



## **How does the WTO agreement on government procurement impact human rights criteria for state purchasing decisions?**

In the 1980s, Massachusetts adopted selective purchasing legislation that put companies doing business with the racist white government of South Africa at a disadvantage in bidding for state contracts. The adoption of selective purchasing and divestment policies by U.S. cities and states in the 1980s was a major factor leading to the collapse of minority rule in South Africa. Today, adoption of similar selective purchasing laws by Massachusetts or other states would violate U.S. commitments under the World Trade Organization's Agreement on Government Procurement.

An example of the threat of international purchasing agreements to state policies is presented in Crosby v. National Foreign Trade Council, better known as the Massachusetts Burma Law case.

The government of Burma is one of the most repressive in the world, infamous for its violations of labor rights and human rights. Over recent years 5.5 million people have been conscripted into forced labor. Forced labor accounts for perhaps as much as seven percent of Burma's economy. The military government viciously persecutes the democratic opposition led by the Nobel Peace Laureate, Aung San Suu Kyi.

The Commonwealth of Massachusetts responded to this situation by enacting a selective purchasing law that was identical to its old South Africa sanctions law, only with South Africa scratched out and Burma written in. The law restricted the authority of state agencies to purchase goods and services from companies doing business with Burma.

Shortly after Massachusetts acted, the European Union and Japan took steps to bring a WTO action against the Massachusetts Burma law. The Massachusetts law was a clear violation of the WTO agreement on government procurement.

Ultimately, the prosecution of a WTO case was suspended pending the outcome of a challenge to the Burma law brought in U.S. federal court by the National Foreign Trade Council (NFTC), an association of 600 multinational corporations. The NFTC suit was supported at the trial stage, on appeal, and in the Supreme Court by European Union amicus briefs, alleging that the Massachusetts law violated WTO obligations.

Ultimately in the Crosby case, the U.S. Supreme Court struck down the Massachusetts Burma law on relatively narrow grounds. The Court found that the Burma law was preempted by a subsequent and less far-reaching congressional act imposing sanctions on Burma. Nonetheless, the tone of the opinion in Crosby was surprising.

The lesson of the Crosby case is that both the U.S. courts and the WTO may be used to attack state procurement laws that are based on social or moral criteria in addition to purely economic criteria like cost and quality.

U.S. courts accepted an argument that the conflict between state and federal policy came not from disagreement over Burma policy, but from the failure of Massachusetts to comply with the WTO agreement.

The Crosby case and the machinations in the WTO that surrounded it should be a wake up call to those in the "living wage" campaign, those who support preferences for minority contractors, and those who support environmental purchasing preferences. Supporters of "buy local" and buy America" preferences also should be alarmed.