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In the last decades the World has witnessed a dramatic increase in trade negotiations and trade agreements. The impetus of these kinds of agreements is not limited to developed countries; it has also manifested in many developing countries. As trade relations among different nations continue to grow, so do the legal and political implications of such relations. When states engage in trade negotiations they make commitments that have serious implications in terms of their conduct in the international arena. Moreover, in many instances these commitments limit the ability of States to regulate trade and commercial transactions across-border lines and within their own territory.

The legal and political implications of trade agreements such as the World Trade Organization (WTO), have been the subject of debates and analysis among international scholars and practitioners. However, most of this analysis has focused on the implication of the trade agreements for central and national governments. Yet, trade agreements and trade relations among nations have legal consequences for sub-national entities and the relations of those entities with the national government.

It is the aim of this article to give a fresh look to the legal implications of trade agreements for sub-national governments. Particularly we will look at the United States in the context of the implementation of the WTO Uruguay Round Agreements. Among other issues, we will assess the abilities of states governments and the territories to

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regulate certain commercial activities. How does the US legal establishment deal with possible conflicts between states measures and US commitments in international trade agreements such as WTO? Can private parties challenge state statutes that may conflict with some of the national governments’ international commitment in the area of international trade? How do we balance the increasing states’ interest in trade policy and the interest of the federal government to speak with one voice when it comes to foreign affairs?

Most state officials in the United States became aware of the possible impact of international trade issues on state law after the well known Beer II case decided by a GATT panel in 1992. Christine T. Milliken summarizes the Beer II case and its impact on state law in the U.S. in the following terms:

The context was the then three-year-old Free Trade Agreement between the United States and Canada. The Americans had earlier brought a complaint to the GATT that certain Canadian practices, such as limiting outlets where imported beer could be sold, as well as certain mark-up practices, were illegal—a GATT panel agreed (Beer I). The Canadians countered that some state and federal tax practices and distribution laws discriminated against them and convinced a GATT panel to agree with them (Beer II). In late February 1992, the states received copy of the GATT Panel Report. The panel found that two federal and sixty to sixty-five state tax provisions involving over thirty states and Puerto Rico were impermissibly discriminatory.

Milliken observed that this was the first time that state law measures were challenged in the context of a trade agreement. Moreover, the panel report intended to interpret the relation between states and the national government, an issue that goes to the

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3 Christine T. Milliken was the Executive Director and General Counsel of the National Association of Attorneys General.
essence of American federalism. For example, the Panel considered the power of the federal government to preempt state legislation that is inconsistent with the GATT and concluded that the President has such power. Quoting an article written by Professor Robert Hudec in 1986, the panel stated:

An international agreement, validly proclaimed as federal law, is superior to conflicting state law, even if it is not superior to other federal law. The federal government possesses adequate legal power to preempt state law in this manner. It does not matter whether the international agreement is authorized or approved by Congress, because even an Executive Agreement resting solely on the President's foreign affairs power prevails over conflicting state law.\(^5\)

In its report the panel also expressed:

Judging from the evidence submitted to this Panel, and in particular that of the various cases before the United States Supreme Court, the Panel considered that the United States has not demonstrated that its state laws inconsistent with Article III impose requirements which the United States could not change, or indeed has not already overruled, by executive action, including, in this case, acceptance by the United States of the obligations under the General Agreement as part of United States federal law.\(^6\)

Describing the impact of the Beer II panel decision, Professor Conrad Weiler argues: “More than any other event, Beer II has heightened sensitivity both in the office of the USTR and in the intergovernmental community to the effects of trade agreements on federalism.”\(^7\) It is not surprising that many state officials were concerned that future panels may attempt to interfere with additional state’s measures that GATT panels deem incompatible with US obligations under GATT. Thus, state officials embarked in an effort to prevent future actions against such state laws.

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\(^6\) Id. at 72.

\(^7\) Weiler Conrad; Foreign-Trade Agreements: A New Federal Partner? The Journal of Federalism 24, Temple University (Summer 1994), Pag. 123.
The Beer II decision provoked strong opposition and distrust among many in the United States. The following quote from an article published in a law review journal just before the Congressional consideration of the WTO implementing legislation in the summer of 1994, illustrates the level of distrust against international trade agreements the GATT panel decision raised:

On the whole, the big losers under the trade pacts will be states in their independent lawmaking capacity. This fact recently prompted a leading constitutional scholar to conclude that GATT’s effects on federalism are so substantial that the constitutional voice of the states, the U.S. Senate, should consider GATT as a treaty requiring a two-thirds vote for passage. GATT is being considered, as was NAFTA, under the congressional foreign commerce power requiring only a majority of both houses for passage.8 Thus, the stage is set for a constitutional and political clash between the foreign commerce clause and the Tenth Amendment—a clash the states are losing, at least initially.9

In addition to the Beer II decision, other events converged to exacerbate the states official’s concerns about the implication of trade issues on state legislation. One of these events was the Supreme Court decision in Barclays Bank v. Franchise Tax Bd. of California.10 In Barclays, a multinational banking enterprise, Barclays Bank PLC, and a U.S.-based parent of a multinational manufacturing and sale enterprise, Colgate-Palmolive Co., challenged a worldwide combined reporting’s method used by the state of California to determine the corporate franchise tax owed by unitary multinational corporate group members doing business in California. The method used by California contrasted with the Federal Government separate accounting method.

The Federal government treats each corporate entity discretely for the purpose of determining income tax liability. On its part, California’s method first looked at the

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9 Supra, note 7, cited at 132.
worldwide income of the unitary business, and then taxed a percentage of that income equal to the average of the proportions of worldwide payroll, property, and sales located within California. Both corporations challenged California’s tax system as an impediment to the federal government to speak with one voice when regulating commercial relations with foreign governments. The Court upheld the validity of the California tax system taking into account first that the Court was only presented with Executive Branch communications in the forms of press releases, letters and amicus briefs expressing government’s opposition to the method used by California, and second based on the Court’s conviction that it was up to the Congress to decide whether or not the nation should speak with one voice in this matter.

Despite the fact that the Court affirmed the validity of the California’s tax system, according to Milliken the Barclays case “left open the question of the scope of the President’s powers to preempt state law pursuant to authority delegated by [Congress through] a statute or a ratified treaty.”¹¹ Similarly, the former Executive Director of the National Association of Attorney Generals quoted a headline of the Multistate Tax Commission’s newsletter after the Barclays decision urging to deny the Executives’ Branch unilateral authority to preempt state taxes based on GATT. This is the environment which preceded the 1994 submission to Congress of the GATT implementing legislation by the administration of President Clinton. In fact, after the Barclays decision, the attorney generals of forty-two states and the Secretary of Justice of Puerto Rico co-signed a letter to the President requesting the administration to clarify the impact of the Uruguay Round on state sovereignty.

