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A Road Paved with Good Intentions

State and local efforts to conduct foreign policy and the application of South African sanctions to Namibia.

By Antonio F. Perez*

When the Framers met at the Philadelphia Convention, the United States were—to use the then applicable grammatical convention—a confederation. Today, the plural usage is considered archaic. Similarly, its underlying constitutional concept is ordinarily thought to be a relic of our constitutional past. The states are no longer coequal sovereigns, each retaining its international personality and thus the capacity to conduct international relations. We are instead united as one federal nation, each state competent only to address internal matters and the federation alone responsible for conducting the nation's external relations.

Modern constitutional practice, however, is not quite as congruent with this received constitutional theory as one would imagine. In recent years, and with increasing frequency, states and cities have intruded on the federal government's conduct of foreign policy. Whether in adopting nonbinding resolutions and referenda on questions of foreign policy, or declaring themselves "sanctuaries" for Central American refugees or "nuclear free zones," states and cities have raised their own voices in matters once reserved to the Executive Branch and the Congress alone.¹ Today, foreign embassies in Washington would be negligent in their duties if they ignored the activities of state legislatures or even city councils, whose influence can be felt far from U.S. borders. If, for example, some major states or cities were to bar from their municipal bond markets all banks doing business in a particular country, it is highly probable those banks would abandon their clients in that country. The effect on the target country could be as great as if the United States itself had imposed economic sanctions.

It is not an exaggeration to suggest that, in many respects, the United States no longer "speaks with one voice" in the conduct of its foreign policy. This is

borne out by one particularly illuminating example of state and local foreign policy—sanctions against South Africa to end apartheid. Because South Africa occupied Namibia at the time many of these measures were adopted, states and localities applied their South Africa sanctions to Namibia as well. For the most part, these measures were imposed out of moral outrage against apartheid. States and localities responded to their constituents' desires to prevent the use of state resources, even if only indirectly, in apparent support of apartheid.

Yet, sanctions against South Africa have proven to be the proverbial "hard case" that makes "bad law." They reveal the danger of state and local forays into foreign policy making, as states and localities continued to apply their South Africa sanctions to Namibia's detriment even after Namibia achieved its independence from South Africa on March 21, 1990, and despite the fact that Namibia's independence was a long-standing goal of U.S. policy in southern Africa. In the author's opinion, the application to Namibia of state and local sanctions against South Africa was a foreign policy time bomb waiting to explode.

U.S. Policy Toward Namibia

It had long been U.S. policy to reverse South Africa's unlawful occupation and administration of the territory of Namibia. Formerly known as South-West Africa, Namibia was a German colony administered after World War I by South Africa, on behalf of the United Kingdom and under a League of Nations mandate. After World War II, South Africa refused to conclude a trusteeship agreement with the United Nations (U.N.) to resolve the status of the mandate and, claiming sovereignty over Namibia, began to implement apartheid.²

Dissatisfied with South Africa's refusal to carry out the mandate, the U.N. General Assembly in Resolution 2145 (XXI)

of October 27, 1966 terminated the mandate.³ This decision was reaffirmed on January 30, 1970 by the Security Council in Resolution 276, which declared "the continued presence of the South African authorities in Namibia illegal."⁴ Finally, at the Security Council's request, the International Court of Justice (I.C.J.) rendered an Advisory Opinion on June 21, 1971 confirming the General Assembly's power to terminate the mandate.⁵ The United States voted in favor of the relevant General Assembly and Security Council resolutions,⁶ and also appeared before the I.C.J. to argue that the General Assembly Resolution was "valid and that it effectively terminated the administrative authority of South Africa under the mandate."⁷

The U.S. commitment was manifested in far more than mere votes and rhetoric. The U.S. expended enormous time and energy to secure Namibia's independence over a ten-year, bipartisan, diplomatic odyssey, beginning during the Carter administration with a plan for Namibia's independence, proposed initially at the U.N. Security Council by the representatives of Canada, France, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland and the United States (the Contact Group).⁸ By Resolution 435 of September 29, 1978, the Security Council approved the Secretary General's plan to implement the Contact Group proposal and established a U.N. Transitional Assistance Group (U.N.T.A.G.) to "ensure the early independence of Namibia through free and fair elections under the supervision and control of the United Nations."⁹

