a corporate withdrawal from Burma beyond the requirements of the law.

Consumer Boycotts

Mobilizing consumer pressure has been the principal strategy of the corporate social responsibility movement since its inception. Activists have used boycotts to attack the corporate "bottom line" directly. Or they have adopted a policy of "naming and shaming," threatening corporate profits indirectly by "link[ing] brand name and corporate reputation to unsavory environmental and social practices."[26] The former strategy was used by transnational coalitions to persuade Nestlé to accept a UN code of conduct regulating the sale of its infant formula in the developing world and Royal Dutch Shell to

[26] Morton Winston, "NGO Strategies for Promoting Corporate Social Responsibility," *Ethics & International Affairs* 16:1 (2002), p. 81.

back off its plans to the Brent Spar oil storage buoy into the North Sea. [27] The latter approach has been used in labor rights campaigns to persuade several garment manufacturers to adopt workplace codes of conduct for their overseas operations and hire independent monitors to report on compliance.[28]

The FBC has used both strategies to persuade firms to disinvest from and sever their trade ties with Burma. The internet has been an invaluable tool in facilitating the dissemination of information regarding corporations in Burma and in mobilizing consumers. This has enabled activists to organize transnational boycotts by receptive constituencies, such as student groups and labor unions. It also facilitated the coordination of demonstrations and other publicity campaigns to stigmatize firms – mostly in the clothing industry – that manufacture in or purchase goods from Burma.

These campaigns persuaded several MNCs to sever their business ties with Burma, particularly those that relied on a youth market given the human rights activism at college and universities. The most high profile and celebrated pullout was PepsiCo's decision first to sell its 40% share in a bottling plant and then, to sever all links with its Burmese franchiser in January 1997. The Pepsi boycott began in early 1993 following student protests at Carleton University in Ottawa, Canada, where Pepsi had an exclusive vending contract. Publicity through the internet multiplied these pressures by triggering student-led campaign on several North American and European campuses. Ultimately,

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[27] See Kathryn Sikkink, "Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code," International Organization (Autumn 1986), pp. 814-840; and Peter J. Spiro, "The Decline of the Nation-State and Its Effect on Constitutional and International Economic Law," *Cardozo Law Review* (December 1996), p. 960.
[28] See Scott J. Werner and Kenneth J. Rose, "The Challenge of Improper Labor Practices Abroad," *New York Law Journal* August 6, 2001, p. 7.

the loss of lucrative contracts at Harvard and Stanford and the risk of losing business at other institutions tipped the balance in favor of withdrawal.[29]

Consumer pressure had its most visible impact on the manufacture and sale of clothing from Burma. Some of this was the result of boycott activity, as when Jansport decided to stop sourcing apparel from Burma in order to fend off its exclusion from college and university stores.[30] For the most part, activists have relied on "naming and shaming" using communications media and demonstrations to publicize labor conditions in Burma. As a result, several prominent clothing manufacturers, such as Levi-Strauss, Eddie Bauer, and Liz Claiborne, terminated their relationships with Burmese subcontractors.[31] In the U.S., the National Labor Committee has exposed retailers selling goods with the "Made in Myanmar" label. As a result of this publicity, several prominent retail chains, such as Wal-Mart, J.C. Penney, and Ames, have instructed their overseas buying agents to stay away from Burmese suppliers.[32]

The FBC has also called for a tourism boycott. It has appealed to tourists to stay away from Burma and has directed pressure at foreign companies, such as Marriott, which operate resort hotels in the country. The secondary pressures against corporations have had only limited success; one company, Best Western, pulled out in 2000.[33] The primary boycott on Burmese tourism has been more effective. According to the Economist Intelligence Unit, tourism to Burma declined by 70% from 1998 to 2001.[34]

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[29] See Peter L. Fitzgerald, "Massachusetts, Burma, and the World Trade Organization: A Commentary on Blacklisting, Federalism, and the Internet," *Cornell International Law Journal* (2001), pp. 13-19.
[30] See FBC website at www.freeburmacoalition.org/2001/01/28/fast.htm.
[31] EIU, *Myanmar*, Country Report, 1997, no. 1, p. 10; For European activities, see *Guardian*, January 29, 2002, p. 10 and *Times of London*, December 23, 2001.
[32] *Washington Post*, January 5, 2002, p. E1; IRRC, *Multinational Business in Burma*, September 2000, pp. 7-8.
[33] *Business Asia*, July 10, 2000.
[34] EIU, *Myanmar*, Country Report, February 2002, pp. 22-23.

According to one sanctions critic, this strategy of "website diplomacy" is "having an impact on American and non-American companies doing business in Myanmar that is comparable to sanctions by the federal, state, and municipal governments combined."[35] This assertion is clearly confirmed by the escalating number of corporate withdrawals from Burma.[36] Nonetheless, consumer pressures were most effective when the stake in question was small relative to vulnerability in Western markets. For Pepsi, for example, losing annual Burmese sales of $4 million was a small price to pay to eliminate the risk of losing lucrative campus contracts. For clothing manufacturers and retailers, cutting off ties with Burma involved minimal costs since they could easily shift from country to country to find alternative sources of supply.

Yet what made these firms vulnerable to consumer pressures also made their withdrawal less costly to the regime. And many of the Western firms that withdrew were replaced by Asian competitors, who do not face comparable social pressures at home.[37] Western energy and mining companies, by contrast, are more crucial to the staying power of the regime and provide technology and expertise that is less replaceable by Asian firms. They are also less vulnerable to boycotts and shaming given the premium they place on developing new sources of supply relative to their vulnerability in Western markets. As a result, activists would need instruments other than consumer pressure to reach companies like UNOCAL and Total.

[35] Preeg, *Feeling Good or Doing Good with Sanctions*, p. 126.
[36] The FBC website lists 56 firms that have withdrawn from Burma as of 10 February 2001. The IRRC (correspondence with the author, 7 August 2002) reports that 29 firms have left Burma since December 2000.
[37] See *Business Asia*, April 21, 1997, and October 20, 1997.