¹¹ Supra, note 3, cited at 329.
Intense negotiations between state officials and the USTR took place for weeks before the administration submitted its implementing legislation to Congress. At the beginning of the negotiation process and with the assistance of key legislators, the states presented a list of issues that most of them felt deserved immediate attention. The list is highlighted by Milliken in her article.\textsuperscript{12} State officials advocated for a requirement that state and local laws, like federal laws, can only be preempted by specific, future action by Congress, not by WTO or federal agencies such as USTR. Protection of state and local laws from automatic WTO and USTR preemption by blocking the use of WTO decisions and USTR statements in Foreign Commerce Clause cases in U.S. courts, as well as a barring to retroactive application of GATT preemption, including tax refunds, were also argued. Finally, USTR would be required to notify state and local government within five days of GATT consultation against them and at least 180 days before USTR initiates a consultation against a state or local government in a foreign country and to actively involve state and local governments in the defense of their own laws under attack in the WTO.

Most of the concerns expressed by states during the negotiation process were finally incorporated in the Uruguay Round implementing legislation. The Uruguay Round Agreement Act\textsuperscript{13} reflects what can be described as a framework for deep cooperation and coordination between states and the federal government on trade issues with potential implication for state and local laws. Section 102 b (1) of the Uruguay Round Agreement Act requires the federal government to consult with states in matters related to the Uruguay Round Agreement. The legislation reads: “The Trade

\textsuperscript{12} Id. at 331.
\textsuperscript{13} 19 U.S.C. Secs. 3501 \textit{et seq}
Representative shall establish within the office of the United States Trade Representative a Federal-State consultation process for addressing issues relating to the Uruguay Round Agreement that directly relate to, or will potentially have a direct effect on the states.”

On its part, the Statement of Administrative Action (SAA), which according to its own text represents an “authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law,” reiterates the obligation of the federal government to consult with states. In particular, the SAA expressed: “The Administration is committed to carrying out U.S. obligations under the Uruguay Round agreement, as they apply to the states, through the greatest possible degree of state-federal consultation and cooperation, in conformity with the consultative framework established under section 102 (b)(1) of the bill.”

Moreover, the language of the SAA unequivocally sustains that the Uruguay Round does not automatically preempt state laws which are in conflict with the agreement, even if a dispute panel finds such state’s measure inconsistent with U.S. obligations under the Uruguay Round Agreement. In addition, USTR must notify state officials in cases of requests for the establishment of panels regarding state measures. The SAA stated: “The Trade Representative will consult with the state representatives and other relevant state officials throughout the consultation period and during any

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15 WTO Statement of Administrative Action: The World Trade Organization Agreement and the Uruguay Round Agreement Act. (Taken verbatim from the House of Representatives Report that represents the Statement as submitted by the President.)
16 Id. at 13.
subsequent panel, Appellate Body, or other proceeding, taking their views into account in
the formulation of U.S. negotiating positions and legal strategy.\footnote{17}

An issue that seems to be of unequal importance for states since the beginning of
negotiations was a proposed bar on private rights of action to challenge state laws
deemed incompatible with U.S. international obligations related to trade. The bar was
incorporated in Section 102 (c) of the implementing legislation. In its pertinent part the
Act reads:

(c) Effect of Agreement with Respect to Private Remedies. –

(1) Limitations. - No person other than the United States –

(A) shall have any cause of action or defense under any of the Uruguay Round
Agreements or by virtue of congressional approval of such an agreement, or

(B) may challenge, in any action brought under any provision of law, any action or
inaction by any department, agency, or other instrumentality of the United States, any
State, or any political subdivision of a State on the ground that such action or inaction is
inconsistent with such agreement.

(2) Intent of Congress. - It is the intention of the Congress through paragraph (1) to
occupy the field with respect to any cause of action or defense under or in connection
with any of the Uruguay Round Agreements, including by precluding any person other
than the United States from bringing any action against any State or political subdivision
thereof or raising any defense to the application of State law under or in connection with
any of the Uruguay Round Agreements

(A) on the basis of a judgment obtained by the United States in an action brought under
any such agreement; or

\footnote{17} \textit{Id.} at 15.
The SAA interprets the language of Section 102 (c) as representing the administration determination that private law suits are not an appropriate means for ensuring compliance with the agreement. Furthermore, according to the SAA the phrase “on any other basis” includes suit base on Congress’ Commerce Clause authority. This point is highlighted by Milliken, arguing that the Uruguay Round Act bar private action related to GATT on any basis including the Commerce Clause. The inclusion of this language in the legislation was a relief for many state officials who were worried about the impact of the agreement on state and local legislation. Milliken explains: “Further, the bar on private action eliminates a state concern that foreign governments or private parties will challenge state laws that are more restrictive than other state or federal laws.”

In an article addressing what she calls “the one voice myth in U.S. foreign relation,” professor Sarah H. Cleveland concluded that the bar on private law suits included in the implementing legislation is part of a historical “room for state autonomy and responsibility with respect to U.S. treaty obligations.” Prof. Cleveland interprets the bar on private law suit in the following terms: “The decision by Congress and the Executive to expressly bar private actions against state to enforce U.S. international trade commitments appears to reflect the political desire to protect state activity in this area, as well as to insulate the GATT instrument from private efforts to interpret their terms.”

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18 19 U.S.C. sec. 3512 (c).
19 Supra, note 15, cited at 18.
20 Supra, note 3, cited at 332.
22 Id.
Similarly, other commentators such as Charles Tiefer have made such a broad interpretation of the bar on private actions. In an unequivocal way Tiefer asserts:

The administration and Congress thus deliberately took away aggrieved foreign suppliers the Commerce Clause-based federal action against a state that discriminates, taking away what has historically been the most powerful tool in breaking down state discrimination (in regulatory, not procurement contexts) against out-of state business. Together with the cumbersome nature of the panel remedy, this represents a deliberate decision to all but preclude sweeping or aggressive foreign campaigns to break down in-state preference. So long as states do not go out spoiling for a fight with foreign countries, they can not only have in-state preference on their legislative books, but they can choose in at least some of their procurement to disfavor foreign suppliers. At least, they need have very little fear of federal court actions as a result, and not overmuch concern about the rare foreign nation’s direct challenge.\(^{23}\)

Government procurement has been an area where states have enjoyed the broadest degree of sovereignty and independence. During the Uruguay Round negotiations a plurilateral agreement on government procurement was negotiated. The fact that the Government Procurement Agreement (GPA) was a plurilateral agreement implies that it only applies to those WTO members who explicitly accepted it. By the end of the Uruguay Round negotiations the agreement had 27 signatories. Among those WTO members covered by the GPA were Canada, the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands (including Aruba), Portugal, Spain, Sweden, and the United Kingdom), Hong Kong China, Israel, Japan, Norway, South Korea, Liechtenstein, Switzerland, and the United States.