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South Africa objected to certain elements of the U.N. plan, initially refused to implement Resolution 435, and proceeded instead with unilateral elections in Namibia.¹⁰ Later, it also objected to the continued deployment of Cuban troops in Angola.¹¹ In negotiations from 1978 through 1988, South Africa's objections to the U.N. plan were addressed. The question of withdrawal of Cuban troops from Angola was also resolved in the Agreement of December 22, 1988, between the People's Republic of Angola, the Republic of Cuba, and the Republic of South Africa. In this Tripartite Agreement, the People's Republic of Angola and Cuba agreed to the phased and total withdrawal of Cuban troops from Angola in accordance with their separate Bilateral Agreement of the same date, and South Africa agreed to implement the U.N. plan for Namibia's independence.¹² Then, with modifications contained in reports by the Secretary General to the Security Council, the Security Council adopted Resolution 632 of February 16, 1989, authorizing U.N.T.A.G. to deploy in Namibia no later than April 1, 1989, to begin implementation of the U.N. Plan for Namibia's independence.¹³

The Assistant Secretary of State for African Affairs, Chester Crocker, mediated the negotiations for the Tripartite Agreement. The fruit of these efforts was the achievement of two long-standing goals of U.S. policy in southern Africa: South Africa's agreement on granting Namibia independence based on a new, democratic constitution drafted by a constituent assembly that would be elected in U.N.-supervised free and fair elections; and the removal of Cuban intervention forces from the Angolan civil war.¹⁴

Accordingly, on March 21, 1990, the President welcomed Namibia's independence and announced the United States' intention to commence good economic relations with the new nation, stating:

The United States established diplomatic relations with the Republic of Namibia today, and we will take the necessary steps to exchange Ambassadors as quickly as possible. We welcome Namibia as a full trading partner and are taking steps to ensure that it is given access to the American market. With the end of South Africa's administration, all U.S. sanctions against Namibia are being lifted.¹⁵

Thereafter, in a letter to state governors, the State Department urged states and localities "to terminate measures

they have imposed that are inconsistent with good economic relations between the United States and Namibia."¹⁶

It should be noted that in 1970, after the termination of the mandate, the U.S. Government had announced its intention not to represent the interests of any U.S. persons investing in Namibia after the termination of the mandate, on the theory that South Africa no longer was competent to grant access to Namibian natural resources.¹⁷ Much later, U.S. sanctions against South Africa under the Comprehensive Anti-Apartheid Act of 1986 (the CAAA) were also applied to Namibia, because the CAAA specifically defined South Africa to include "any territory under the administration, legal or illegal, of South Africa."¹⁸ These and other Executive acts had created a web of special burdens for Namibian commerce in the United States. Because of changed circumstances, however, the President reversed over two decades of federal policy virtually overnight.

[T]he case of state and local sanctions against South Africa and Namibia is a textbook example of the argument for the exclusive federal management of the nation's foreign affairs in all cases.

The same cannot be said for states' and localities' management of their own foreign policies. After the Republic of Namibia became independent on March 21, 1990, many states and localities failed to follow the federal example of lifting sanctions, continuing to penalize the very victims of apartheid in Namibia their sanctions were originally intended to benefit. The State Department's letters to states and localities following Namibia's independence appeared to have little effect. According to the Investor Responsibility Research Council, as of November 1990, forty-two states and localities retained sanctions against Namibia. As of this writing, three states and twenty cities and countries continued to retain these sanctions.¹⁹

There is, of course, a serious question whether, even before Namibia's independence, state and local sanctions against South Africa (and by extension, Namibia) were inconsistent with the federal government's exclusive power to manage the nation's foreign relations or with the federal government's control of foreign commerce under the dormant commerce clause.²⁰ A case can also be made that such measures were preempted by the CAAA.²¹ It is clear, however, that state and local South Africa sanctions have had the unintended effect of hampering Namibia's development as a market-oriented democracy, undercutting the federal government's efforts in this direction and embarrassing the United States in the conduct of its foreign relations.

