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Darfur, State Divestment Initiatives, and the Commerce Clause

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Darfur, State Divestment Initiatives, and the Commerce Clause

Cover Page Footnote

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DARFUR, STATE DIVESTMENT INITIATIVES, AND THE COMMERCE CLAUSE

Lucien J. Dhooge†

While the situation on Darfur is undoubtedly tragic, the U.S. business community opposes the politicization of U.S. capital markets.¹

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Introduction

On June 25, 2005, Rod R. Blagojevich, the governor of Illinois, signed Senate Bill 23.² Designated as the “Act to End

† Associate Professor of Business Law, Eberhardt School of Business, University of the Pacific, Stockton, CA. This article shares a factual foundation, introductory language, and some conclusions with a previous article written by the author entitled *Condemning Khartoum: The Illinois Divestment Act and Foreign Relations*, 43 AM. BUS. L.J. 245 (2006).

¹ Letter from William A. Reinsch, President, Nat’l Foreign Trade Council, to Albio Sires, Speaker, N.J. Assembly at 8 (Apr. 12, 2005), available at <http://www.nftc.org/default/council%20highlights/2005/June-July%202005.pdf>.

² Press Release, Office of the Ill. Governor, Governor Ends State Investment in Sudan (June 25, 2005), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=4097>; see also Erika Slife, *State to Bar Deals with Sudan-Linked Firms*, CHI. TRIB., June 25, 2005, at 17.

Atrocities and Terrorism in the Sudan,” Senate Bill 23 amended the Deposit of State Moneys Act³ and the Illinois Pension Code⁴ to prohibit state investment in both the government of Sudan and in companies doing business in or with the country of Sudan.⁵ Fund managers responsible for Illinois’ state pension and retirement funds were given eighteen months to divest from such companies.⁶ Legislative sponsors of the Act cited Illinois as the first state in the United States to terminate its investments in South Africa in response to the system of apartheid as well as to the widespread commission of human rights violations by the Sudanese government.⁷ Governor Blagojevich echoed these sentiments in a statement issued at the time of his signing of the Act wherein he stated: “[t]his bill sends a clear message to the Sudanese government — the people of Illinois will not condone human rights abuses and genocide, we will take our money elsewhere.”⁸

Governor Blagojevich also urged other states to adopt similar legislation in order to “show Sudan that we take human rights abuses seriously.”⁹ Several states had in fact adopted similar legislation prior to Governor Blagojevich’s signature of Senate Bill 23. California and Louisiana adopted legislation in April and May 2005 respectively, New Jersey and Oregon followed in July and August 2005 respectively, and Connecticut followed in May 2006.¹⁰ These efforts could ultimately impact \$24 billion of the

³ 15 ILL. COMP. STAT. 520/0.01-23 (2006).

⁴ 40 ILL. COMP. STAT. 5/1-101-20 (2006).

⁵ 15 ILL. COMP. STAT. 520/22.6(b)(1-5) (2006); 40 ILL. COMP. STAT. 5/1-110.5(b)(1-6) (2006). The amendments will be referred to collectively as the Illinois Act or the Act throughout this article.

⁶ 40 ILL. COMP. STAT. 5/1-110.5(a)(3) (2006).

⁷ Press Release, Office of the Ill. Governor, *supra* note 2 (quoting Ill. State Senator Jacqueline Collins as stating “[t]his is a piece of legislation that really grew out of my belief that we have a moral obligation to stand against oppression when we see it. Our humanity diminishes whenever we profit from the slaughter and suffering of others.”). Ill. State Representative Lovana Collins characterized the Act as “uphold[ing] our pact with the people to defend human rights and safeguard their tax dollars.” *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ CAL. GOV. CODE § 7513.6(b) (2006) (providing that the Bd. of Admin. of the Pub. Employees’ Ret. Sys. or the Teachers’ Ret. Bd. of the State Teachers’ Ret. Sys. “shall not invest public employee retirement funds in a company with business operations in Sudan” that meets certain criteria); CONN. GEN. STAT. § 3-37 (2006)

\$91 billion invested by state retirement systems in companies doing business in Sudan.¹¹ The divestment movement was not limited to state governments; colleges and universities throughout the United States also reviewed their portfolios.¹²

The motivation for the Illinois Act was the ongoing humanitarian crisis in the Sudanese province of Darfur.¹³ The immediate cause of this crisis was the response of the Sudanese government to two rebel movements, the Sudan Liberation Army

provides that the state treasurer “may divest, decide not to further invest state funds or not enter into any future investment in any company doing business in Sudan, and shall divest and not further invest in any security or instrument issued by Sudan”; LA. REV. STAT. ANN. § 11:263(F) (2001) provides that the [state retirement system board of trustees] “may but is not required to divest itself of any holding in a company having facilities or employees or both located in a prohibited nation”. “Prohibited nation” is defined to include Iran, Libya, North Korea, Sudan, and Syria. *Id.* § 352(B)(2); N.J. STAT. ANN. § 52:89.9-11 (West 2005) prohibits the investment of assets of any state pension or annuity fund in “any foreign company with an equity tie to [sic] government of Sudan or its instrumentalities and is engaged in business in or with the same” and requiring redemption, divestment, or withdrawal of existing investments in such companies by July 2008; OR. REV. STAT. § 293.701-820 (2005) empowers the Oregon Investment Council and the State Treasurer to divest state investment funds in companies doing business in Sudan.

¹¹ See GENOCIDE INTERVENTION FUND, AMOUNT INVESTED BY RETIREMENT SYSTEMS IN SUDAN 1-2 (2005), available at <http://www.sudancampaign.com/sudaninvestments.htm>.