In terms of the GPA coverage each signatory would specify its covered entities in its annexes to the GPA. Annex No. 1 included central government entities covered by

the agreement, sub-national government entities would be listed in annex No. 2 and other
government entities in annex No. 3. The United Stated included 37 states in its annex
No. 2 as sub-national entities covered by the agreement. States to be covered by the
agreement were to be decided on a voluntary basis. The U.S. government would bind a
particular state by the agreement only if a voluntary commitment to be bound was
submitted by the governor. Several criteria must be met for the GPA to apply. The
criteria are that the country is a signatory, the entity in question is specifically covered by
the GPA, the particular procurement is covered, and finally the value of the procurement
is within the GPA threshold.\footnote{24}

The thirty-seven states included by the United States in its appendix Num. I,
annex No. 2 and thus specifically covered by the GPA are: Arizona, Arkansas,
California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa,
Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota,
Mississippi, Missouri, Montana, New York, Nebraska, New Hampshire, Oklahoma,
Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utha, Vermont,
Washington, Wisconsin, and Wyoming.\footnote{25}

WTO Government Procurement Agreement (GPA) and its possible implications
for state and local legislation were specifically addressed in the Statement of
Administrative Action. In its relevant part the SAA stated:

\begin{quote}
Title I of the bill requires the President to consult with the states for the
purpose of achieving conformity of state laws and practices with the 1996
Code. In addition, the bill requires the Trade Representative to establish a
Federal-state consultation process to keep the states informed on matters
\end{quote}

\footnote{24} Government Procurement Agreement (WTO-GPA), Article 1 (Scope and Coverage).
\footnote{25} WTO-GPA Appendix I Annex 2.
under the Code that directly relate to, or potentially have an impact on, the states.  

In light of this WTO-GPA language and the mechanism by which central government would decide whether or not to bind sub-central entities, several questions can be raise. First of all, one may ask how this agreement affects the ability of states not included by the U.S. in its appendix I, annex 2, to impose restrictions as part of their procurement legislations, in particular when dealing with foreign bidders. Are they free to discriminate against foreign corporations? Does the exclusion of those states from the GPA can be interpreted as a Congressional authorization of states’ protectionist legislation? What would be the implication of this for the “one voice” doctrine? 

In addition, a legitimate question may be directed to clarify the scope of the bar on private law suit included in the WTO implementing legislation. Can a private party challenge discriminatory procurement legislation in light of the WTO-GPA provisions and the WTO implementing legislation and SAA? What about challenges to legislation of states not included by the US as sub-central entities covered by the WTO-GPA? Does the bar on private suits includes suit based on allege Commerce Clause violation? These are legitimate questions that scholars as well as practitioners are beginning to confront and would have to address and answer. They represent a new set of issues that derive from the interaction of sub-national entities, such as states, with international trade and international obligations of the national governments that directly or indirectly affect states’ policies and legislation. 

Recently, a foreign-made cement importer corporation brought suit in the Federal Court against the government of Puerto Rico, challenging two Puerto Rican laws

26 Supra, note 15, cited at 1044.
establishing a discriminatory mechanism against foreign cement in construction projects funded by the government of Puerto Rico or by the United States.\textsuperscript{27} The statutes also required the importer to display warning labels on foreign cement bags. The legal dispositions in questions are Puerto Rico Law 109 and Puerto Rico Law 132.\textsuperscript{28}

Law 109 mandates the inclusion of a provision requiring the use of construction materials manufactured in Puerto Rico in those cases in which a call for bids is required for the contracting of a construction work with public funds. The law defined “public funds” as “funds or guarantees from the Commonwealth or from the United States Government, and those funds provided by federal laws for the purposes of revitalizing the economy.”\textsuperscript{29} In addition, as explained in the district court decision, Law 109 allowed by exception the use of imported cement. The decision stated:

The law 109 provides several exceptions that permit covered entities to use imported cement where there is a breakdown or equipment failure in Puerto Rico cement plants, where Puerto Rican cement is not available in sufficient quantities or is not of the satisfactory quality, and where the use of Puerto Rico cement would exceed the maximum percent of funding allowed by the government for cement in a given state-funded project.\textsuperscript{30}

This statute was passed at the time when Puerto Rico was going through a period of economic recession in the construction industry and the legislation was aimed to aid the rehabilitation of the aforementioned industry.\textsuperscript{31}

On its part, Law 132, passed on September 2001, requires all bags of cement manufactured outside of Puerto Rico to display a warning label stating: “in accordance


\textsuperscript{29} 3 P.R. Stat. Ann. §927 (f).


\textsuperscript{31} Antilles Cement Corporation \textit{v.} Anibal Acevedo Vila, Governor of Puerto Rico, 408 F. 3d 41, 43 (1\textsuperscript{st} Cir. 2005).
with federal laws and laws of Puerto Rico, this cement shall not be used in construction works of the government of the United States and of Puerto Rico nor in works financed with funds from said governments except in the specific cases established in said laws.”32 Both pieces of legislation were clearly related.

The importer corporation in its complaints sought a declaratory judgment stating that both law 109 and 132, were unconstitutional as they violated the Dormant Foreign Commerce Clause and the Supremacy Clause of the U.S. Constitution. On the one hand, plaintiff challenged the constitutionality of both Puerto Rican statutes alleging that by discriminating against cement manufactured outside Puerto Rico the laws violated the Dormant Foreign Commerce Clause. On the other hand, plaintiff argued the legislation violated the Supremacy Clause by contradicting federal legislation which, according to plaintiff, prohibits states use of federal funds for highway construction from imposing requirements that discriminate against materials from other states.33

The government of Puerto Rico responded to plaintiffs’ allegation by arguing lack of standing and that the laws had been sanctioned by Congress. In the first place, the government contested plaintiff’s standing to challenge the constitutionality of laws 109 and 132 on Commerce Clause arguing that, as a foreign importer plaintiff did not sustain any injury related to the domestic commerce restriction imposed by the Puerto Rican legislation. Secondly, the government made the argument that the laws were sanctioned by Congress and did not violate the Commerce Clause. The Puerto Rican governments’ defense was summarized in the district court decision. The Court stated:

32 10 P.R. Laws Ann. § 167e(a)(4).
33 In its original complaint plaintiff alleged Law 109 and 132 conflicted with the Surface Transportation Assistance Act of 1982, 23 U.S.C. §§ 101-161 and the Buy American Act, 41 U.S.C. § 10b. However, Plaintiff amended its complaint and withdrew its Buy American Act allegation under the premise that such federal statute does not apply to construction contract made by the government of Puerto Rico.
In addition, Defendants state that Laws 109 and 132 do not violate the Commerce Clause because Congress has “sanctioned” laws of this type by not passing legislation invalidating existing “Buy American” legislation passed in various states. According to Defendants, Congress is aware of state effort to restrict procurement of foreign goods in state-funded construction projects and has yet to impose a policy of national uniformity. They allege that this inaction constitutes Congressional approval. Finally, Defendants argue that, even without this tacit approval, Laws 109 and 132 are not unconstitutional under the Commerce Clause. \(^{34}\)

The district court, granting a motion for summary judgment by plaintiff, concluded that both laws 109 and 132 were unconstitutional under the Dormant Foreign Commerce Clause. The Courts concluded:

Because Laws 109 and 132 are not exempt from review under the market participant exception, have not been sanctioned by Congress, and are unconstitutional under the Dormant Foreign Commerce Clause of the United States Constitution, the Court HOLDS that the Government of Puerto Rico must AMEND Laws 109 and 132 so that they comply with the U.S. Constitution. \(^{35}\)

In its analysis about the constitutionality of the laws, the Court evaluated the public interest at stake in the legislation as expressed by the Government of Puerto Rico. The Puerto Rican governments’ interest in passing Laws 109 and 132 were to create jobs, to build local capital and to improve the local economy in general through the replacement of foreign building material with indigenous material. After expressing that the interests of the federal government in maintaining uniformity when it comes to foreign trade “outweigh the interest of Puerto Rico in this matter,” \(^{36}\) the Court relied on the “one voice” doctrine. The Court ruled: “It is clear that Law 109 has a substantial


\(^{36}\) 288 F. Supp. 2d 187, 199.
effect on foreign commerce and that it would significantly interfere with the nation’s ability to ‘speak with one voice’ as to matters involving international trade.”  