Foreign Policy: The Constitutional Design

The federal government's exclusive management of U.S. policy, including its policy towards Namibia, is firmly based in the text, structure and history of the U.S. Constitution. The Framers' design was a practical effort to avoid repeating apparent weaknesses of the Articles of Confederation, which in the first years of independence permitted thirteen different sovereigns to conduct thirteen different foreign policies. The prospect of multiple and inconsistent obligations and undertakings then jeopardized the very survival of the United States. It was for this reason that the constitution consolidated authority over foreign relations powers in the federal government.²²

The clauses of the Constitution specifically touching on questions relating to foreign affairs confirm this understanding. For example, the Constitution provides that the President "Shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties" and "by and with the Advice and Consent of the Senate, shall appoint Ambassadors."²³ He alone may "receive Ambassadors and other public Ministers."²⁴ The Constitution even explicitly denies states any independent authority to conclude treaties or other international agreements, for it provides "No State shall enter into any Treaty, Alliance, or Confederation,"²⁵ and "no State shall, without the consent of Congress, . . . enter into any Agreement or Contract with another State, or with a foreign Power . . ."²⁶ Notably, "Treaties made . . . under the Authority of the United States"—rather than also those made under the authority of the mem-

bers of the Confederation individually—"shall be the Supreme Law of the Land."²⁷ Finally, the constitutionally-prescribed original jurisdiction of the Supreme Court extends to "all Cases affecting Ambassadors, other public Ministers and Consul . . .,"²⁸ thus ensuring that the nation speaks with one voice in even the most mundane juridical questions relating to foreign emissaries.²⁹

In sum, our constitutional framework could not be clearer. Yet none of these bulwarks of federal supremacy and exclusivity in foreign affairs has held back the tide of state and local forays into foreign policy.

The Theory for Non-Federal Foreign Policy

States and localities could in theory draw on various constitutional sources to defend their foreign policy activities. Arguments could be framed in terms of general principles of federalism to defend procurement restrictions, or perhaps, under principles of freedom of speech, to defend legislative resolutions which purport only to express a point of view. Yet the behavior of state and local representatives is conditioned more by their desire to be reelected than the precise allocation of constitutional authority over foreign affairs.³⁰ Thus, states and localities have responded to political pressure by adopting their own sanctions. Perhaps because of the serious constitutional questions raised by these efforts, most state and local measures on South Africa, taken individually, are in fact quite pedestrian. They generally take only two forms. In one, the governmental unit requires managers of its employee pension funds to prohibit or condition investment in U.S. corporations doing business in South Africa. In the second form, the governmental unit requires its purchasing agents to prohibit or condition procurement from U.S. corporations doing business in South Africa.

The rationale for both types of measures, however, is the same: the governmental unit, ostensibly in its capacity as a market participant rather than market regulator, has chosen to set aside purely economic concerns and incorporate political or moral desiderata in deciding how to invest funds for which it is responsible and from whom to purchase goods and services.³¹

Taken together, state and local measures can have a serious impact. Given the differences in the phrasing and im-

plementation of these laws and regulations, they result in a plethora of overlapping and conflicting requirements from state to state, and locality to locality. In some cases, any goods or services originating in South Africa are barred; still others cover goods or services provided by South African incorporated entities, regardless of whether the goods or services themselves originate in South Africa. Thus, to ensure it is eligible for a significant share of state and local government business, a prudently managed U.S. corporation would be inclined to conform its business in South Africa to the strictest applicable state or local standard. Because of the number and variety of measures, corporate counsel may assume the worst and advise their clients to terminate operations in South Africa to avoid unnecessarily jeopardizing potential U.S. business.

No federal court has addressed the constitutional issues posed by these measures. However, the highest court of the State of Maryland has sustained a City of Baltimore ordinance barring the investment of city pension funds in corporations doing business in South Africa.³² Relying heavily on the trial court's finding of fact that the Ordinance itself had only a minimal and indirect impact on South Africa, the court held that the Ordinance did not unconstitutionally interfere with the federal government's exclusive power to manage U.S. foreign policy.³³ The court also relied in part on "market participant" doctrine, under which a state may discriminate in investment and procurement decisions in favor of its own citizens, to sustain the ordinance against dormant Commerce Clause challenge.³⁴ Finally, it concluded that the Comprehensive Anti-Apartheid Act of 1986 did not preempt—or "occupy the field" of—U.S. sanctions against South Africa so as to bar state measures by implication.