¹² Amy Borrus, *Hitting Sudan in the Pocketbook; Pension Funds are Taking Notice of a Growing Push to Cut Ties to the Rogue State*, BUS. WK., May 2, 2005, at 72 (discussing the April 2005 decision of Harvard’s Corporation Committee on Shareholder Responsibility to divest \$4.4 million in stock in PetroChina Company, whose parent company is a major participant in Sudanese oil development); see also *Stanford University to Divest From Sudan*, L.A. TIMES, June 10, 2005, at B4, reporting that Stanford University would divest any “direct stock investments it holds in four international energy companies with business ties to the government” of Sudan; Jim Doyle, *UC May Divest from Firms Operating in Sudan*, S.F. CHRON., Mar. 15, 2006, at B4 (discussing the pending decision of the Board of Regents of the University of California to divest \$100 million from oil and gas companies doing business in Sudan); Press Release, Yale University, Yale Acts to Divest in Response to Darfur Genocide (Feb. 15, 2006), available at <http://www.yale.edu/opa/newsr/06-02-15-07.all.html>.

¹³ As the largest region in the largest state in Africa, Darfur borders Libya, Chad, and the Central African Republic. CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK 2 (2005) [hereinafter CIA]; see also HUM. RTS. WATCH, DARFUR DESTROYED: ETHNIC CLEANSING BY GOVERNMENT AND MILITIA FORCES IN WESTERN SUDAN 5 (2004) [hereinafter DARFUR DESTROYED]. Darfur was divided into South, West, and North regions in 1994. *Id.* Any reference to “Darfur” in this article will refer to the entire region unless otherwise specified.

(SLA) and the Justice and Equality Movement (JEM).¹⁴ After attacks by these rebel movements on government interests in Darfur in 2003, the Sudanese government armed, trained, and deployed local Arab militias known as “Janjaweed.”¹⁵ The Janjaweed and Sudanese armed forces commenced a campaign of ethnic cleansing and forced displacement of the civilian population of Darfur through aerial bombing and burning of villages, murder, and rape.¹⁶ According to Human Rights Watch, 2,000,000 civilians were forcibly displaced, 2000 villages were destroyed, and 70,000 people died as a result of these campaigns.¹⁷ In addition to the violence perpetrated upon the people of Darfur, the Sudanese military and Janjaweed poisoned wells, plundered crops and cattle, and obstructed the delivery of food, shelter, and medicine to affected populations.¹⁸

The Illinois Act has proven very controversial. In addition to the foreign relations implications of the Act,¹⁹ critics concluded

¹⁴ HUM. RTS. WATCH, WORLD REPORT, SUDAN, OVERVIEW OF HUMAN RIGHTS ISSUE IN SUDAN 166, 166 (2005) [hereinafter SUDAN OVERVIEW].

¹⁵ There are numerous spellings of “Janjaweed.” This article will utilize the spelling set forth in the previous sentence and accompanying text. The term “Janjaweed” refers to armed horsemen as well as outlaw groups in general. HUM. RTS. WATCH, DARFUR IN FLAMES: ATROCITIES IN WESTERN SUDAN 8 n.5 (2004) [hereinafter DARFUR IN FLAMES].

¹⁶ U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, SUDAN 1 (2005) [hereinafter STATE DEPARTMENT REPORT]; see also SUDAN OVERVIEW, *supra* note 14, at 166.

¹⁷ SUDAN OVERVIEW, *supra* note 14, at 166; see also Glenn Kessler, *Rice Visits Darfur Camp, Pressures Sudan*, WASH. POST, July 22, 2005, at A19. The World Health Organization estimated that 70,000 civilians were killed, 1.5 million persons were internally displaced and 200,000 refugees fled to Chad as a result of these campaigns. See STATE DEPARTMENT REPORT, *supra* note 16, at 1. Estimates of the number of civilians killed as a result of the campaigns of the Sudanese military and Janjaweed range as high as 400,000. Glenn Kessler, *Rice Defends U.S. Response to Ethnic Violence in Sudan*, WASH. POST, July 21, 2005, at A19. However, the U.S. State Dept. has estimated the number of dead between 63,000 and 146,000. *Id.* In any event, the crisis in Darfur has contributed significantly to the population of internally displaced persons in Sudan, which number six million people, the largest such population in the world. SUDAN OVERVIEW, *supra* note 14, at 167, 169. The U.S. has estimated the number of displaced persons to be 4.3 million. CIA, *supra* note 13, at 11.

¹⁸ Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497, § 3(9), (11), (12), 118 Stat. 4012, 4013-14 (2004).

¹⁹ Critics specifically noted that divestment was unlikely to change the behavior of the Sudanese government. See, e.g., Jim Doyle, *Athletes, Students, Leaders Unite to*

that the Illinois Act and similar initiatives posed serious consequences for U.S. financial markets and state pension funds. Such initiatives improperly politicized financial markets, encouraged companies singled out for divestment to seek out other sources of capital, and invited retaliation in the form of prohibitions upon the listing of U.S. companies on foreign exchanges and pension fund investment by foreign citizens.²⁰ Divestment also required massive stock sales, which would result in increased risk and volatility as well as loss of value for investors.²¹ These sales would in turn result in significant