The “one voice doctrine” seems to be the leading concern for the Court in addressing the constitutionality of the challenged legislation. Explaining its decision, the Court described the effect that allowing states to intervene in issues involving foreign trade may have on national interests. According to the Court, state legislation such as Laws 109 and 132 can be seen by other countries as “selfish provincialism” and can provoke retaliation. Thus, the district courts’ rationale is that any legislation that may intervene with foreign trade must be expressly sanctioned by Congress. The Court judged:

Simply put, a state or territory of the United States is not permitted to make restrictions on foreign commerce unless the restrictions are approved by Congress. That is not the case here…Therefore, the Court finds that Law 109 discriminates against imports from foreign nations in violation of Foreign Commerce Clause to the Unites States Constitution. This discrimination could lead to retaliation and that would injure the nation as a whole. 

The decision of the Court specifically addressed the defense raised by the government of Puerto Rico about the Congressional validation of the statutes. The government argued that Congress has implicitly sanctioned states’ Buy American statutes because, despite Congressional knowledge about those states legislations, Congress has not taken any affirmative action to invalidate those statutes. In order to make this argument, the government quoted the decision by the Third Circuit in Trojan Technologies v. Commonwealth of Pennsylvania. In Trojan the Third Circuit validated

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38 288 F. Supp. 2d 187, 199.
39 916 F.2d 903 (3rd Cir., 1990).
a Pennsylvania statute that required companies doing business with governmental agencies, including municipalities and other local entities, to provide products whose steel is made in the U.S. In its decision, the Third Circuit expressed that in areas traditionally occupied by the states, such as state procurement policy as mentioned by the court decision, “[C]ongressional intent to preempt must be clear and manifest.” More specifically, and quoting some parts of the Supreme Court decision in *Wardair Canada v. Florida Dept. of Revenue*, the court states:

> Furthermore, the record in this case shows that Congress is aware of state activity to restrict procurement of foreign goods, see supra Part I, and yet has not imposed a policy of national uniformity. Thus state procurement policy fits comfortably within the Supreme Court observation that nothing in ‘the Foreign Commerce Clause insists that the Federal Government speak with any particular voice.’

Notwithstanding the arguments of the Puerto Rican government, the District Court was not persuaded and declared the unconstitutionality on the bases of the Dormant Foreign Commerce Clause.

On appeal, the First Circuit decided to remand the case to the District Court. The Appellate Court considered that some statutory question must be addressed before considering the constitutionality of the challenged legislations. In its order the First Circuit gave the District Court specific instructions to consider whether the federal Buy American Act applies to Puerto Rico and, if so, whether the BAA preempts Law 109. Judge Selya, delivering the opinion of the Court, expressed:

> Thus, it is at least arguable that the BAA applies to public works contracts entered into by the government of Puerto Rico and requires that Puerto Rico include in those contracts a clause restricting the use of foreign goods. It is also arguable that, if so, Puerto Rico is not free to impose

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40 916 F.2d 903, 906 (1990)
41 477 U.S. 1, 13 (1985)
42 916 F.2d 903, 913. (1990)
clauses containing restrictions on the use of foreign goods grater that those imposed by the federal law. So viewed, the constitutional question might be avoided by construction of the statute.  

The case then returned to the District Court and the district judge ordered parties to briefs on the specific issues raised by the Appellate Court. It was not until this stage of the proceedings that the matter of the WTO-GPA and the bar on private law suits included in the GATT-WTO implementing legislation was discussed by the parties in their briefs. The matter was neither considered at first instance nor during the appeal. The issue of the bar on private law suits could had been raised by the judges, whose first duty is to evaluate whether a case is properly before them, but it was not the case; no one raised this point.

In response to the district judge order to the parties to summit their briefs on the issues indicated in the decision of the First Circuit, the Puerto Rican government argued that the laws were affirmatively sanctioned by Congress by passing the WTO-GPA. The government sustained that by choosing to bind only some states and in a voluntary bases, although it had the constitutional authority to bind them all, the Congress has acted and by such action has sanctioned state measures of those stated not covered by the WTO-GPA. Thus, states not covered by the agreement are free to enact protectionist legislation. Based on this assertion, the Puerto Rican government concludes: “Within this context it is evident that Congress has made a definitive statement as to the propriety of ‘Buy American’ laws in the states or territories.”

This rationale advanced by the government necessarily leads to the conclusion that since Puerto Rico was not included as one of the entities covered by the WTO-GPA,

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43 Antilles Cement Corporation v. Anibal Acevedo Vila, 408 F. 3d 41, 48 (1st Cir., 2005)
Puerto Rico is free from enacting protectionist legislation such as the laws challenge in the case. In advancing its argument, the government relied on the Supreme Court decision in Wardair. Arguing that the Congress has consented to the Puerto Rican laws, the government states:

In support of the conclusion that Congress has given its approval to state preference procurement laws such as “Buy American” or “Buy Local” statutes, the Court should examine the case of Wardair, a case where the Supreme Court “found that a state tax on aviation fuel did not violated the Dormant Foreign Commerce Clause because numerous international agreements demonstrated that the federal government has affirmatively acted, rather than remained silent, regarding the power of the states to tax aviation fuel…” However, as will be shown in the next section below, the Congressional approval of state preference laws like Law 109 took exactly the same form that was acknowledge by the Supreme Court in Wardair as an affirmative decision to permit ‘local taxes of fuel’ over foreign travel.

The international agreements addressed by the Supreme Court in Wardair were the Chicago Convention on International Civil Aviation (The Chicago Convention) and subsequent bilateral aviation agreements signed by the U.S. The plaintiff in Wardair argued that the Chicago Convention, particularly a resolution adopted by its members in November 14, 1996, as well as other international aviation agreements, exempted international air traffic from local taxation. However, the Supreme Court judged that, by including only some of the local power to tax, the Congress has spoken allowing those authorities not included in the language of the agreements. The Supreme Court expressed:

We agree with amici National Governors’ Association, et al, that the negative implication of this provision support recognizing Florida’s power to tax, certainly, the provision demonstrates the international community’s awareness of the problem of state and local taxation of international air

travel, specifically aviation fuel, and represents a decision by the parties to that Convention to address the problem by curtailing and limiting only some of the localities’ power to tax, while implicitly preserving other aspects of that authority.\(^{48}\)

Additionally, the Supreme Court took into account the fact that, since the Chicago Convention the United States has not denied state’s power to tax certain types of aviation fuel in more than 70 bilateral agreements, the U.S. has became a party to.