The court's discussion illustrates the complexities of these constitutional and statutory interpretive issues; given the difficulties, it would appear prudent for states and localities to adopt a healthy degree of self-restraint in this area. The court's decision, for example, appears to suggest that the City of Baltimore may purport to encourage the dismantling of apartheid, but only when the measures through which it chooses to implement that policy are largely ineffective. The decision thus seems to avoid confronting the constitutional principle that states not implement separate foreign policies, which is the major premise of the

Supreme Court's leading statement on the federal foreign relations power, *Zschernig v. Miller*.

In *Zschernig*, the Court invalidated an Oregon law under which foreign nationals could not claim an inheritance when their country's laws did not provide U.S. citizens the same rights, on the theory that the law had "more than 'some incidental or indirect effect in foreign countries'."³⁵ Unlike the Maryland Court of Appeals, in deciding whether the *Zschernig* test is met, courts may wish to evaluate the cumulative impact a measure would have were it to become the rule for every other state.³⁶ Similar reasoning is invoked to determine, for example, the scope of the Congress's power under the Commerce Clause.³⁷ More important, focusing their analysis on the hypothetical cumulative impact of state and local sanctions would help courts preserve their role as neutral guardians of the constitutional separation of authority between the federal government and the states by allowing them to avoid difficult judgments as to the effect of a particular measure on U.S. foreign policy.³⁸

The Maryland court also thoroughly analyzed the preemption issue. Yet, it may not have given Congress's own articulation of its intent the wide berth it deserved. Section 4 of the CAAA expressly states the CAAA is intended to "set forth a comprehensive and complete framework to guide the efforts of the United States in helping bring about an end to apartheid in South Africa."³⁹ Moreover, the CAAA implied that after a specific date, the federal government could take action to enforce the foreign policy articulated in Section 4. Section 606 barred the reduction of federal contributions to states or the imposition of any other federal penalty "by reason of application of any state or local law concerning apartheid . . . for 90 days after" the CAAA's enactment.⁴⁰ This limited safe-harbour rule supports the interpretation that Congress contemplated that states and localities would cease applying their anti-apartheid ordinances.

The Congress later adopted an additional safe-harbour provision for state and local rules on procurement from South Africa.⁴¹ Like Section 606 of the CAAA, this measure limited the Executive Branch's power to deny—essentially as a means to enforce federal foreign policy—funds appropriated by Congress for transportation projects in offending states and localities. It does not suggest the Congress intended to overturn the preemptive effect of the CAAA or ap-

prove state and local foreign policy-making that would otherwise intrude on the federal government's exclusive competence in foreign relations.

One last point may shed light on the preemption issue. The Comprehensive Anti-Apartheid Act of 1986 itself mandates the termination of a broad range of sanctions against South Africa when the government meets certain specific conditions. This suggests that Congress intended to create an integrated statutory scheme to maximize the effect of federal sanctions by providing rewards for specific progress. The retention of state and local measures that would undercut the effect of the integrated federal scheme could thus subvert the purposes of the CAAA.

The issue of greatest general interest in the Maryland court's opinion, however, is its expansive reading of the market participant exception to the dormant Commerce Clause to sanction states' and localities' expressing their citizens' views on foreign policy. The modern formulation of the dormant Commerce Clause is found in *Pike v. Bruce Church, Inc.*, in which the Court stated that:

[W]here the statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree⁴²

The market participant doctrine, which, as its name suggests, is founded on the distinction between the state's behavior as a market participant rather than market regulator, is perhaps best understood as the distinct category of "legitimate local purposes." It was first articulated in the 1976 decision *Hughes v. Alexandria Scrap Corporation*, in which Justice Powell concluded that the State of Maryland could, as purchaser of abandoned cars for purposes of a recycling program, effectively "restrict its trade to its own citizens" by imposing more onerous title proof requirements on out-of-state firms than in-state firms in establishing eligibility for state subsidies for processing Maryland-titled abandoned cars.⁴³ Four years later, in *Reeves, Inc. v. Stake*, the Court invoked the exception when the state acted as a seller. In that case, the State of South Dakota, which itself operated a cement plant, in a time

of shortage refused to sell to out-of-state buyers.⁴⁴ Then, in *White v. Massachusetts Council of Construction Employers, Inc.*, the Court sanctioned an executive order by the Mayor of Boston requiring firms performing city-funded construction projects to ensure that Boston residents made up at least half their work force. Justice Rehnquist concluded that the city—even in this case where it imposed "restrictions that reach[ed] beyond the immediate parties with which the government transact[ed] business"—engaged in participation in, rather than regulation of, the market.⁴⁵

However, a more recent Supreme Court decision suggests the market participant exception may be inapplicable to cases touching on foreign relations. In *South-Central Timber Development, Inc. v. Wunnicke*, the Court refused to extend the doctrine to preference for state residents implemented through market participation.⁴⁶ The State of Alaska had required buyers of state owned timber—mainly in the Japanese market—to process the timber in Alaska before shipping outside the state.⁴⁷ Notably, *Wunnicke* is the only market participant doctrine case thus far to involve foreign commerce, and Justice White expressly distinguished it on this ground from preceding cases where the doctrine had shielded state action from dormant Commerce Clause attack. Justice White relied on settled precedent to suggest that a state's latitude to act even in a solely proprietary capacity is far less whenever foreign commerce may be affected than it is when only domestic commerce is involved.⁴⁸ Yet, considering that Justice White also noted special significance in the case of natural resources and the imposition of the restrictions on resale, it is not clear whether the presence of foreign commerce alone would have sufficed to distinguish *Wunnicke* from previous market participant cases.⁴⁹

In sum, the Maryland Court of Appeals' use of the market participant exception goes beyond precedent. The court, indeed, failed to distinguish between state action to favor the state's own citizens, the traditional domain of the market participant exception, and state action to encourage political change in a foreign country. Consequently, its decision could be misinterpreted to transform the doctrine from a narrowly limited exception to the Supreme Court's traditional Commerce

Clause jurisprudence to a constitutional wild card in foreign affairs.

The Lessons of Namibia Sanctions

Even opponents of apartheid acknowledge that state and local forays into foreign policy making on South Africa raise serious constitutional questions.⁵⁰ Indeed, given the startling progress toward dismantling apartheid, one questions whether state and local sanctions against South Africa also will soon become anachronistic. On the theory that U.S. corporate presence is a force for improving the condition of non-white workers in South Africa, the Executive Branch has consistently opposed sanctions designed to force U.S. businesses to disinvest from South Africa.⁵¹

Moreover, as noted earlier, the CAAA contemplates an integrated statutory scheme of carrots and sticks—with one hand, imposing sanctions; and, with the other, conditioning their lifting on South Africa's meeting certain specific conditions.⁵² Thus, even if state and local sanctions against South Africa were considered constitutional before the CAAA's conditions were met, on the theory that they were consistent with a federal policy to impose sanctions against South Africa, this rationale would disappear with the lifting of federal sanctions pursuant to the sanctions' lifting provisions of the CAAA. State and local action to conform with federal policy would probably be necessary to fully implement these federal foreign policy goals. But if the case of Namibia is any guide, it is questionable whether states and localities are institutionally capable of reacting to changing circumstances overseas with the same coherence demonstrated by the federal government.

Unlike the Articles of Confederation in the 1780's, the nation's survival is not threatened today by inconsistent and incoherent foreign policies of the several states. Nonetheless, the case of state and local sanctions against South Africa and Namibia is a textbook example of the argument for the exclusive federal management of the nation's foreign affairs in all cases. The institutional incapacity of states and localities to conform their would-be foreign policies to the federal government's in a timely fashion, even if it is their desire to do so, suggest that states and localities are better off conducting their own affairs rather than the nation's.