Help Sudanese Refugees, S.F. CHRON., Mar. 5, 2006, at A13 quoting Bill Reinsch, the president of the National Foreign Trade Council, who characterizes divestment initiatives as “chicken soup diplomacy” which make proponents feel better but do not succeed in their goal of moderating the behavior of the Sudanese government; Letter from William A. Reinsch to Albio Sires, *supra* note 1, at 8. Divestment initiatives such as the Illinois Act interfered with the balancing of policies formulated by the U.S. government to achieve national foreign policy goals and placed responsibility for foreign policy in the hands of state pension managers, who were not trained or empowered to make national security decisions. See, e.g., *Sleeping with the Enemy (So to Speak)*, THE COUNCILOR (Council of Institutional Investors, Washington, D.C.), Mar. 2004, at 2, available at <http://www.ipers.org/pdfs/news/sleepenemy.pdf> [hereinafter *Sleeping with the Enemy*]; Letter from Ed Hennessee, President, Nat’l Ass’n of State Ret. Adm’s, to Frank J. Gaffney, Jr., President, Ctr. for Sec. Policy at 2 (Aug. 30, 2004), available at http://www.divestterror.org/PDF/Joint_Letter.pdf. Foreign policy critics also noted the absence of methods available to investors to determine if companies publicly traded in the United States are doing business directly or indirectly in Sudan. See, e.g., *Sleeping with the Enemy*, *supra* note 19, at 1-2. Finally, divestment punishes companies who are operating legally within Sudan and automatically and improperly links such operations with support for genocide and human rights violations. See, e.g., COUNCIL OF INSTITUTIONAL INVESTORS, DRAFT NOTE ON INVESTMENT ISSUES-SUDAN/TERRORISM 3 (2005), available at http://www.cii.org/site_files/pdfs/learning/draft_note_sudan.pdf; Letter from Ed Hennessee to Frank J. Gaffney, Jr., *supra* note 19, at 1 (“[m]erely highlighting whether a company or its subsidiary has a business tie to a country on the State Department’s terrorism list . . . does not disclose whether the company is in some way ‘aiding and abetting our enemies’”); *Sleeping with the Enemy*, *supra* note 19, at 1-2 (stating that it would “almost certainly be unwise to conclude that a company that discloses a business tie to a . . . country [on the list of states supporting terrorism] was supporting terrorism).

²⁰ See, e.g., Letter from William A. Reinsch to Albio Sires, *supra* note 1, at 8.

²¹ See Borus, *supra* note 12, at 72 (estimating that Illinois pension and retirement funds would have to divest themselves of investments valued at \$368 million, which is 3.3% of the value of its total assets); see also Gilbert Chan, *Pension Funds Under Pressure to Avoid Sudan-Related Investments*, SACRAMENTO BEE (Sacramento, Ca.), May 11, 2005, at D1 quoting Frederick Nesbitt, executive director of the National Conference on Public Employee Retirement Systems, as stating “funds simply can’t

transaction costs.²² In addition to these losses and costs, state pension funds would be required to engage in continual and expensive monitoring in order to identify companies investing in Sudan and to ensure that existing investments did not commence operations there.²³

This article examines the Illinois Divestment Act and its consistency with the Commerce Clause of the United States Constitution. First, it examines current developments in Sudan with particular emphasis on the situation in Darfur, the resulting humanitarian crisis, and the international response. It then examines the provisions of the Illinois Act. Finally, the article analyzes the consistency of the Illinois Divestment Act with the Commerce Clause. The article concludes that the Illinois Divestment Act is an unconstitutional intrusion upon the federal government's authority to regulate commerce.

I. The Conflict in Darfur

Sudanese history has been marked by almost continual conflict since its independence from the United Kingdom and Egypt in 1956. This history of conflict includes the region of Sudan known as Darfur. Non-Arab and African ethnic groups, known as *zurga*, are primarily agriculturalists inhabiting central Darfur.²⁴ Darfur's pastoralists are primarily of Arab descent and inhabit the state's desert north and drought-prone south.²⁵ These groups came into conflict in the mid-1980s as a result of severe drought and

dump volumes of stock onto the market without risking the loss of millions".

²² BARCLAYS GLOBAL INVESTORS, ANALYSIS OF IRRC-CSAG TERROR/PROLIFERATION SCREEN: BENCHMARK RISK AND INVESTMENT IMPLICATIONS 1 (2004).

²³ *Sleeping with the Enemy*, *supra* note 19, at 2.

²⁴ DARFUR IN FLAMES, *supra* note 15, at 6. The largest ethnic group among the *zurga* is the Fur. *Id.* at 6 n.2. The term "dar" refers to a homeland or territory. *Id.* As such, Darfur is the dar of the Fur people. *Id.* Other ethnic groups within the *zurga* are the Bergid, the Berti, the Masalit, the Tama, and the Tunjur peoples. *Id.* at 6.

²⁵ *Id.* Northern Darfur is inhabited primarily by nomadic and semi-nomadic camel herding tribes, including the Arab Beni Hussein, Irayqat, Mahariya, Northern Rizeigat, and the African Zaghawa. *Id.* Cattle herding Arab tribes such as the Beni Halba, Habbaniya, and the Southern Rizeigat inhabit the southern and eastern areas of Darfur. *Id.* Regardless of ethnicity, almost all Darfurians are members of the Tijaniya sect of Sufi Islam. DARFUR DESTROYED, *supra* note 13, at 28.

increasing desertification in northern Darfur, which caused increased southward migration of Arab pastoralists.²⁶ Tribal leaders most often negotiated resolutions of resulting clashes between these groups.²⁷ However, political issues proved more intractable. In 1986, Arab tribes formed the *Tujammo al Arabi* (Arab Alliance) to counteract a perceived lack of representation in local government.²⁸ These efforts were countered by similar organizations among the *zurga* to counteract the national government's favoritism of Arab groups.²⁹ Hostilities broke out again in the late 1990s after Arab groups began to migrate to central Darfur earlier than usual.³⁰ The combination of ethnic tensions, extended drought, and the resulting competition for scarce resources, political disagreement, and ready availability of firearms rendered these clashes increasingly bloody and beyond the control of local tribal leaders.³¹

Civil war erupted in February 2003 with attacks upon government property and troops, including the capture of the Darfurian town of Gulu, by members of the SLA.³² These attacks were followed by other successful attacks on the Sudanese People's Armed Forces (SPAF) throughout North Darfur.³³ JEM emerged later in 2003 and joined in these attacks.³⁴ The Sudanese government responded through reprisals as well as recruitment and utilization of the Janjaweed. Consisting primarily of nomadic groups living in Darfur and neighboring Chad, the Janjaweed are led by emirs from local Arab tribes.³⁵ The Sudanese government

²⁶ DARFUR IN FLAMES, *supra* note 15, at 7.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ DARFUR DESTROYED, *supra* note 13, at 6.