Shareholder Pressure

Shareholder pressure represents a second source of leverage deployed by the FBC against business with Burma. Corporate social responsibility activists have used two different shareholder strategies. The first is *divestment* – i.e., persuading churches, universities, pension funds, and other institutional investors to sell from the portfolios the stocks of targeted corporations in order to depress their selling price. This was the primary strategy of the anti-apartheid movement on college campuses in the late 1970s and 1980s. Some members of the FBC have also used this tack. In July 1996, for example, a Dutch pension fund sold $10.45 million in Total stock. A few colleges and universities, most notably the University of Minnesota, also established policies of selling the stocks of companies with business ties to Burma.[38]

Divestment, however, has been a less prominent feature of the Burma democracy campaign than it was for the anti-apartheid movement and there has been no systematic call for selling the stocks of companies with direct investments in Burma. The preferred a strategy has been one of *shareholder activism* – i.e., introducing proxy resolutions at annual shareholder meetings that call on corporations to change "socially irresponsible" practices.[39] In theory, these resolutions are designed to overturn management decisions, though no social responsibility proposal has ever come close to winning a majority of the vote. In practice, their impact on corporate decision-making is indirect. One mechanism of influence is the so-called "hassle factor," forcing management to devote disproportionate resources to defend a small part of their global operations. During the

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[38] IRRC, *Multinational Business in Burma*, February 1998, pp. 5-6.
[39] See Robert Stumberg, "Pre-emption and Human Rights: Local Options after Crosby v. NFTC," *Law and Policy in International Business* (2002), p. 154

campaign against apartheid, this was the strategy of some activists, such as the Interfaith Center for Corporate Responsibility (ICCR), which coordinated religious investors. And it had a significant impact on some Western multinationals, particularly the private banks for which South Africa represented on average less than 1% of its loan portfolios.[40] Proxy resolutions also augment the "naming and shaming" pressures of consumer campaigns, both by generating publicity and engaging other shareholders. As a result, they add to the reputational costs of "socially irresponsible" corporate behavior.[41]

Burma-related activism, however, faced a more constrained regulatory environment than did comparable efforts in the 1970s and 1980s. The anti-apartheid movement benefited from a 1970 decision by the U.S. Securities and Exchange Commission (SEC) that granted wide latitude to filers of public interest resolutions. As a result, activists were able to demand that companies comply with a wide range of proposals from workplace codes of conduct to divestment and the severance of non-equity ties.[42] In 1994, however, the SEC excluded a proposal calling on Amoco to suspend its investment until the regime releases political prisoners and restores democracy. It did so by citing a section of the regulations that allows a company to omit proposals not related to its fiduciary responsibilities if the activities in question represent less than 5% of its assets or net earnings. Activists were thereby prevented from introducing the kinds of proposals that were routinely filed during the campaign against apartheid.[43]

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[40] Rodman, *Sanctions Beyond Borders*, p. 208.
[41] Simon Billenness, "Should You Divest From Burma Stocks? Answer: It Depends," Trillium Asset Management Website, December 2000 (www.trilliuminvest.com/pages/news/news_detail.asp?ArticleID=26&Status=Archive).
[42] See David Vogel, *Lobbying the Corporation: Citizen Challenges to Business Authority* (New York: Basic Books, 1978), pp. 115-119; and Richard W. Hull, *American Enterprise in South Africa: Historical Dimensions of Engagement and Disengagement* (New York: New York University Press, 1990), p. 279.
[43] IRRC, "U.S. Business in Burma," 1999, p. 3.

Shareholder activists were able to stay within the regulations and bring several Burma-related resolutions to the floor by rephrasing their proposals. Instead of calling for companies to withdraw, they asked them to assess the impact of business in Myanmar on the corporate bottom line from international boycotts, political risk, and the costs of lobbying and litigation.[44] Other resolutions called for the appointment independent auditors to investigate allegations for forced labor and establish guidelines for doing business with regimes that violate human rights. The economic rationale for this was to minimize the risks of litigation and of losing funds from institutional investors "that are concerned with the impact of workplace practices on shareholder value."[45]

From 1994 to 2001, roughly 20 proxy resolutions were filed against companies involved with Burma, beginning in 1994 with proposals directed at Amoco, Pepsi, Unocal, and Texaco.[46] The strategy was initiated by Franklin Research and Development (now Trillium Asset Management), a socially responsible investment firm. Other filers include religious organizations working through the ICCR, labor-managed pension funds (Longview Investments and the AFL-CIO), and the University of Washington. Most have been directed at companies involved in energy development. The principal target has been UNOCAL, though resolutions have also been filed against Amoco, Texaco, Arco, and Mobil. Other cases include technology firms (Halliburton, Caterpillar, McDermott Industries, and Baker-Hughes) that provide equipment and construction services for the Yadana pipeline, and Citigroup, which was part of a consortium that provided a loan to the Thai power plant that is the end user of the Yadana project.[47] The

[44] IRRC, *Corporate Social Issues Reporter*, January 1996, p. 6.
[45] IRRC, SIS, 2002 Company Report – A, "UNOCAL: Global Standards," April 23, 2002, pp. 5-6
[46] Fitzgerald, "Massachusetts, Burma, and the World Trade Organization," p. 18.
[47] IRRC, *Corporate Social Issues Reporter*, January 2001, pp. 14-15.

IRRC reports that Burma-related resolutions received relatively strong support from shareholders. During the last two years, proposals for UNOCAL to implement global labor standards in Burma and elsewhere garnered 23.4% and 31.3% of the vote.[48]

While most shareholder activism has taken place in the U.S., non-U.S. firms have also been subjected to pressure. In the U.K., the central target has been Premier Oil, a company that was singled out by Aung San Suu Kyi for its involvement in the Yetagun offshore gas project, the second largest foreign investment in Burma.[49] In Canada, shareholder pressure has been directed against Ivanhoe Mines, which established a major copper project in Burma in 1998.[50] French rules regarding corporate governance make it more difficult to submit human rights proposals to Total. Nonetheless, Total's annual meetings have been subjected to demonstrations since the release of a 1996 report from the International Human Rights Federation documenting the extensive use of forced labor in the area around the Yadana pipeline project.[51]