ENDNOTES

¹See Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 822-23 (1989) (reviewing practice by states and localities and the legal issues raised by state and local sanctions).

²See generally J. DUGARD, *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS* 15-128 (1973).

³*Id.* at 379.

⁴*Id.* at 442.

⁵*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), 1971 I.C.J. Reports 4.

⁶See DEP'T ST. BULL., Dec. 5, 1966, at 871-72; *id.*, Mar. 16, 1970, at 360-61.

⁷See U.S. Oral Statement on Continued Presence of South Africa in Namibia Presented Before the International Court of Justice, DEP'T ST. BULL., Apr. 26, 1971, at 524-29.

⁸See Letter of April 10, 1978, U.N. Doc. S/12626 (1978).

⁹Resolution 435 (1978), para. 3, S/RES/435 (1978).

¹⁰See DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 38-54 (1978).

¹¹See DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (1981-89) (forthcoming).

¹²See DEP'T ST. BULL., Dec. 22, 1988, at 13-16.

¹³See S/RES/632 (1989); U.N. Doc. S/20412 (1989); U.N. Doc. S/20457 (1989).

¹⁴See Freeman, *The Angola/Namibia Accords*, 68 FOREIGN AFF., 126-41 (1989); see also NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, *NATION BUILDING: THE U.N. AND NAMIBIA* (1990).

¹⁵See President's Statement on Namibian Independence, 26 WEEKLY COMP. PRES. DOC. 452 (Mar. 21, 1990).

¹⁶See *Namibia, A Year After Independence Still Faces Sanctions of U.S. Localities*, Wall St. J., Mar. 22, 1991, at A5C, col. 1.

¹⁷See *Namibia: The Exploitation of Natural Resources and U.S. Policy: Hearing Before the Subcomm. on Africa of the House Committee on Foreign Affairs*, 99th Cong., 1st Sess. 154-59 (1985) (App. 2).

¹⁸Section 3(6) of the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440 (codified at 22 U.S.C. § 5001 *et seq.*) [hereinafter CAAA].

¹⁹See *Local U.S. Laws Confound Namibia*, IRRRC S. AFR. REP., Dec. 1990, at 70-71; see also *IRRC Divestment Action Roundup: November 1990*, at 50 ("States and Localities with Legislative References to Namibia").

²⁰Compare, e.g., Note, *State and Local Anti-South Africa Action as an Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813 (1986) [hereinafter *State and Local Action*] with L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 6-21 (1988).

²¹*Cf.*, e.g., Note, *Federal Preemption and the South Africa Sanctions: A Survival Guide for States and Cities*, 10 LOY. L.A. INT'L & COMP. L.J. 693 (1988).

²²See L. HENKIN, *THE CONSTITUTION AND FOREIGN AFFAIRS* 227 (1972).

²³U.S. CONST. art. II, § 2, cl. 2.

²⁴U.S. CONST. art. II, § 3.

²⁵U.S. CONST. art. I, § 10, cl. 1.

²⁶U.S. CONST. art. I, § 10, cl. 3.

²⁷U.S. CONST. art. VI, § 2.

²⁸U.S. CONST. art. III, § 2, cl. 2.

²⁹Nowhere than in the field of foreign affairs is it more useful to recall Justice Holmes' often quoted assertion that "I do not think the United States would come to an end if [the Supreme Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." O.W. HOLMES, *COLLECTED LEGAL PAPERS* (1920), quoted in G. GUNTHER, *CONSTITUTIONAL LAW* 48 (1980).

³⁰See generally, D. MAYHEW, *THE ELECTORAL CONNECTION* (1974).

³¹See generally, *State and Local Action*, *supra* note 20, at 822-24 (also describing the argument that companies in South Africa are not good investments).

³²*Board of Trustees v. City of Baltimore*, 317 Md. 72, 562 A.2d 720 (1989), *cert. denied*, 110 S. Ct. 1167 (1990) [hereinafter *City of Baltimore*]. See also Colomb, *Maryland Counters Apartheid: Board of Trustees v. City of Baltimore*, 14 MD. J. INT'L L. & TRADE L. 251 (1990).