Moreover, the Court took the position that Dormant Foreign Commerce Clause analysis was not available to the Florida aviation tax’s challenge because the Congress has spoken through the Chicago Convention and other aviation agreement. The Court stated:

For the dormant Commerce Clause, in both its interstate and foreign incarnations, only operates where the Federal Government has not spoken to ensure that the essential attributes of nationhood will not be jeopardized by States acting as independent economic actors. However, the Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority. In our view, the facts presented by this case show that the Federal Government has affirmatively decided to permit the States to impose these sales taxes on aviation fuel.\(^{49}\)

The government insists that in similar manner Congress has spoken through the WTO-GPA agreement allowing states and Puerto Rico to enact preference procurement legislation like Law 109.\(^{50}\)

On its part, Puerto Rican Cement Co. submitted a supplemental brief as intervening defendants. In its writing to the court, Puerto Rican Cement focused on the bar on private law suits included in the GATT-WTO implementing legislation and urged the District Court to dismiss the case on the grounds that only the federal government has

\(^{48}\) _Wardair Canada v. Florida Dept of Revenue_, 477 U.S. 1, 11 (1986).

\(^{49}\) _Wardair Canada v. Florida Dept of Revenue_, 477 U.S. 1, 12 (1986).

\(^{50}\) _Wardair Canada v. Florida Dept of Revenue_, 477 U.S. 1, 13 (1986).
standing to challenge the Puerto Rican measures. In its supplemental brief the intervening defendant highlights the fact that Puerto Rico was not included in the list of sub-national entities covered by the WTO-GPA submitted by the U.S. in Annex No. 2 and makes the same interpretation advanced by the government in its brief, that is, that the non-inclusion of Puerto Rico and other sub-national entities is a Congressional expression allowing the type of legislation passed by the Puerto Rican legislature.

Moreover, Puerto Rican Cement questioned the standing of plaintiff, Antilles Cement, to challenged Law 109 and Law 132. In support of its interpretation that plaintiff lacks a cause of action to challenge the aforesaid measures, Puerto Rican Cement points to the Uruguay Round implementing legislation and the SAA. Commenting on the language included by Congress in the implementing legislation Puerto Rican Cement states: “In fact, the statute specifically proscribes a declaration of invalidity of any state law based upon the content of the Uruguay Agreement, except to the extent such action is brought by the United States.”

The argument put forward by Puerto Rican Cement is quite simple: if any one can challenge the Puerto Rican legislation, it is the federal government, according to the mechanisms established by Congress in the GATT-WTO implementing legislation and the SAA. The implication of this bar on private law suits, according to Puerto Rican Cement, is that the Court has no other choice but to dismiss Antilles Cement’s challenge. Puerto Rican Cement concludes:

Finally, if the Uruguay Round Trade Agreement adds anything to these proceedings it is the requirement that the Court abstain from making pronouncements in this area. Congressional intent to occupy the field and make the challenge of potentially conflictive laws the sole province of the federal government rings truly of the one voice pronouncements identified.

by the Supreme Court in Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979). Therefore, following the decisions of the Supreme Court under Barclays, Wardair and Container Corp. of America v. Franchise Tax Board 436 U.S. 159 (1983), this Court should acknowledge the voice of Congress contained in its pronouncement concerning the adoption of the Uruguay Round Agreements and leave any potential challenge of these statutes to the federal government… As stated before, the Uruguay Round Agreements are consistent with the view that Congress has knowingly allowed states to implement and adopt state statutes which may or may not have the potential to interfere in one way or another with foreign commerce. Congress has expressly reserved its right to be the one to challenge such statutes and has foreclosed such challenges to private parties seeking to challenge the same.  

Surprisingly, in its brief Antilles Cement totally ignored the issue raised by defendants about the WTO-GPA and the bar on private law suits included in the WTO implementing legislation. Antilles Cement acted like the issue was never introduced to the case. Instead, its argumentation took the form of traditional Commerce Clause arguments without even mentioning the matter of the WTO-GPA and the private cause of action so well elaborated by the government of Puerto Rico and Puerto Rican Cement in their respecting writings to the District Court. 

Antilles Cement disposed of the question whether or not it has standing to challenge Law 103 and Law 132 by simply arguing in one paragraph that it has suffered an economic injury, without any attempt to refute defendant’s contention that it has not standing based on the bar on private law suit found in the WTO implementing legislation. In terms of defendant’s contention that Congress has sanctioned the Puerto Rican legislation, Antilles Cement limited its response to quoting parts of Trojan, questioning

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53 Antilles Cement v. Calderon, Case No. 02-1643(JP) Docket No. 87
defendant’s interpretation of the case. However, there is no mention in Antilles Cement’s brief of Wardair, a case quoted in extenso by the government in its brief.\(^5^4\)

In challenging defendants’ interpretation of Trojan, Antilles Cement sustained that Court’s expression that Congress has not imposed a policy of national uniformity does not amount to say that Congress has sanctioned the legislation. Referring to the Third Circuit expression in the case, Antilles Cement maintained:

> It has no relation to approval by Congress of states regulation of foreign commerce such as that involved in Laws 109 and 132. According to Trojan, the lack of national uniformity goes to show that the Pennsylvania buy-American statute survives the most searching Commerce Clause scrutiny. That finding, clearly does not implicate that Congress approves or sanctions states buy-American statutes which discriminate against foreign goods.\(^5^5\)

As mentioned above, rather than responding to defendants’ well elaborated arguments about the possible implications of the WTO-GPA agreement for the case at hands, Antilles Cement opted to ignore them and limited its brief to traditional Commerce Clause argumentation and to address the possible conflict between the Puerto Rican statutes and the federal Buy-America Act.\(^5^6\)

In its Commerce Clause argumentation Antilles Cement insisted in the unconstitutionality character of Laws 109 and 132. In addition, referring specifically to the Foreign Dormant Commerce Clause and quoting an American Constitutional Law text, Antilles Cement sustained: “If state action touching foreign commerce is to be

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\(^5^4\) For this in extenso quotation see Antilles Cement v. Calderon, Case No. 02-1643(JP) Docket No. 80, pages 10-13


\(^5^6\) The possible conflict between Buy American Act and “Buy local” legislation have not been settle by the courts. See Trojan Technologies v. Commonwealth of Pennsylvania, 916 F.2d 903 (3rd Cir., 1990) and WCW Window Co. v. Bernardi, 730 F.2d 486 (7th Cir., 1984).
allowed, it must be shown no to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce.”\textsuperscript{57}

Despite the efforts to treat this case as a traditional Commerce Clause litigation, parties cannot ignore the fact that some U.S. international obligations may have an impact on this case. In particular, parties need to address the possible implications of the bar on private suit, previously discussed, included in the WTO implementing legislation. Nor can be ignore the WTO-GPA agreement and the fact that Puerto Rico was not included as part of the sub-national entities covered by it.\textsuperscript{58} It is my impression that from now on courts will need to be willing and prepare to confront this kind of issues and recognize that a new form of federalism and a new relation between the federal government and the states is been shaped by the role and implications of U.S. international obligation in the domestic sphere.