Shareholder pressure appears to have had some influence in expediting corporate withdrawals from Burma. Two of the engineering firms subjected to shareholder proposals (Baker-Hughes and McDermott Industries) pulled out of the Yadana project, which represented a relatively small part of their international operations.[52] Two oil companies (Amoco and Arco) withdrew after disappointing results, though industry sources suggested that shareholder pressures, which increased the costs and risks of staying, might have hastened those departures.[53] In late 1997, Texaco abandoned a more

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[48] IRRC, *Corporate Social Issues Reporter*, June-June 2001, p. 8; IRRC, "Unocal – Global Standards."
[49] *Financial Times*, April 12, 2000, p. 1
[50] See Matthew McLearn, "Strangers in a Strange Land," *Canadian Business*, February 15, 2002, p. 60; and *Ottawa Citizen*, June 16, 2001, p. D2.
[51] *Agence France Press*, June 4, 1996 and October 23, 1996.
[52] IRRC, *Multinational Business in Burma*, August 1999, p. 4, and May 2000, p. 4.
[53] *Platt's Oilgram News*, August 12, 1998, p. 3.

significant stake – its 28% share of the Yetagun offshore natural gas fields. The pullout, which took place shortly after highly public racial allegations against the company, was probably influenced by the additional political risks associated with Burmese investments.[54] Nonetheless, it had little impact on the Burmese economy since the company sold its $260 million share to its British partner, Premier Oil.[55]

By contrast, shareholder pressure has been ineffective vis-à-vis more significant energy investments that are more central to corporate strategy (and the regime's staying power). Some of these firms have accepted a measure of social responsibility to legitimize their investments in the West. UNOCAL adopted a workplace code of conduct and Premier Oil agreed to independent social auditing and paid for human rights training for the security forces responsible for protecting the company's facilities.[56] Nonetheless, neither stock divestments, the hassle factor, nor negative publicity, has been costly enough to persuade those firms to move beyond social responsibility to withdrawal.

Municipal Procurement Power

In addition to mobilizing consumers and shareholders, the FBC pressed state and local governments in the United States to pass selective procurement laws that linked eligibility for municipal contracts to the severance of business ties with Burma. This instrument was used effectively by the anti-apartheid movement, which persuaded 25 states and 164 municipalities – including major cities, such as New York, Los Angeles, and Chicago – to enact laws that made divestment from South Africa (something not required by federal anti-apartheid sanctions) a prerequisite for bidding on government

[54] *Financial Times*, September 23, 1997, p. 33.
[55] Preeg, *Feeling Good or Doing Good with Sanctions*, p. 125.

contracts.[57] These ordinances were the most potent subnational levers on corporate behavior since states and cities command a huge portfolio of public funds. The costs of being blacklisted from this business played a significant role in persuading two-thirds of U.S. direct investors in South Africa with withdraw since most did considerably more business with U.S. cities and states than they did with South Africa.[58]

By the end of 1998, the FBC was able to get selective purchasing laws passed in one state (Massachusetts), one county (Takoma Park, Maryland), and 21 cities (mostly college towns, but also a few major municipalities such as New York, Los Angeles, and San Francisco).[59] The most prominent of these laws was enacted by the Commonwealth of Massachusetts in September 1996. The law placed all firms that did business with Burma on a restricted purchase list and added 10% to any bid coming from them.[60] The linkage established by the law exceeded what was required by the federal statute since it covered existing as well as new investments and non-equity relationships, such as trade, financing, distribution, and licensing. The law was seen as part of a larger national movement whose cumulative effect would be to replicate the South African experience in triggering corporate withdrawal beyond the requirements of federal law.

These municipal ordinances persuaded several companies to pull out of Burma. Apple Computer and Motorola, for example, ended their relationships with local distributors to maintain supply contracts with Massachusetts and San Francisco.[61] Non-U.S. corporations were also affected. Two Dutch banks withdrew their bid to buy the

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[56] See IRRC, "UNOCAL"; On Premier Oil, see *Financial Times* February 2, 2001, p. 12 and May 16, 2001, p. 16.
[57] Robert Stumberg, "No Business in Burma," *Legal Times*, March 20, 2000, p. 58.
[58] Rodman, *Sanctions Beyond Borders*, p. 210-211.
[59] *Legal Intelligencer*, November 6, 1998, p. 4.
[60] Guay, "Local Government and Global Politics," p. 355.
[61] See Washington Post, March 4, 1997, p. C1; *Financial Times*, February 6, 1997, p. 6; and *Los Angeles Times*, June 19, 1997, p. D1.

Bank of Boston because their Burmese ties would preclude them from dealings with the state government. U.S. subsidiaries of Mitsubishi Heavy Industries (Japan) and Ericsson (Sweden) were deemed ineligible for contracts in San Francisco because of their parents' ties with Burma.[62] In some cases, foreign firms severed their Burmese ties to preserve their business in U.S. municipalities. For example, the Dutch firm Phillips Electronics pulled out of Burma to protect its business in Massachusetts and the Swedish firm, ABB Asea Brown Boveri, canceled a Burmese joint venture by its German affiliate to remain eligible to bid on an airport construction project in San Francisco.[63]

Yet, as in the case of consumer pressure, these measures were most successful vis-à-vis firms with licensing and franchising arrangements for which they had not sunk considerable capital. They had less of an impact on the oil and mining companies that had invested heavily in exploration and development and for whom the resources were a major part of their corporate strategy. Moreover, the two principal targets of the campaign – UNOCAL and Total – took conscious actions to minimize their vulnerability to such measures. In the 1990s, UNOCAL staked its future growth in exploration in Southeast and Central Asia and had sold many of its downstream operations in its home state of California to finance that effort. San Francisco's decision to exclude the company from a fuel contract gave the company an additional reason to dispose of its U.S. operations and commit itself to overseas exploration and development.[64] Its French partner, Total, also sold most of its U.S. operations in order to reduce its vulnerability not only municipal human rights sanctions, but also the increasing U.S. tendency to attach

[62] *Financial Times*, February 6, 1997, p. 6.
[63] IRRC, *Social Issues Reporter*, December 1996, p. 14 and March 1997, p. 11.
[64] see IRRC, *Social Issues Reporter*, April-May 1996, p. 10; *Oil Daily*, March 4, 1997, p. ; and *New York Times*, May 22, 1997, p. D1.

economic penalties to non-U.S. firms dealing with Cuba, Libya, Iran, and other "rogue states."[65]

Another limitation of this instrument – mirroring the anti-apartheid experience – is that the use of municipal procurement power has been almost exclusively a U.S. phenomenon. During the campaign against apartheid, comparable ordinances passed in European and Canadian cities had been overturned in courts and parliaments, while the U.S. practice was protected by American federalism.[66] As a result, selective procurement laws had a disproportionate impact on U.S. firms.