³³Colomb, *supra* note 32, at 260.

³⁴*City of Baltimore*, 317 Md. at 146, 562 A.2d at 751.

³⁵389 U.S. 429, 434 (1968) (*quoting Clark v. Allen*, 331 U.S. 503, 515 (1947)).

³⁶*Cf. State and Local Action*, *supra* note 20, at 835 n.9.

³⁷See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (the aggregation approach).

³⁸See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (Justice Brennan, commenting on the nature of foreign relations issues, stated: "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature but many such questions uniquely demand single-voiced statement of the Government's views").

³⁹See CAAA, *supra* note 18, § 4.

⁴⁰*Id.*, § 606.

⁴¹See *Dire Emergency Supplementals and Transfer, Urgent Supplemental Appropriations, and Correcting Enrollment Errors Act of 1989*, Pub. L. No. 101-45, 22 U.S.C. 5117, ch. IX, tit. I.

⁴²397 U.S. 137, 142 (1970).

⁴³426 U.S. 794, 808 (1976).

⁴⁴447 U.S. 429 (1980).

⁴⁵460 U.S. 204, 211 n.7 (1983).

⁴⁶467 U.S. 82 (1984).

⁴⁷*Id.* at 85 n.4. See also *New Energy Co. v. Limbach*, 108 S. Ct. 1803, 1809 (1988) (The Court found a violation of the commerce clause where an Ohio statute provided a tax credit for the purpose of encouraging production of ethanol but denied the same tax credit for ethanol produced in any state that did not provide a similar tax credit for ethanol produced in Ohio, because the Court viewed the power to tax as a "primeval government activity" that "cannot plausibly be analogized to the activity of a private purchaser").

⁴⁸467 U.S. at 100. See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (invalidating a nondiscriminatory *ad valorem* state property tax on foreign-owned cargo containers in international commerce because it "prevents the Federal Government from 'speaking with one voice' in international trade" and so is "inconsistent with Congress' power to 'regulate Commerce with foreign Nations'"). *But see* *Container Corp. of America v. Federal Tax Board*, 463 U.S. 159 (1983) (sustaining application of California's unitary tax to a U.S. corporation with its principal place of business in the U.S., even though the corporation had foreign subsidiaries).

⁴⁹467 U.S. at 96.

⁵⁰See, e.g., Berat, *Undoing and Redoing Business in South Africa: The Lifting of the Comprehensive Anti-Apartheid Act of 1986 and the Continuing Validity of State and Local Anti-Apartheid Legislation*, 6 CONN. J. INT'L L. 7, 31-42 (1990).

⁵¹See, e.g., Statement by Deputy Assistant Secretary for African Affairs Robert S. Smith, *The Dilemma of Foreign Investment in South Africa*, DEP'T ST. BULL., June 28, 1971, at 825-27 ("We do not discourage U.S. firms from investing, because we believe U.S. firms can exercise an influence for good, even within the system").

⁵²Section 311(a) of the CAAA, *supra* note 18, provides that certain measures "shall terminate if the Government of South Africa—(1) releases all persons persecuted for their political beliefs or detained unduly without trial and Nelson Mandela from prison; (2) repeals the state of emergency in effect on the date of enactment of this Act and releases all detainees held under such state of emergency; (3) unbans democratic political parties and permits the free exercise by South Africans of all races of the right to form political parties, express political opinions, and otherwise participate in the political process; (4) repeals the Group Areas Act and the Population Registration Act and institutes no other measures with the same purposes; and (5) agrees to enter into good faith negotiations with truly representative members of the black majority without preconditions." Section 311(b) also authorizes the President to "suspend or modify" sanctions if he determines, and so reports to Congress, that "the Government of South Africa has—(1) taken the action described in paragraph (1) of subsection (a), (2) taken three of the four actions listed in paragraphs (2) through (5) of subsection (a), and; (3) made substantial progress toward dismantling the system of apartheid and establishing a nonracial democracy, unless the Congress enacts . . . a joint resolution disapproving the determination of the President . . ." which, under *I.N.S. v. Chadha*, 462 U.S. 919 (1983), would be presented to the President for his signature or veto.