This debate about the implications of U.S. international obligations for the federal-states relation poses a serious challenge for some traditional believes and doctrines about the role of the states in regulating certain activities which may have an impact on foreign affairs. As it has been illustrated by the litigation initiated by cement importers against the government of Puerto Rico in the federal courts, at the heart of the discussion about the ability of states to discriminate against foreign importers in government procurement biddings is the One Voice Doctrine.

The issue of whether to apply the principle of a solitary executive voice in US foreign relations -also known as the One Voice Doctrine- has been addressed by the US

\textsuperscript{57} Antilles Cement v. Calderon, Case No. 02-1643(JP) Docket No. 87, page 8.

\textsuperscript{58} At this point it is important to highlight the fact that Puerto Rico was represented by the Secretary of State of Puerto Rico, who actively participated in the negotiations that preceded the Congressional approval of the WTO implementing legislation.
Supreme Court in a number of cases. The judicial origins of this principle was first acknowledged in *Brown v. Maryland*.\(^{59}\) In this case, a Maryland statute required all importers of foreign goods to obtain a license before they were authorized to sell their goods in the Maryland territory. After scrutinizing the legitimacy of the statute, the Supreme Court struck down the state import licensing requirement as violating federal exclusivity, stating that such requirement “[was] repugnant to that provision of the constitution of the United States, which declares, that ‘no State shall, without the consent of Congress, lay any impost, or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws’.”\(^{60}\) The Court also emphasized that the statute contravened that part of the Constitution which declares that Congress shall have power ‘to regulate commerce with foreign nations, among the several States, and with the Indian tribes.’\(^{61}\)

Later on, the Supreme Court further developed this doctrine in *Worchester v. Georgia*.\(^{62}\) In its decision, the Court confronted the case of a plaintiff indicted in the state court for residing in part of the territory belonging to the Cherokee nation without a license or permit from the governor of the state, or from any one authorized to grant it. The action was contrary to the laws of the state of Maryland which prevented white persons from residing within that part of the chartered limits of Georgia, occupied by the Cherokee Indians. By the same period, several treaties had been entered into by the United States with the Cherokee nation, by which that tribe was acknowledged to be a sovereign nation. Accordingly, the Court declared the state in violation of the


\(^{62}\) *Worchester v. Georgia*, 31 US (6 Pet) 515, 561, (1832),
constitutional provision granting to the United States the exclusive power to regulate intercourse with foreign nations. Thus, the Court invalidated the statute on constitutional grounds stating that the authority to regulate Indian affairs, which were regarded as part of U.S. foreign relations, was vested exclusively on the national government.

Moreover, in *Chy Lung v. Freeman*, the Supreme Court struck down a California immigration statute as infringing on the exclusive national power over foreign commerce, emphasizing the following:

> [If ] this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not a direct claim for redress? Upon whom would such a claim be made? Not upon the state of California; for by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union.

Subsequently, in a long line of decisions, the Supreme Court reaffirmed the state’s exclusion from foreign relations clarifying that the US should speak with one voice through the President as the “sole organ of the US in foreign relations.” Precisely, in *Zschernig v. Miller*, the Supreme Court applied the doctrine of dormant foreign affairs preemption invalidating an Oregon statute barring inheritance by nationals of communist states that denied inheritance rights to U.S. citizens. The Court so ruled despite the facts that the Oregon law did not conflict with any federal provision and the U.S. Department of Justice had represented as amicus that the Oregon statute did not unduly interfere with the United States conduct of foreign relations. In deciding this,

63 *Chy Lung v. Freeman*, 92 US 275 (1876).
64 *Chy Lung v. Freeman*, 92 US 275, 279 (1876).
the Court established that the statute conflicted with the national government ability to conduct foreign affairs stating that “[the statute constituted] an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress.”67

The doctrine of foreign affairs preemption established by the Supreme Court was interpreted for quite long time as suggesting that any state or local government action with more than some incidental or indirect effect in foreign conduct was *per se* invalid under the constitutional distribution of the foreign affairs powers, whether or not the action actually conflicted with national policy.68

Nonetheless, despite the one voice doctrine’s jurisprudence revised in the preceding paragraphs, in *Wardair Canada, Inc v. Florida Department of Revenue*,69 the Court upheld the constitutionality of Florida’s tax on sale of aviation fuel notwithstanding the government’s contention that the tax threaten the ability of the Federal Government to speak with one voice. To inform the doctrinal inquiry, the Court noted that US treaties and other laws exempted states taxes regulation that the Executive defended the statute and that congressional actions suggested that state tax could be tolerated.70 The Court also found that international agreements regulating such taxation did not apply to individual states and noted that “[they] never have suggested that the Foreign Commerce Clause insists that the Federal Government speak with any particular voice.”71

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70 *Supra*, note 21, cited at 983.
Moreover, in *Barclays v. Bank PLC v. Franchise Tax Board*\(^72\) the court rejected the suggestion that a specific indication of congressional intent was required to allow a state practice under the Foreign Dormant Commerce Clause. The court concluded that by not prohibiting explicitly the state’s taxation system Congress “had passively indicated that certain states’ practices do not impair federal uniformity in an area where federal uniformity is essential”\(^73\). In short, in this recent jurisprudence, the Court clearly rejected the presumption that the President must “speaks as a soloist for the United States.”\(^74\)

Notwithstanding the new approach taken by the Supreme Court in interpreting the One Voice Doctrine, one may be induced to proclaim a return to its old narrower interpretation by some recent decisions. One of such decisions is *Crosby v. National Trade Council*\(^75\) were the Court, once again, extended the application of the One Voice Doctrine to inform the inquiry about the legitimacy of the action taken by the State of Massachusetts. In *Crosby*, the Court addressed the constitutionality of a government procurement statute that barred entities from contracting with firms that did business in Burma. This statute was adopted in order to prevent Massachusetts taxpayer dollars from supporting human rights violations committed by Burma’s military regime.\(^76\)

As a result of the lobbying by non-governmental organizations in the United States to impose economic and political sanctions on the military regime, in June of 1996 the state of Massachusetts enacted the Act Regulating Contracts with Companies Doing

\(^{74}\) Supra, note 21, cited at 982.
Business with or in Burma. Various US allies, such as the European Union and Japan, protested the statute as it resulted in the exclusion from bidding of many European and Japanese companies. They argued that the statute violated the WTO-GPA concluded in 1994 as part of the Uruguay Round negotiations. As it has been stated earlier, under this agreement members are supposed to ensure that governmental entities procure goods and services on a nondiscriminatory basis. However, it is important to remind that the United States’ delegation and other signatories made clear that the sub-national units such as U.S. states would submit voluntarily, resulting in the acceptance of 37 states to be bound by the code with certain conditions.