³¹ *Id.*

³² DARFUR IN FLAMES, *supra* note 15, at 9. Originally named the Darfur Liberation Front, the SLA demanded the creation of a socio-economic initiative for the region, the disarmament of tribal militias and negotiation of a power-sharing agreement with the national government. *Id.*

³³ *Id.* For example, in April 2003, SLA forces destroyed government aircraft and looted fuel and arms depots in El Fashir, the capital of North Darfur, and Mellit, the second largest town in North Darfur. *Id.*

³⁴ *Id.* at 11.

³⁵ DARFUR DESTROYED, *supra* note 13, at 45. Human Rights Watch has identified

clothes, feeds, arms, and provides satellite telephones to approximately 20,000 Janjaweed.³⁶ Janjaweed officers and militia members also receive salaries from the Sudanese government as well as assurances of immunity from local prosecution for any crimes committed while operating in Darfur.³⁷

Numerous serious human rights violations have been committed by all parties to the Darfur conflict. The primary target of these violations has been civilian populations. Darfurians have suffered numerous and significant violations of their personal integrity and well-being. The World Health Organization estimates that 70,000 civilians have died as a result of the conflict in Darfur.³⁸ Civilians, government officials, and humanitarian aid workers have been subjected to abduction by the SPAF as well as rebel forces.³⁹ Civilians suspected of supporting the SLA or JEM have been arrested, detained for prolonged periods of time and, in some cases, tried, convicted, and sentenced to death by special courts operating in secrecy.⁴⁰ Such persons were likely subjected to torture and beatings by the SPAF and other government security forces.⁴¹ There has been a “clear and documented pattern of

the leaders of the Janjaweed as emirs from the Awlad Zeid, Beni Halba, Ma'alia, and Misseriya tribes. *Id.*

³⁶ *Id.* at 46. The uniforms of the SPAF and the Janjaweed are identical except for a badge depicting an armed horseman on the breast of Janjaweed uniforms. *Id.* Given this similarity, the only method to distinguish forces is that the Janjaweed usually attack on horses or camels. Hum. Rts. Watch, Q & A: Crisis in Darfur (2004), http://hrw.org/english/docs/2004/05/05/darfur8536_txt.htm (last visited Mar. 5, 2007); see also DARFUR IN FLAMES, *supra* note 15, at 22-26 (describing the relationship between the SPAF and the Janjaweed).

³⁷ DARFUR DESTROYED, *supra* note 13, at 46, 49. According to Human Rights Watch, Janjaweed officers receive £600,000 Sudanese (U.S. \$233) per month. *Id.* at 46. Men with horses and camels receive £300,000 Sudanese (U.S. \$117) per month while men without horses or camels receive monthly salaries of £200,000 (U.S. \$79). *Id.*

³⁸ See STATE DEPARTMENT REPORT, *supra* note 16, at 1.

³⁹ *Id.* at 3 (describing the abduction of government officials and humanitarian aid workers in Darfur); see also DARFUR IN FLAMES, *supra* note 15, at 22-26 (describing abductions of children in Darfur).

⁴⁰ STATE DEPARTMENT REPORT, *supra* note 16, at 5. Defendants in such cases are not permitted access to legal representation and are granted only one week to appeal decisions prior to the carrying out of their sentence. *Id.* at 6.

⁴¹ *Id.* at 4. Torture is not limited to the SPAF and its allies. In 2004, the African Union's Ceasefire Commission for Darfur reported that the SLA detained Arab civilians who were later subjected to repeated beatings. *Id.*

sexual abuse” by all parties according to the United States Department of State.⁴² Instances of rape were primarily committed by members of the Janjaweed and the SPAF and directed at women of all ages in North Darfur.⁴³

Darfurians have also suffered catastrophic interference with their property rights. The SPAF has utilized aircraft, primarily Antonov supply planes converted for use in aerial assaults, helicopter gunships and MiG jet fighters, to destroy hundreds of villages inhabited by Fur, Masalit, and Zaghawa civilians throughout Darfur; this destruction was usually in preparation for an immediate ground attack by the Janjaweed.⁴⁴ These attacks have resulted in destruction of villages, food stocks, water sources, and other resources essential for the survival of civilian populations, in addition to widespread looting.⁴⁵ Villages may avoid such attacks only through the payment of bribes to the

⁴² *Id.* at 4, 8. Louise Arbour, the United Nations’ High Commissioner for Human Rights, characterized rape, including gang rape, by members of the SPAF as ongoing in July 2005. See Colum Lynch, *U.N. Report Details Rampant Sexual Violence in Darfur*, WASH. POST, July 30, 2005, at A20. According to Commissioner Arbour, the number of actual rapes is much higher than those reported due to “fear of reprisal” and the absence of adequate redress for sexual violence. *Id.* For example, rape victims “have been denied access to confidential medical treatment” for the purpose of gathering evidence of a crime, and Sudanese law enforcement often refuses to register or investigate claims of sexual abuse. *Id.* Despite the “establishment of a committee to combat gender crimes and special criminal court,” accountability for and punishment of perpetrators of sexual violence remains inadequate. *Id.* Commissioner Arbour noted that “of the 230 cases of rape monitored by United Nations’ human rights observers” in Sudanese courts, only seven convictions have resulted and none arose from sexual abuse that had occurred in Darfur. *Id.*

⁴³ DAFUR IN FLAMES, *supra* note 15, at 29 (describing sexual abuse and rape committed by the Janjaweed in areas under the control of the Zaghawa in North Darfur). Rape is a common occurrence during attacks by the Janjaweed in Fur, Masalit, and Zaghawa areas of Darfur. In May 2004, Human Rights Watch stated that reported instances of rape occurred in half of the villages destroyed in these areas by the Janjaweed. DAFUR DESTROYED, *supra* note 13, at 33.