The Burma regulations were also overwhelmingly American, but affected a larger number of non-U.S. firms as a result of the liberalization of government procurement regulations during the Uruguay round of multilateral trade negotiations. As a result, in March 1997, the Massachusetts restrictive purchase list covered 44 U.S. companies and 281 foreign firms, 53 of whom did business with the state.[67] As noted by Simon Billenness of Franklin Research & Development: "if you pass a selective procurement law in any city in the world, it will have an impact beyond its borders."[68]

Yet that liberalization triggered a new challenge to this practice from trading partners who viewed them as extraterritorial sanctions no less illegitimate than Helms Burton and the Iran-Libya Sanctions Act. In 1997, the EU and Japan filed a grievance against the Massachusetts ordinance in the World Trade Organization (WTO), claiming a violation of the 1994 Government Procurement Agreement (GPA) that has been accepted by 37 U.S. states, including Massachusetts, alleging discrimination against their firms.

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[65] *Financial Times*, September 30, 1997, p. 7; Total's recent merger with Fina (Italy) creates more vulnerability, with 2400 US service stations, but probably not enough to persuade it to reconsider its involvement in Burma.
[66] Rodman, *Sanctions Beyond Borders*, pp. 214-215.
[67] Fitzgerald, "Massachusetts, Burma, and the World Trade Organization," p. 7
[68] *New York Times*, June 24, 2000, p. A6.

Massachusetts countered that it had a right to control its own procurement practices and that the order did not discriminate between U.S. and non-U.S. firms who do business with Burma. The actual text of the GPA, however, banned inclusion of all conditions except "those which are essential to ensure the firm's capability to fulfill the contract in question,"[69] which would disallow both "Buy America" clauses and human rights criteria.

The Clinton administration initially sided with the EU/Japan protest and tried to discourage Massachusetts from passing the law. After its passage, it agreed to defend Massachusetts before the WTO in exchange for working with the state in drafting future laws (there was a pending bill on Indonesia) so they were consistent with international trade agreements. There were also diplomatic efforts work out a compromise in which the law would apply only to contracts under $500,000 for goods and services and under $6 million for construction.[70] This effort failed and EU and Japan resubmitted their grievance. In October 1998, the WTO agreed to convene a dispute resolution panel. A negative ruling could have subjected the state to costly retaliation since it does $1.5 billion in annual business with Japan and $6 billion with the EU.[71]

The WTO dispute became moot due to a constitutional challenge to the Massachusetts Burma Law within the United States. The impetus behind this challenge was the National Foreign Trade Council (NFTC), a corporate trade association representing over 600 businesses. In 1997, it formed a coalition called USA-Engage to reverse the trend toward unilateral sanctions in the 1990s. This agenda included

[69] IRRC, *Multinational Business in Burma*, June 1998, p. 13.
[70] *Journal of Commerce*, April 28, 1998, p. 2A.
[71] Jason F. Hellwig, "The Retreat of the State? The Massachusetts Burma Law and Local Empowerment in Terms of Globalization," *Wisconsin International Law Journal* (Spring 2000), p. 488.

opposition to local procurement legislation that sought to influence corporate conduct abroad, of which Burma-related laws were the most prominent example. By the late 1990s, this practice extended beyond Burma to disinvestment from Indonesia, Nigeria, China, and Cuba, implementation of nondiscriminatory workplace practices in Northern Ireland, and compensation to Holocaust victims by Swiss banks.[72]

The NFTC selected the Massachusetts Burma Law as its test case. In April 1998, it filed suit against its constitutionality in federal district court on behalf of its members. The court's decision to grant the NFTC standing to challenge the law played a major role in allowing the case to go forward since affected companies were reluctant to accept the political fallout likely to ensue from such a high profile case.[73] In its brief, the NFTC argued that state and local sanctions violated the U.S. Constitution, which grants the federal government the exclusive right to conduct foreign policy and regulate foreign commerce. By using municipal procurement power to regulate overseas corporate conduct, state and local governments were usurping a federal prerogative.[74]

The Massachusetts Attorney General countered that selective procurement laws are protected by federalism since they represent an exercise of the state's spending power rather than its regulatory power. That is, they do not bar private consumers or retailers from buying or selling goods from Burma or from doing business with companies that invest in Burma. Rather, they are limited to the expenditure of government monies and municipalities should have the right to decide who they do and don't business with by

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[72] See Guay, "Local Government and Global Politics," p. 358, and Peter J. Spiro, "Hearing Local Voices on the World Stage," *Legal Times*, December 14, 1998, p. 25.
[73] *Financial Times*, July 9, 1998, p. 4.
[74] See Brannon P. Denning and Jack H. McCall, "States' Rights and Foreign Policy," *Foreign Affairs* (January-February 2000), pp. 9-14.

whatever ethical criteria they see fit. Since federal Burma sanctions law did not explicitly pre-empt state and local measures, they should be constitutionally protected.[75]

Each side lobbied the administration to support its position. The NFTC tried to persuade the State Department to overturn a 1986 Justice Department finding that state and local anti-apartheid laws passed constitutional muster. There were indications that State was receptive to this view. Its chief point man on sanctions, Stuart Eizenstat, had testified that state and local sanctions were "likely to be counterproductive" and the Undersecretary for African Affairs lobbied the Maryland state legislature against passage of a selective purchasing ordinance vis-à-vis Nigeria.[76] Massachusetts countered by working with human rights and labor groups and in mobilizing other state governments to lobby the administration.[77] Given these conflicting pressures, official policy remained neutral during the early phases of the litigation.