In fact, the states agreed to allow foreign suppliers to bid on projects only to the extent that states’ laws as of 1994 did not require otherwise. Also, Congress barred private suits against states based on the violations of the Agreement and stated its intention to occupy the field. Thus, being Massachusetts one of the states which voluntarily accepted to be bound by the code, the EU asked for the formation of a panel to adjudicate the U.S. responsibility for violating the agreement.

The issue also provoked a domestic reaction, brought about by the National Foreign Trade Council (NFTC) which sued the state in the Federal District Court arguing that the statute unconstitutionality infringed on the federal government’s foreign affairs power. The EU filed amicus brief at the appeal in the Supreme Court alleging that the law had created a significant irritant in EU-US relations. Finally, the Supreme Court affirmed the District Court decision invalidating the statute holding that the statute was preempted by the federal law.

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In deciding this, the Court stated that the statute violated the One-Voice Doctrine and compromised the President’s authority by limiting his ability to speak with one voice in the international community regarding Burma policy. In fact, one of the primary criticisms of the Burma Law was that it provoked objection from the international community (European Community, Thailand and Japan) who condemned the sanctions as violating the WTO-GPA. As stated above, various countries initiated dispute settlement proceedings in the WTO, even requesting the establishment of a WTO panel which was established in October 1998, (request that was dropped after the US District Court invalidated the Massachusetts statute). Nonetheless, the EC indicated its intention to initiate a new proceeding if the decision was not affirmed. International protest to the Massachusetts statute seems to be a factor taken into account by the Supreme Court in deciding the case.

In sum, this recent decision set forth by the US Supreme Court could indicate that the One Voice Doctrine is fairly strongly applied by the Court when state actions interfere with foreign affairs, demonstrating a tendency to strike down state regulations that contravene uniformity in the foreign affairs arena. Accordingly, the Court relied primarily on the fact that the statute obstructed the capacity of the President to speak with one voice in foreign affairs. However, it is important to highlight the fact that Massachusetts was one of the thirty-seven states that agreed to be part of the GPA, consequently violating the treaty. In other words, although the court relied on the need for uniformity by applying the One Voice Doctrine, it could have addressed the statute preemption by the inclusion of the state of Massachusetts in the WTO-GPA. Instead, it opted not to consider this matter.
Notwithstanding this decision, in *American Insurance Association v. Garamendi, Insurance Commissioner, State of California*,\(^{78}\) the court once again addressed the issue of state action provoking additional international turmoil. In this case, the court decided whether a California statute -California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA)- requiring any insurer doing business there to disclose information about insurance policies issued to persons in Europe which were, in effect, during the Holocaust interfered with the National Government conduct of foreign relations.

The principal argument for preemption made by petitioners and the United States as amicus curiae was that the statute interfered with the foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany and France. In the mid 1990’s, the U.S. and German governments negotiated the German Foundation Agreement whereby Germany and German companies set up a 10 billion Deutschmark foundation to compensate Holocaust victims. The foundation worked with a private organization, the International Commission on Holocaust Era Insurance Claims (ICHEIC), which negotiated with European insurance companies to get access to information on unpaid policies and settled claims of some survivors. As part of these undertakings, the U.S. promised to use its best efforts to ensure that U.S. states and local governments would allow the foundation to serve as the exclusive mechanism of resolution of these claims. The Court stated:

> There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the “concern for uniformity in this country's dealings with foreign nations” that animated the Constitution's allocation of the foreign relations power to the National Government in the first

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Moreover, the court ruled:

The exercise of the federal executive authority means that state law must give way, where as here, there is evidence of clear conflict between the policies adopted by the two. The foregoing negotiations toward the three settlement agreements is enough to illustrate that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive actions.[…]Quite simply, if the California law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.\(^\text{80}\)

On her part, Justice Ginsburg, in a strong dissenting opinion, disagree with the Court opinion in the following terms:

Sustaining the HVIRA would not compromise the President's ability to speak with one voice for the Nation…. To the contrary, by declining to invalidate the HVIRA in this case, we would reserve foreign affairs preemption for circumstances where the President, acting under statutory or constitutional authority, has spoken clearly to the issue at hand. “[T]he Framers did not make the judiciary the overseer of our government.” Dames & Moore, 453 U.S., at 660, 101 S.Ct. 2972. As I see it, courts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds…\(^\text{81}\).

This case can be seen as a clarification on the part of the Supreme Court of its rationale in Crosby. The holding in American Insurance Association implies that the decision to invalidate a state action must be the result of an evaluation on whether it conflicts with established foreign policy rather than just presuming that it may undermines the uniformity in the foreign arena and the capacity of the Nation to speak with one voice. According to the Court, in this case it was clear that the statute


\(^{81}\) Garamendi, 539 US 396, 422 (2003).
contravene the foreign policy of the Executive as evidenced by the President’s agreements assuring that whenever a German company was sued on a Holocaust-era claim in an American court, the Government would (1) submit a statement that it would be in this country's foreign policy interests for the foundation to be the exclusive forum and remedy for such claims, and (2) try to get states and local governments to respect the foundation as the exclusive mechanism.\textsuperscript{82} Thus, there was a clear intent to preempt state action regarding the issue at hand.

After the opinion in \textit{Association v. Garamendi} -previously discussed- the decision set forth in \textit{Crosby} may not fairly be interpreted to mean that the court will strike down a local BAA that has some impact on foreign affairs, specifically in the WTO-GPA context. Despite the potential of state actions to provoke international conflict, it is arguable that there is a national deference to federalism. Congress and the President have frequently defended state’s action despite acknowledge breaches of US Treaty obligations.\textsuperscript{83}

This deference has been particularly notable in the treaty context where the national government has refused to impose treaty obligations upon states and local governments. With regard to the WTO-GPA, the United States was deferential to states in ratifying the agreement. Rather than simply imposing the GPA obligations on the states, the United States invited each state to voluntarily consent to the agreement, resulting in the inclusion of thirty-seven states. Furthermore, the states agreed to allow foreign suppliers to bid on projects only to the extent state law as of 1994 did not require

\textsuperscript{82} \textit{Garamendi}, 539 US 396, 447 (2003).
\textsuperscript{83} \textit{Supra}, note 21, cited at 1001.
otherwise.\textsuperscript{84} Also, Congress barred private suits against states based on the violations of the Agreement and stated its intention to occupy the field and thereby preclude such suits in state courts. As a result of this, 37 states agreed to allow some of their procurement to be cover by WTO-GPA obligations. Moreover, the parties that enter into the agreement have complete understanding of the fact that the United States is only obliged by the treaty with respect to the federal government’s procurement, reserving the right of states to be included or not in the treaty.