⁴⁴ DAFUR DESTROYED, *supra* note 13, at 24; see also STATE DEPARTMENT REPORT, *supra* note 16, at 7.

⁴⁵ DAFUR DESTROYED, *supra* note 13, at 26, 28 (describing the destruction of villages and theft of cattle, horses, goats, and sheep in West Darfur); see also DAFUR IN FLAMES, *supra* note 15, at 31. Human Rights Watch also alleged that the SPAF attacked mosques and desecrated religious articles throughout Darfur despite the common Islamic heritage of the Sudanese government and the majority of the inhabitants of Darfur. See DAFUR DESTROYED, *supra* note 13, at 27-28.

Janjaweed.⁴⁶ As a result, more than one million people, approximately thirty percent of Darfur's population, "have been forcibly evicted from their homes" and have been deprived of most of their personal property.⁴⁷ The majority of these people have been unable to return to their villages as a result of ongoing occupation by the Janjaweed.⁴⁸

The crisis in Darfur has created an estimated two million internally displaced persons, including more than 200,000 refugees that have fled to neighboring Chad.⁴⁹ Between sixty and seventy-five percent of such persons require sustained humanitarian assistance, including food, water, sanitation, shelter, and health services.⁵⁰ However, humanitarian relief has been available on a reliable basis to only half of those persons in need.⁵¹ A significant cause of the lack of availability of humanitarian relief has been the Sudanese government's policy of hindering access to Darfur by relief agencies through denial of entry visas and travel permits, and harassment by the SPAF, the Janjaweed, and other government-backed militia and law enforcement personnel.⁵² This pattern of human rights violations led Human Rights Watch to conclude in May 2004 that the Sudanese

⁴⁶ DAFUR IN FLAMES, *supra* note 15, at 22. Human Rights Watch has documented one instance where a village paid U.S. \$7000 to the Janjaweed in order to avoid attack. *Id.*

⁴⁷ *Id.* at 40.

⁴⁸ *Id.* at 34.

⁴⁹ STATE DEPARTMENT REPORT, *supra* note 16, at 1; *see also* The Secretary-General, *Report of the Secretary-General on the Sudan*, ¶ 26, delivered to the Security Council, U.N. Doc. No. S/2005/57 (Jan. 31, 2005). In 2004, Human Rights Watch reported increased efforts by the SPAF and the Janjaweed to obstruct displaced civilians from seeking refuge in Chad. DAFUR DESTROYED, *supra* note 13, at 37; *see also* DAFUR IN FLAMES, *supra* note 15, at 35. These efforts included cross-border raids upon people residing in Chad. DAFUR IN FLAMES, *supra* note 15, at 37.

⁵⁰ The Secretary-General, *Monthly Report of the Secretary-General on Darfur*, ¶ 13, delivered to the Security Council, U.N. Doc. No. S/2005/378 (June 9, 2005).

⁵¹ The Secretary-General, *Report of the Secretary-General on the Sudan*, ¶ 22, delivered to the Security Council, U.N. Doc. No. S/2005/68 (Feb. 4, 2005). The Secretary-General estimated that over half of those persons in need received food, shelter, and access to medical care, but less than half had access to clean water. *Id.*; *see also* Emily Wax, *A Cry for Respect in a Sudan Camp*, WASH. POST, Dec. 27, 2005, at A1 (describing conditions in refugee camps for civilians displaced by the conflict in Darfur).

⁵² STATE DEPARTMENT REPORT, *supra* note 16, at 8, 12.

government was engaged in a “policy of ‘ethnic cleansing’” of Fur and Masalit populations, especially in West Darfur.⁵³ The United Nations has concurred in this conclusion on numerous occasions.⁵⁴

⁵³ DAFUR DESTROYED, *supra* note 13, at 39. Although lacking a formal definition under international law, “ethnic cleansing” has been defined by a United Nations’ Commission of Experts as:

a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas . . . [the] purpose [of which] appears to be the occupation of territory to the exclusion of the purged group or groups.

U.N. Sec. Council, *Report of the United Nations’ Commission of Experts Established Pursuant to Security Council Resolution 780*, § 3(B), delivered to the Security Council, U.N. Doc. No. S/1994/674 (May 27, 1994).