On November 4, 1998, a federal judge sided with the NFTC and declared the Massachusetts Burma Law to be unconstitutional. Since the aim of the law was to "change Burma's domestic policy," Judge Joseph L. Tauro ruled that it "impermissibly infringes on the federal government's power to regulate foreign affairs."[78] The ruling was upheld by the First Circuit Court of Appeals in June 1999, which found additional grounds for the constitutional argument, namely that the state law violates the federal government's exclusive right to regulate foreign commerce.[79]

The U.S. Supreme Court resolved the legal controversy on 19 June 2000. In *Crosby v. NFTC*, it unanimously struck down the Massachusetts Burma Law. Its ruling,

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[75] Fitzgerald, "Massachusetts, Burma, and the World Trade Organization," p. 31
[76] Deirdre Shesgreen, "Can States Set Trade Policy?" *Legal Times*, August 17, 1998, p. 4.
[77] IRRC, *Multinational Business in Burma*, November 1997, p. 2.
[78] *Legal Intelligencer*, November 6, 1998, p. 4
[79] Hellwig, "The Retreat of the State?" pp. 491-492.

however, was narrower than that of the lower courts, sidestepping the constitutional question. Instead, the decisive factor was the conflict with federal statute. The opinion, written by Justice David Souter, pointed to three areas where the state law obstructed the achievement of the federal law's aims. First, its rigidity interfered with the discretion delegated to the executive branch in administering the sanctions. Second, since its restrictions exceeded the scope of the federal sanctions, it "undermined congressional calibration of force." Finally, Congress intended that the sanctions would enable the President to "proceed diplomatically in developing a multilateral strategy toward Burma." The state law vitiated this goal, as evidenced by the diplomatic fallout from allies and trading partners and the grievance filed at the WTO.[80] This view was echoed by the administration, which abandoned its neutrality and filed an amicus brief contending that the municipal sanctions impeded its ability to conduct foreign policy with "one voice."[81]

Some activists contend that the narrowness of the *Crosby* ruling leaves some leeway for sub-federal action. First, given the Court's focus on the conflict with federal statute, it may allow state and local measures when neither the Congress nor the Executive Branch has acted.[82] Second, the ruling may not apply to laws divesting pension funds of the stocks of companies that do business with Burma. Three cities have passed such measures to test the limits of *Crosby*.[83] Third, some human rights lawyers speculate that state ordinances may pass the Court's scrutiny if they directly target firms that are involved in human rights abuses – i.e., blacklisting UNOCAL and Total for their

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[80] Brannon P. Denning and Jack H. McCall, "Crosby vs. NFTC," *American Journal of International Law* (October 2000), pp. 752-753.
[81] *Ibid*, p. 755n57.
[82] See IRRC, *Corporate Social Responsibility Reporter*, June-July 2000, p. 13.

involvement with forced labor – rather than enact a blanket secondary boycott on all firms that do business with Burma. That way, states can more credibly argue that they are using their spending power for purposes of moral disassociation rather than for erecting a parallel sanctions regime to that of the federal government.[84]

Under *Crosby*, state and local ordinances can still make disclosure of corporate activities a prerequisite for bidding for municipal contracts, as is the case in Vermont's Burma law. [85] Such measures do not impose direct economic penalties. They can contribute to the "naming and shaming," but as with the consumer and shareholder variants of this strategy, this tends to be least influential vis-à-vis the most economically significant investments in the target state. Therefore, the practical consequence of *Crosby* is to narrow the ability of activists to use municipal procurement power to wield economic leverage vis-à-vis MNCs and limit state and local action to moral suasion on corporations or on the President or Congress to impose more extensive sanctions.

Plaintiff's Diplomacy

One of the central weaknesses of the instruments discussed above is that none is likely to exact a price high enough to convince major investors that withdrawal best serves their self-interest. The FBC has employed one instrument - "plaintiff's diplomacy"[86] - that has the potential to overcome that limitation. By encouraging Burmese exiles to sue UNOCAL and Total in U.S. federal court for their complicity with forced labor, activists can reach these companies, either by securing injunctive relief

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[83] Erika Moritsugu, "The Winding Course of the Massachusetts Burma Law: Subfederal Sanctions in Historical Context," *George Washington International Law Review* (2002), p. 476.
[84] Stumberg, "Pre-emption and Human Rights," pp. 132-133.
[85] *Ibid*., p. 129.

against participation in the pipeline or by imposing punitive damages so severe that continued operations would no longer be feasible. If successful, they will have achieved what amounts to judicially-imposed economic sanctions without executive or legislative consent.

These lawsuits were filed under the Alien Tort Claims Act (ATCA), a law passed by the first Congress in 1789 that gave the federal courts jurisdiction over claims by aliens for torts "in violation of the law of nations or a treaty obligation of the United States."[87] ATCA, which was originally designed to deal with the crime of piracy, lay dormant until *Filartiga v. Pena Arala* in 1980. In that case, the Second Circuit allowed the family of a Paraguayan dissident, who was tortured and killed in prison, to sue a former Paraguayan police inspector residing in the United States. Even though the defendant and the victim were both foreign nationals and the crime took place outside the U.S., the Court assumed jurisdiction because torture is a violation of human rights so widely condemned that it fell within the statutory definition of a "violation of the law of nations."[88]

Filartiga set the precedent that public officials could be sued for violations of universally recognized human rights norms. This provided NGOs with a new weapon that was used in subsequent litigation to expand ATCA's jurisdiction to genocide, war crimes, summary executions, disappearances, and sexual slavery, and established liability over private individuals as well as public officials.[89] As a result, human rights lawyers

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[86] Anne Marie Slaughter and David Bosco, "Plaintiff's Diplomacy," *Foreign Affairs* (September/October 2000), pp. 102-116.
[87] Beth Stephens and Michael Ratner, *International Human Rights Litigation in U.S. Courts* (Irving-on-Hudson, N.Y.: Transnational Publishers, 1996), p. 7.
[88] See Richard P. Claude, "The Case of Joelito Filartiga and the 'Clinic of Hope,'" *Human Rights Quarterly* (1983), pp. 275-295.
[89] See Stephens and Ratner, *International Human Rights Litigation*, ch. 1

filing ATCA suits became the "civil counterparts to the newly aggressive prosecutors who have pursued criminals like Augusto Pinochet and Slobodan Milosevic."[90] And they were able to do so without having to convince a government official to initiate a proceeding or extradite a suspect.