This kind of deference toward states on the part of the federal government has been described by some commentators as new paradigm for federalism and free trade. Explaining this “new paradigm” professor Tiefer contends:

     Part of this consists of a new form of international negotiation that essentially makes states “partners” with the President. In effect, the President becomes less the director of a national sovereign government and more a broker finding common ground between differing state governments. The other part consists of “weak” preemption. In this implementation format, foreign enterprises have few or no legal tools for overcoming state actions.\textsuperscript{85}

This clearly reflects the established foreign policy and the political desire of the national government to protect states’ activity in the area of procurements, being deferential towards state actions taken by states that are not part of the GPA. Despite the apparent clarity of this policy in federal practice, the \textit{Crosby} decision may create the impression of a disposition of the Court to strike down a state procurement measure when conflicting with foreign relations without even addressing the agreement as such and its implication for local statutes. The Court did not even take seriously the bar on


\textsuperscript{85} Supra, note 23, cited at 73.
private law suit included in the implementing legislation. On the contrary, with regard to government procurement and local BAA there is a clear foreign policy towards validating state action. The national government has continuously protected and granted substantial independence to state activity with respect to the WTO-GPA agreement, encouraging states to decide whether or not to become part of the treaty.

In fact, as recently as September 2003, this national deference to state action was once again displayed in the ratification of the Dominican Republic- Central America – United States- Free Trade Agreement (CAFTA), where the USTR asked if the 37 states covered by the WTO-GPA would be willing to extend to the partners of the CAFTA the opportunities they currently extend to the WTO members covered by the GPA. It also invited the 13 states not part of the WTO-GPA if they would be willing to have their procurement covered by the agreement as well as under the CAFTA agreement. As a result of this, 22 states and Puerto Rico agreed to cover their procurements under the CAFTA agreement.

In consequence, one could conclude that despite the Crosby decision the One Voice Doctrine is a “myth” in the foreign relations arena. Contemporary US practice regarding foreign relations clearly illustrate how the national government has tolerated, and actively encouraged independent states activities, preserving sub-national responsibility and autonomy in its treaty ratifications. In light of this deferential approach to state compliance with the WTO-GPA on the part of the federal government,

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87 Id.
88 Supra, note 21, cited at 976.
a state that chooses not to be part of the treaty and whose actions contravene the requirements established in it violates no domestic or WTO obligation.\textsuperscript{89}

Furthermore, subscribing to the Court’s rationale in \textit{Association v. Garamendi}, a state’s action is invalid only if it conflicts with the established foreign policy. As discussed earlier, in the context of the WTO-GPA, there is an explicit foreign policy acknowledging the autonomy of the state to become part of the agreement. Consequently, a state that enacts a local BAA which contravenes the requirements set forth in the agreement, and which is not part of the WTO-GPA, is in perfect harmony with the foreign policy on government procurements. In fact, some scholars argued that the way Congress decided to implement the WTO agreements, makes BAA legislations, both federal and states perfectly compatible with US obligations under the trade agreement.\textsuperscript{90}

However, some aspect of the \textit{Crosby} and \textit{Garamendi} decisions can be disturbing depending on the interpretation one give to the Court’s holding in these two important cases. In \textit{Crosby} we propose that the Court decision to strike down the Massachusetts statute without considering the WTO-GPA agreement and it implications for the case was provoked by the character of the statute itself. This is, the Massachusetts statute represent a political expression on the part of the state of Massachusetts in relation to a foreign nation. In this context, we can agree with the Court that the statute may interfere with the US foreign policy toward Burma and probably other foreign nations. If, on the other hand, the Court decision means a disposition on the part of the Supreme Court to

\textsuperscript{89} \textit{Supra}, note, cited at 1010.
\textsuperscript{90} \textit{Supra}, note 23.
disregard the effort and agreements reached between the states and the federal government in the negotiation that preceded the Congressional passage of the WTO implementing legislation, we must denounce it as an attempt against the sovereignty of the states and against federalism.

In the case of the Puerto Rican laws challenged by Antilles Cement, there is no political expression that could jeopardize U.S. foreign policy toward any of the countries from where Antilles Cement imported cement to Puerto Rico. The issue at stake is a commercial activity addressed by Congress in the context of the WTO-GPA agreement. Again, the agreement excluded several U.S. states and territories from complying with the obligations assumed by the federal government and the states that voluntarily requested to be covered by the agreement. Therefore, we do not see how the Court may decide the controversy presented in this case without even considering the possible implications of the WTO-GPA agreement. Additionally, the bar on private law suit must be addressed by the Court in the Antilles Cement challenge, as it should had been addressed in *Crosby*.

Despite the positive expression of the Court in *Garamendi* that state’s action is invalid only if it conflicts with a clear established foreign policy, we must agree with the dissident’s concerns given the absent of a treaty or any other concrete Congressional action or text. As we quoted Justice Ginsburg “courts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds.”\(^91\) The concern that a mere Executive

agreement without specific Congressional authorization could preempt state law was precisely what brought states to the pre-WTO Congressional implementing legislation’s negotiation. State officials advocated for a requirement that state and local laws, like federal laws, can only be preempted by specific future action by Congress, not by WTO or federal agencies such as USTR. In this context, the bar on private actions was a central part of the compromises between the states and the federal government. This is probably why Cristine T. Milliken expressed: “the bar on private action eliminates a state concern that foreign governments or private parties will challenge state laws that are more restrictive than other state or federal laws.”

In sum, as we stated at the beginning of this article, the new challenges and opportunities that international commercial agreement such as WTO bring to the relation between central governments and sub-central entities such as states in the U.S. federal system, is an issue that disserves and requires the attention of scholars and practitioner. In addition, if legal mechanisms for a more effective federal-states relations in the context of international obligations that have some impact on states as those provided in the WTO implementing legislation are to have any value, courts must take them seriously. The legal obligation assumes both by the federal government and by the states must be taken into account by the Court system when adjudicating cases such as the Antilles Cement case discussed in this article.

In order to do this, judges at all levels of the judicial system must be willing to consider non traditional approaches to non traditional issues like those resulting from the impact of international commerce and international commercial agreements on sub-

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92 Supra, note 4, cited at 332.
central entities such as states or even local and municipal governments. The lack of familiarity with these issues on the part of many lawyers and judges accustomed to dispose of conflicts between the states and the federal government in the context of traditional Commerce Clause or Supremacy Clause litigations may serve as an incentive to ignore these new issues. A formidable example of this is the Antilles Cement case where the issue of the WTO-GPA agreement was totally absent of any discussion between the parties until the case returned to the District Court and the defendants, Government of Puerto Rico and Puerto Rican Cement, raised the issue of the WTO-GPA and the bar on private law suits. Even at this level the issue was ignored by plaintiff in its brief.

Our argumentation in this article and our analysis of the Antilles Cement case do not respond to any intention to dispose of the controversy but to call the attention to new issues that are relevant and cannot be left out of the discussion and legal argumentation. Moreover, the case illustrates a reality that hides a series of complex social and economic ties which goes beyond the academic lens and that ought to be considered. Puerto Rico as a result of its undefined territorial status, which maintains the Island in a frontier, inside-outside situation, has adopted a social infrastructure and institutional organization characterized by close local-personal and family relationships.

In effect, the Antilles Cement case eloquently shows the effort of this society, which responding to its particular internal social structure, struggles to achieve greater commercial liberalization within the federal system. This may well be the case of other societies within the U.S. most of the time represented by states, municipal or local governments. The question is how federalism responds to the interest of those societies and what the legal system can do to assist this process of accommodation and
compromises between the federal government and the states as well as municipal and local governments.