⁵⁴ See, e.g., Press Release, United Nations, Sudan: Envoy Warns of Ethnic Cleansing as Security Council Calls for Ceasefire (Apr. 2, 2004), available at <http://www.un.org/apps/news/storyAr.asp?NewsID=10307&Cr=sudan&Cr1=> (quoting Jan Egeland, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, as describing the humanitarian situation in Darfur as ethnic cleansing). The Sudanese government justified its relationship with the Janajweed as necessary to quash the rebellion. DAFUR DESTROYED, *supra* note 13, at 43 (quoting Sudanese President Field Marshall Umar Hassan Ahmad al-Bashir that “the horsemen” would act in coordination with the SPAF to defeat the SLA and JEM). In April 2004, Sudanese Foreign Minister Mustafa Osman Ismail admitted that the government “may have turned a blind eye toward the militias” but defended their actions as “targeting the rebellion.” *Id.* Officials subsequently admitted that the government’s handling of the crisis was flawed. See Emily Wax, *Sudan’s Unbowed, Unbroken Inner Circle*, WASH. POST, May 3, 2005, at A1, A14 quoting Sudanese Vice President Ali Uthman Muhammad Taha that “[n]obody would say we have been perfect in handling Darfur. In war, things happen that are outside of the normal In such a complex situation, there would be gaps and shortcomings. One wishes that this chapter in Sudan’s history had not taken place”. The Sudanese government established the Independent Investigation Committee in May 2004 to investigate reports of human rights violations in Darfur. Released in May 2005, the Committee’s report concluded that, although serious human rights violations were committed by all parties to the conflict in Darfur, genocide did not occur, the number of persons killed was exaggerated, and rape was not widespread. See *Report of the Secretary-General on the Sudan*, *supra* note 51, ¶ 13 (summarizing the report of the Independent Investigation Committee on human rights violations in Darfur). These conclusions were universally rejected, and the Sudanese government was condemned for failing to investigate or charge Janjaweed leaders for crimes committed against civilians in Darfur. See, e.g., STATE DEPARTMENT REPORT, *supra* note 16, at 2. The United Nations’ Secretary-General concluded that the government’s efforts failed to address the “root causes of impunity” to human rights violations, which required “intervention at every level of government, extensive legislative review and amendment, and the creation of effective mechanisms and procedures to monitor the actions of the authorities.” *Monthly Report of the Secretary-General on Darfur*, *supra* note 50, ¶ 20.

The United States Congress and the Bush Administration have also concurred in this characterization.⁵⁵

Diplomatic efforts to end the crisis in Darfur commenced immediately after the outbreak of violence in 2003. Under the auspices of the African and European Unions, and the governments of Chad and the United States, the Sudanese government, SLA, and JEM signed a “humanitarian ceasefire agreement” in N’Djamena, Chad on April 8, 2004 (N’Djamena Agreement).⁵⁶ In addition to mandating a cessation of hostilities, the N’Djamena Agreement obligated the African Union to commit personnel to monitor the ceasefire, establish a commission to monitor and report on ceasefire violations, and required all parties to facilitate the delivery of humanitarian aid to civilians.⁵⁷ Most importantly, the N’Djamena Agreement obligated the Sudanese government to “commit itself to neutralize” the Janjaweed.⁵⁸ A joint communiqué between the government of Sudan and the United Nations’ Secretary-General on July 3, 2004 addressed shortcomings in the N’Djamena Agreement by requiring the

⁵⁵ The U.S. Congress declared the actions of the Sudanese military and Janjaweed to be genocide on July 22, 2004. See Darfur Genocide Accountability Act of 2005, H.R. 1424, 109th Cong. § 3(1) (2005). Then U.S. Secretary of State Colin Powell, reached the same conclusion in testimony before the U.S. Senate Committee on Foreign Relations on September 9, 2004. See Comprehensive Peace in Sudan Act of 2004, *supra* note 18, § 3(15). Secretary Powell stated that “[w]hen we reviewed the evidence compiled by our team, along with other information available to the State Department, we concluded that genocide has been committed in Darfur and that the Government of Sudan and the [Janjaweed] bear responsibility—and genocide may still be occurring.” *Id.* President Bush subsequently endorsed this conclusion. Darfur Accountability Act of 2005, S. 495, 109th Cong. § 3(3) (2005); see also Jim VandeHei, *In Break with U.N., Bush Calls Sudan Killings Genocide*, WASH. POST, June 2, 2005, at A19. In an address to the United Nations General Assembly on September 21, 2004, President Bush stated “[a]t this hour, the world is witnessing terrible suffering and horrible crimes in the Darfur region of Sudan, crimes my government has concluded are genocide.” Darfur Accountability Act of 2005, *supra* § 3(3). President Bush reiterated this conclusion on June 2, 2005 when he stated that he concurred with former Secretary of State Powell’s conclusion that the situation in Darfur constituted genocide. VandeHei, *supra* at A19.

⁵⁶ Humanitarian Ceasefire Agreement on the Conflict in Darfur, Apr. 8, 2004, available at http://www.darfurinformation.com/cf_ceasefire_agreement.asp [hereinafter N’Djamena Agreement]; see also DARFUR DESTROYED, *supra* note 13, at 51-52 (discussing the “humanitarian ceasefire agreement”); SUDAN OVERVIEW, *supra* note 14, at 166.

⁵⁷ N’Djamena Agreement, *supra* note 56, arts. 1-4, 8.

⁵⁸ *Id.* art. 6.

government to disarm the Janjaweed, improve humanitarian access, and prevent further human rights violations.⁵⁹ These agreements were supplemented by the Abuja Protocol of November 9, 2004, which required all parties to the conflict to guarantee free movement and access for humanitarian workers and protection of civilians.⁶⁰

The N'Djamena Agreement and Abuja Protocol were predecessors to two further agreements concerning Darfur. The Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur (Declaration of Principles), signed on July 5, 2005, set forth a seventeen point plan to achieve a peaceful solution to the conflict in Darfur by the end of 2005.⁶¹ However, the Declaration of Principles failed to resolve the crisis. As noted by the U.N. Secretary-General in February 2005, "the Darfur political process [had] not succeeded so far in bearing the hoped-

⁵⁹ Joint Communiqué between the Gov't of Sudan and the United Nations on the Occasion of the Visit of the Secretary General to Sudan, at 2-3 (July 3, 2004), *available at* <http://www.unmis.org/English/documents/JC.pdf>.