The FBC attempted to expand the scope of ATCA to corporations by supporting two suits filed against companies involved in the Yadana project. On September 3, 1996, the Burmese government-in-exile and the Federation of Trade Unions of Burma, working with the International Labor Rights Fund (ILRF) filed suit against UNOCAL in U.S. District Court in Los Angeles. The next month, a class action suit - *John Doe v. Unocal* - was filed against UNOCAL, Total, SLORC, and MOGE, by the Center for Constitutional Rights on behalf of 15 Karen, the ethnic minority from the region where the pipeline was built. Both suits contended that while the government was directly responsible for the abuses, the companies became beneficiary accomplices when they agreed to finance SLORC's activities in clearing land for the pipeline and in providing labor. They sought injunctive relief as well as compensatory and punitive damages.[91] UNOCAL countered that it was no more liable for the human rights abuses of the SLORC than its Los Angeles headquarters was for the city's police brutality, and moved to have the case dismissed.[92]

On March 25, 1997, District Judge Richard Paez rejected UNOCAL's motion to dismiss *John Doe v. UNOCAL* and accepted jurisdiction over the case (later consolidating both lawsuits). His ruling found that the allegations of forced labor fell within the scope of ATCA because slavery is a universally condemned violation of the law of nations. He

[90] Slaughter and Bosco, "Plaintiff's Diplomacy," p. 103.
[91] See Leslie Wells, "A Sheep in Wolf's Clothing? Why Unocal Should Be Liable Under U.S. Law for Abuses Burma," *Columbia Journal of Law and Social Problems* (Fall 1998), pp. 39-43.
[92] See Dominic Bencivenga, "'Unocal': A Warning Flag for International Deals, " *Corporate Counselor* (September 1997), p. 6.

did dismiss the case against SLORC and MOGE due to foreign sovereign immunity, even though they were ones accused of actually perpetrating the abuses. He nonetheless ruled that UNOCAL and Total could be held vicariously liable for "participation in slave trading" even if they did not directly procure forced labor. All the plaintiffs had to prove to a jury was that the companies financed SLORC's activities, knew or had reason to know of the abuses associated with them, and benefited from those activities.[93]

Judge Paez's decision set a significant precedent. Traditionally, corporations could not be sued in the U.S. for the behavior of their subsidiaries in a foreign jurisdiction. Now, ATCA made them liable for human rights abuses associated with offshore business activities. Human rights lawyers used this to file subsequent suits against Texaco for toxic dumping in Ecuador, Freeport McMoran for environmental abuses in Indonesia, the Gap and Levi-Strauss for labor conditions in their factories in Saipan, and German companies for the use of slave labor during the Second World War. The fact that UNOCAL faced liability not for its own behavior, but also for the abuses perpetrated by its sovereign business partner, also set a precedent. This provided the legal rationale for proceedings against oil companies (Shell and Chevron) in Nigeria, ExxonMobil in Indonesia, Del Monte in Guatemala, and Coca-Cola in Colombia, for the abuses of security forces designed to protect them, and against Talisman Energy in Sudan for ethnic cleansing in the region around its oil exploration activities.[94]

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[93] Gregory J. Wallance, "Linked to Slavery," *Legal Times*, December 1, 1997, p. 24.
[94] For details of these cases see, Elliott Schrage, "A Long Way to Find Justice: What Are Burmese Villagers Doing in a California Court?" *Washington Post*, July 11, 2002, p. B2; Slaughter and Bosco, "Plaintiff's Diplomacy," p. 109; John Bray, "Petroleum and Human Rights: The New Frontiers of the Debate," *Oil and Gas Journal*, November 1, 1999, p. 65; and Terry Collingsworth, "The Key Human Rights Challenge: Developing Enforcement Mechanisms," *Harvard Human Rights Journal* (Spring 2002), pp. 190-195.

While the ostensible purpose of these cases is to provide compensation to victims, they can also amount to "de facto economic sanctions."[95] In other words, extending corporate liability to the acts of governments with whom they do business makes the human rights abuses of host countries – a matter about which MNCs claims to be neutral – a matter of hard-headed self-interest because of the prospect of multi-million dollar civil damages (or the litigation costs of fending them off). Firms are thereby compelled to exercise greater due diligence in assessing the human rights practices of their sovereign business partners. Shareholder considerations may magnify these pressures. Fund managers may not base stock recommendations on moral criteria, but as one labor rights lawyer noted, "if there is a chance a company could be damaged by an big award in a trial, its business practices overseas become quite relevant."[96] The end result is an increase in the political risk of investments in pariah states contributing to their economic isolation. There is some evidence that this is happening in the Burma case. In December 2001, eight of the largest European institutional investors issued a joint statement warning that companies should "justify their involvement in Burma by publishing independently verified assessments of the risks they are taking with shareholders' money."[97]

The case also has an extraterritorial dimension since Judge Paez initially allowed the case to proceed against Total, a French firm with no connection to U.S. persons or territory. Although the suit against Total was latter dropped, the ruling set a precedent for an ATCA suit filed against Royal Dutch Shell by the family of Ken Saro-Wiwa, who was executed by the Nigerian military in 1995 for leading protests against the company's

[95] Slaughter and Bosco, "Plaintiff's Diplomacy," p. 110.
[96] Terry Collingsworth of the ILRF, in David Corn, "Corporate Human Rights," *Nation* July 15, 2002, p. 31.

environmental practices.[98] As with Title III of the Helms-Burton law,[99] this enables sanctioners to chill non-U.S. investment in target states through the prospect of protracted litigation if they have significant assets in the United States. As a result, the federal courts can exert transnational reach over corporate conduct abroad even if there is no connection to the United States and their home governments encourage economic engagement.[100] This could be of particular importance vis-à-vis Asian firms who have replaced many of the departing Western firms in Burma and face few if any social pressures at home. These companies, whose activities have weakened the impact of nongovernmental sanctions, may be deterred from moving in if they have significant U.S. assets that would be vulnerable to attachment.