⁶⁰ Protocol between the Gov't of the Sudan, the Sudan Liberation Movement/Army and the Justice and Equality Movement on the Improvement of the Humanitarian Situation in Darfur, arts. 1-2, (Nov. 9, 2004), *available at* <http://www.humanitarianinfo.org/darfur/uploads/protocol/The%20Humanitarian%20Situation%20Protocol.doc> [hereinafter Abuja Protocol].

⁶¹ Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur, July 5, 2005, *available at* <http://www.africa-union.org/DARFUR/DOP%205-7-05%20new.pdf> [hereinafter Declaration of Principles]. The seventeen principles are: (1) respect for diversity; (2) commitment to democracy, political pluralism, the rule of law, the independence of the judiciary, freedom of the media, accountability and transparency; (3) citizenship rather than religion, ethnicity or gender as the basis for civil rights; (4) commitment to a federal system of government; (5) effective representation of all persons at all levels of government; (6) equitable distribution of national wealth; (7) power and wealth sharing in accordance with "fair criteria" to be agreed upon by the parties; (8) compliance with international standards of humanitarian law; (9) the right of internally displaced persons to return to their villages; (10) rehabilitation and reconstruction of Darfur; (11) the restoration of peaceful co-existence among all communities in Darfur; (12) affirmation of tribal land ownership and other historical rights relating to real property; (13) the creation of security arrangements to ensure the well-being of all Darfurians; (14) the submission of agreements between the parties to Darfurians for approval; (15) the participation and assistance of the African Union and the international community in the implementation of such agreements; (16) the incorporation of agreements between the parties into Sudan's constitution; and (17) the good faith negotiation of agreements between the parties. *Id.* arts. 1-17.

for fruits.”⁶² The Secretary-General acknowledged that achievement of a peaceful resolution to the crisis in Darfur had been complicated by issues underlying the conflict, including a lack of confidence as a result of a continual pattern of ceasefire violations and efforts by all parties to improve their military and political position pending the outcome of the final stages of a negotiated settlement.⁶³ Other causes which contributed to the uncertainty of success of the peace process included the small size of the African Union peacekeeping force, its resultant inability to prevent continuing attacks by the Janjaweed, the absence of clear lines of separation between the opposing parties, and the eruption of factional fighting between supporters of the SLA and JEM.⁶⁴

The Declaration of Principles was followed by the Darfur Peace Agreement between the Sudanese government and the SLA, signed on May 5, 2006.⁶⁵ Negotiated under the auspices of the United States and subsequently endorsed by the United Nations, the Darfur Peace Agreement consisted of five separate initiatives.⁶⁶ First, the Sudanese government was required to complete a “verifiable disarmament and demobilization” of the Janjaweed by mid-October 2006, followed by disarmament and demobilization

⁶² *Report of the Secretary-General on the Sudan*, *supra* note 51, ¶ 35; see also Colum Lynch, *Official Pushes for U.N. Force in Sudan*, WASH. POST, Jan. 14, 2006, at A16 quoting Jan Pronk, the U.N. special envoy to Sudan, that “[l]ooking back at three years of killings and cleansing in Darfur, we must admit that our peace strategy so far has failed”.

⁶³ *Report of the Secretary-General on the Sudan*, *supra* note 51, ¶ 35. More recently, the Secretary-General has expressed pessimism with respect to the outcome of the crisis absent “a major new international effort.” Kofi A. Annan, *Darfur Descending*, WASH. POST, Jan. 25, 2006, at A19.

⁶⁴ See Daniel Pepper, *Darfur Stymies Peacekeepers, Few Resources, Strict Rules of Engagement Severely Hamper African Union Contingent*, S.F. CHRON., Dec. 22, 2005, at A11 (describing the deteriorating security situation in Darfur).

⁶⁵ JEM and other smaller rebel groups refused to endorse the Darfur Peace Agreement. Glenn Kessler, *Sudanese, Rebels Sign Peace Plan for Darfur*, WASH. POST, May 6, 2006, at A14. These groups condemned the Darfur Peace Agreement as failing to provide adequate compensation for victims of the violence, or a significant role for the groups in regional government as well as failing to permit rebel groups to participate in the disarmament of the Janjaweed. See Opheera McDoom, *Government and Former Darfur Rebels Work to Heal Rift*, REUTERS, Aug. 5, 2006, available at <http://news.scotsman.com/latest.cfm?id=1137202006>.

⁶⁶ See S.C. Res. 1679, ¶¶ 1-4, U.N. Doc. S/RES/1679 (May 16, 2006); see also Kessler, *supra* note 65, at A1.

of rebel forces.⁶⁷ Second, the Darfur Peace Agreement created mechanisms by which the people of the region could determine their status.⁶⁸ Third, the international community agreed to convene a donors' conference with the goal of raising \$700 million to implement the Agreement for the first three years.⁶⁹ Fourth, buffer zones were to be created around refugee camps and humanitarian assistance corridors.⁷⁰ Finally, the Sudanese government agreed to pay \$30 million in compensation to victims of the conflict.⁷¹

Despite the Darfur Peace Agreement, the violence remained unabated at the time of preparation of this article. Fifty thousand additional people were displaced in Darfur in the two months after the signing of the Peace Agreement as a result of intensified fighting between the SPAF, the Janjaweed, and rebel forces that refused to endorse the peace process.⁷² Baba Gana Kingibe, the commander of the African Union peacekeeping mission, characterized security in Darfur as "plummeting," and the United Nations described conditions as going from "real[ly] bad to catastrophic" as evidenced by the killing of eight humanitarian aid workers in July 2006.⁷³ As a result, efforts of groups such as