In September 2000, the scope of the ATCA's reach was narrowed. Judge Ronald Lew (who replaced Paez) granted UNOCAL's motion for summary judgment and dismissed the case. The ruling accepted the applicability of ATCA to the crime of forced labor and also found that UNOCAL knew of and benefited from that practice in Burma. That alone could not establish liability, which required direct participation in slave trading or the solicitation of forced labor. Absent that, a private company could not be held accountable for the abuses of its host government.[101]

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[97] *Financial Times*, December 3, 2001, p. 25.
[98] Elizabeth Amon, "Coming to America," *National Law Journal*, October 23, 2000, p. A1.
[99] Title III allows US citizens, including naturalized Cuban-Americans, to sue foreign companies for triple damages for "trafficking" in property confiscated from them after the Cuban revolution. The term "trafficking" is ambiguously defined and could include any kind of economic relationship. The purpose of this ambiguity is to increase the uncertainty and risk surrounding Cuban investments in terms of litigation in the United States. See Rodman, *Sanctions Beyond Borders*, pp. 175-183.
[100] Robert J. Peterson, " Political Realism and the Judicial Imposition of International Secondary Sanctions: Possibilities from John Doe v Unocal and the Alien Tort Claims Act, *University of Chicago Law Roundtable* (1998), p. 294-297.
[101] Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations" *Berkeley Journal of International Law* (2002), pp. 134-137.

Judge Lew's ruling, which is currently under appeal, reduced the potency of ATCA as an instrument of nongovernmental human rights sanctions. By raising the threshold for liability, MNCs can insulate themselves from claims by enacting codes of conduct and monitoring their compliance; they no longer needs to consider the human rights practices of states with whom they sign joint ventures as long as they do not solicit those abuses themselves. In other words, while ATCA still provides incentives for corporate social responsibility, but no longer serves as a prod for disinvestment from Burma or other repressive regimes whose practices violate fundamental human rights norms.

ATCA jurisprudence, nonetheless, is still a contested area of the law and no case has yet reached the U.S. Supreme Court. The judge in the Shell-Nigeria case has accepted the broader interpretation of liability adopted by the original *UNOCAL* ruling, as did a California state judge, who allowed the Burmese villagers to pursue their case against UNOCAL in state court.[102] By contrast, some legal scholars and policy makers drawn parallels between the expansive interpretation of ATCA and the *Crosby* decision, asserting that "plaintiff's diplomacy" has gone too far in usurping foreign policy functions that properly belong to the Congress or the President.[103] The Bush administration appears to have joined that debate. The State Department Legal Adviser recently interceded to ask the judge hearing the ATCA suit against ExxonMobil in Indonesia to dismiss the case and Unocal has requested that it do the same in the California state litigation.[104] How these debates ultimately play out in the political and

[102] See Amon, "Coming to America," p. A1; and *Los Angeles Times* June 12, 2002, sec. III, p. 1.
[103] See Donald Kochan, "After Burma," *Legal Times*, August 21, 2000, p. 54; and David P. Rivkin and Lee A. Casey, "The Rocky Shoals of International Law," *National Interest* (Winter 2000-2001), pp. 44-45.
[104] *Los Angeles Times*, August 9, 2002, sec. III, p. 2

legal system will determine the utility of ATCA as a means of circumventing the state in imposing human rights sanctions.

Conclusion

To what extent has the experience of the FBC challenged a traditional state-centered approach to our understanding of economic sanctions and what are its implications for the deployment of sanctions by transnational civil society? The FBC did succeed in establishing a degree of quasi-regulatory authority over business in Burma beyond what it was able to persuade governments to command. The mix of consumer and shareholder pressure and municipal procurement power (prior to *Crosby*) persuaded roughly 60 firms either to disinvest or sever their licensing and franchising relationships in Burma. Public allegations of forced labor also persuaded many prominent retailers and clothing manufacturers to stop sourcing textiles and apparel from Burma.

These tactics were less effective with the most strategically significant investors. Some tried to deflect societal pressures by implementing social responsibility practices, the most significant example of which was Premier Oil's decision to provide human rights training to the security forces designated to protect its operations. Such measures were undertaken to legitimize their decision to stay in Burma, and as such, were opposed by the FBC. They nonetheless were not required by home country law and demonstrated the influence of transnational societal pressures in pushing MNCs beyond their traditional argument that human rights issues are outside of their purview.

At the same time, the inability of the FBC to reach major energy investments illustrates a key limitation of transnational civil society in "enforcing" human rights accountability over MNCs. NGOs can rely only on inducements – i.e., altering corporate calculations of interest regarding business in Burma by increasing the cost and risk to corporate reputation and sales, the diversion of board time, and from the prospect of litigation. Unlike a sovereign state, however, NGOs cannot command a corporation to withdraw when private calculations of risk and reward point in the other direction.[105]

The central implication of this is that NGO influence on MNCs is a function of the value of the particular stake in question relative to its vulnerability in Western markets. Consumer pressures were most successful when deployed against large high-profile corporations like PepsiCo, for whom Burma represented small fraction of its operations, or footwear and apparel companies for whom there were many alternative sources of supply. Municipal procurement power was most influential with firms that had licensing and franchising agreements they could liquidate without forfeiting substantial assets.

By contrast, energy companies, whose investments were more crucial to SLORC/SPDC, were also more immune to these pressures because of their heavy investment in exploration and development and the critical value of established sources of oil and gas for corporate strategy. In theory, the one technique that could alter these incentives is "plaintiff's diplomacy." Unlike consumer campaigns, which are most effective vis-à-vis companies that are visible to the public, an ATCA suit can reach anyone. Unlike shareholder pressure or municipal procurement power, there is no clearly defined limit as to the costs that companies might incur if a jury were to award punitive damages. If the courts were to accept Judge Paez's expansive view of liability, ATCA could "transform the federal courts into a tool of economic sanctions and a regulator of

[105] See Rodman, "Think Globally, Punish Locally," p. 38.

foreign policy."[106] Yet the question of whether it will do so points to another vulnerability of nongovernmental human rights sanctions – namely, their dependence on government institutions that facilitate their influence.

With the exception of consumer pressure, the instruments used by the FBC and other elements of transnational civil society vis-à-vis MNCs were abetted by the regulatory policies and institutional structures of nation-states. For example, the most significant source of pressure during the anti-apartheid campaign (municipal procurement power) and the most potentially powerful instrument vis-à-vis future corporate behavior (plaintiff's diplomacy) are almost exclusively U.S. phenomena. Until *Crosby*, U.S. state and local anti-apartheid and Burma ordinances were protected by federalism. Virtually all parallel laws outside the U.S. were invalidated by courts and legislatures and only one non-US municipality (Marrickville, Australia) has enacted a Burma-related selective procurement law.[107] Similarly, while ATCA is based on the same notions of universal jurisdiction that have informed European prosecutions of war crimes and crimes against humanity, the U.S. is alone in imputing civil (as opposed to criminal) liability to corporations (as well as public officials and private individuals).

Moreover, many of these instruments are vulnerable to changes in state policy that can limit their effectiveness. The clearest example of this is the Supreme Court's *Crosby* decision, which invalidated the most influential sources of subfederal pressure on multinationals during the anti-apartheid campaign. Similarly, the SEC's decision to tighten rules regarding social responsibility proposals made shareholder activism a less prominent feature of the Burma democracy campaign than it was for the anti-apartheid

[106] Pia Zara Thadhani, "Regulating Corporate Human Rights Abuses: Is UNOCAL the Answer?" *William and Mary Law Review* (December 2000), p. 141.

movement. Finally, Judge Lew's verdict in *John Doe v. Unocal* set a much higher test for corporate liability than did Judge Paez's original ruling, thereby limiting the utility of ATCA for judicially-imposed human rights sanctions.

Finally, some of the instruments deployed by NGOs against MNCs are vulnerable to a backlash by the state. Some of this might be due to the fact that as NGOs become more successful in chilling investment, corporations are more likely to turn to the state for protection.[108] It is also likely to occur because this "democratization of the foreign policy process" also "pose[s] a serious challenge to the autonomy of national governments in the foreign policy arena."[109] Washington is likely to resist that challenge because of the costs to relations with allies, whose firms are denied access to municipal contracts or placed at risk of litigation. It may see nongovernmental sanctions as undermining its support for the liberalization of trade rules or for strategies of economic engagement with authoritarian regimes. In addition, holding corporations accountable for the abuses of a host country's security forces may work at cross-purposes with strategic cooperation with illiberal regimes – a goal to which Washington may assign a higher value after the bombings of the World Trade Center and the Pentagon. Since NGO successes are likely to be seen as nibbling away at sovereign prerogatives, states will be more inclined to press for changes in regulatory and legal policies in order to reclaim control over economic statecraft.

The clearest illustration of this trend is the change in the Clinton administration's policy toward selective procurement laws. When the Massachusetts Burma Law was initially challenged in the WTO and the federal courts, the administration temporized. In

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[107] See IRRC, *Multinational Business in Burma*, May 2000, p. 2.
[108] See Slaughter and Bosco, "Plaintiff's Diplomacy," p. 111.

the former case, it agreed to defend Massachusetts in exchange for a voice in drafting future laws. In the latter case, it initially adopted a position of neutrality. In the interim, it tried to work with sympathetic members of Congress to rein in some of the excesses of unilateral and extraterritorial sanctions in the 1990s. That eventually led it to come down resolutely against subfederal sanctions by the time of the *Crosby* decision.

The same process may be taking place in the area of plaintiff's diplomacy. It is important to note that the executive branch supported the most significant precedents in ATCA jurisprudence. For example, when the Second Circuit originally rejected the application of ATCA to *Filartiga*, the Carter administration asked it to reconsider because a favorable ruling would further its human rights policy.[110] *Kadic v. Karadzic*, the first case in which ATCA was applied to private individuals, was supported by the Clinton administration because it assisted its negotiating strategy in separating Milosevic from the Bosnian Serb leaders during the closing days of the Bosnian war.[111] Prior to Judge Paez's ruling in *John Doe v. Unocal*, the State Department submitted a brief stating that the application of ATCA "would neither prejudice nor impede the conduct of U.S. foreign relations with the current government of Burma.[112] In other words, judicial intervention was seen as a strategic asset, adding to the leverage exercised by diplomats.

But plaintiff's diplomacy can constrain as well as support official policy. This was the view of the Reagan administration's Justice Department in the 1980s, which successfully persuaded the judiciary to rein in the scope of ATCA.[113] It is also likely to

[109] The quotes are from Guay, "Local Government and Global Politics," pp. 353 and 364.
[110] Stephens and Ratner, *International Human Rights Litigation*, p. 10.
[111] Peterson, "Political Realism," p. 291.
[112] *Ibid*., p. 290n60.
[113] Stephens and Ratner, *International Human Rights Litigation*, p. 18.

be the view of the executive branch when the goal of ATCA suits is to ostracize a regime with which it favors constructive economic and diplomatic relations,

This backlash against ATCA jurisprudence can evolve in a variety of ways. First, the State Department may routinely file amicus briefs regarding the conflict between litigation and diplomacy – as it did in the ExxonMobil case and may do for UNOCAL - and expect the judiciary to adopt its traditional deference to foreign policy prerogatives. Second, Congress might amend ATCA, spelling out precisely who is liable and the kinds of crimes that can be defined as "violations of the law of nations." Third, the Supreme Court may finally adjudicate an ATCA case in order to render a *Crosby*-like decision that would effectively re-centralize in Washington the regulation of offshore corporate conduct. The latter two routes would not invalidate ATCA jurisprudence, but may eliminate many of the ambiguities that human rights lawyers have creatively relied on to sue companies that do business with repressive regimes

That leaves consumer pressure as the principal NGO weapon immune to sovereign backlash. Boycotts and shaming have played a prominent role in the history of the corporate social responsibility movement, particularly when directed at companies visible in the marketplace to change socially irresponsible practices. They are less able to concentrate sufficient pressure to persuade major investors, like UNOCAL or Total, to abandon substantial assets unless NGOs can marshal greater resources through municipal procurement power or wield the credible threat of costly civil damages. Nonetheless, the breadth and intensity of the FBC's campaign against business in Burma is a pervasive part of international economic environment and plays a major role in augmenting political risks to most corporations considering investment in Burma. The impact of this campaign on business confidence in Burma is probably one of the central reasons why international financial institutions have linked economic normalization with Burma to political change, not just to the "economic fundamentals." That, more than its impact on any particular corporation, may be the FBC's most important contribution to the international sanctions campaign to bring democracy and human rights to Burma.