⁶⁷ U.S. DEP'T OF STATE, FACT SHEET 2006/472, DARFUR PEACE AGREEMENT (May 8, 2006). Disarmament and demobilization of the Janjaweed was to be certified by the African Union. *Id.* Four thousand former combatants were to be integrated into the SPAF through incorporation into the police forces and through education and training programs. *Id.*

⁶⁸ *Id.* Rebel signatories were awarded the position of Senior Assistant to the President and Chairperson of the newly created Transitional Darfur Regional Authority, the fourth highest position in the Sudanese government. *Id.* A referendum was scheduled for July 2010 in which Darfurians would determine whether to establish the province as a unitary region with a single government. *Id.* Prior to the referendum, signatory rebel groups would be represented in the Sudanese National Assembly and in the Darfur State Legislature, Governorship, and Ministries. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See Todd Pitman, *Little Peace Seen in Darfur After Accord*, ASSOCIATED PRESS, Aug. 8, 2006, available at http://www.boston.com/news/world/africa/articles/2006/08/08/little_peace_seen_in_darfur_after_accord/.

⁷³ See Bradley S. Klapper, *U.N.: Darfur is Becoming "Catastrophic,"* ASSOCIATED PRESS, Aug. 10, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/10/AR2006081000420.html>.; see also Pitman, *supra* note 72.

Oxfam, CARE, the International Rescue Committee, and World Vision were seriously impeded, and the United Nations' World Food Program was unable to deliver supplies to more than 400,000 people.⁷⁴ Efforts to bolster the presence of the African Union in conjunction with United Nations' peacekeepers also failed. Former Secretary-General Kofi Annan's call for an African Union force numbering between 15,000 and 18,000 troops serving alongside 5,300 United Nations' officers fell on deaf ears as the Sudanese government continued to refuse United Nations' personnel access into the region.⁷⁵ Consequently, it presently appears that the Darfur Peace Agreement will serve to be as unsuccessful as its predecessors in ending the violence wracking the province.

American critics have noted the lack of success of international efforts to resolve the crisis in Darfur as well as the inadequacy of current policy.⁷⁶ Such critics have proposed a four point plan to strengthen the American response to the crisis.⁷⁷

⁷⁴ See Pitman, *supra* note 72.

⁷⁵ See Edith M. Lederer, *U.N. Chief Calls for Strengthened Darfur*, ASSOCIATED PRESS, Aug. 2, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/08/01/AR2006080101641_pf.html.

⁷⁶ See, e.g., Barack Obama & Sam Brownback, *Policy Adrift on Darfur*, WASH. POST, Dec. 27, 2005, at A25.

⁷⁷ Current U.S. policy with respect to Sudan consists of four separate initiatives. Initially, the U.S. designated Sudan as a state sponsor of terrorism in August 1993 as a result of its offering of sanctuary to numerous terrorist leaders, including Osama bin Laden, and its support of insurrections and radical organizations in Algeria, Egypt, Eritrea, Ethiopia, Tunisia, and Uganda. BUREAU OF AFRICAN AFFAIRS, U.S. DEPT. OF STATE, BACKGROUND NOTE: SUDAN (NOV. 2006), available at <http://www.state.gov/r/pa/ei/bgn/5424.htm>. States determined by the U.S. Secretary of State to have repeatedly provided support for acts of international terrorism may be designated as state sponsors pursuant to the Foreign Assistance Act, the Arms Export Control Act, and the Export Administration Act. See Foreign Assistance Act, 22 U.S.C. § 2371(a) (2000); Arms Export Control Act, 22 U.S.C. § 2780(a-b) (2000); Export Administration Act, 50 U.S.C. App. § 2405(j)(1)(A-B) (2000). When read together, the primary sanctions resulting from such a designation are restrictions on U.S. foreign assistance, a ban on the sale and exportation of defense-related goods, controls placed upon dual use goods and restrictions upon financial transactions. See *id.* States currently listed as sponsors of terrorism by the U.S. Dep't of State are Cuba, Iran, Libya, North Korea, Sudan, and Syria. COUNTERTERRORISM OFFICE, U.S. DEPT. OF STATE, STATE SPONSORS OF TERRORISM 1 (2005), available at <http://www.state.gov/s/ct/c14151.htm>. Second, President Clinton issued Executive Order 13,067 on November 5, 1997. The Executive Order blocked all property interests of the Sudanese government presently located in the

U.S., coming within the U.S. in the future, or coming into the possession or control of U.S. persons, including overseas branches. Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (Nov. 3, 1997). Section 2 of the Executive Order prohibited importation of goods and services of Sudanese origin, the direct or indirect exportation or re-exportation of any goods, technology or services from the United States or by a U.S. person to Sudan, and the performance of all contracts by U.S. persons in support of an industrial, commercial, public utility, or governmental project in Sudan, including the extension of credit and loans and transactions relating to the transportation of cargo. *Id.* § 2(a-g). The Executive Order was implemented by the Sudanese Sanctions Regulations, which imposed significant criminal and civil penalties upon violators. *See* Sudanese Sanctions Regulations, 31 C.F.R. § 538.101-538.901 (2004). Criminal penalties include up to ten years' imprisonment and fines up to \$500,000 for businesses and \$250,000 for individuals. *Id.* § 538.701(a)(2). Civil penalties may also be imposed in an amount of no more than \$50,000 per violation. *Id.* § 538.701(a)(1). The third U.S. policy initiative was the Sudan Peace Act. Signed by President Bush on October 21, 2002, the Sudan Peace Act states that the U.S. should use all available means to facilitate a comprehensive solution to the civil war, including multilateral "economic and diplomatic tools," "reconciliation mechanisms," "humanitarian assistance," and "cooperation its among trading partners and within multilateral institutions." Sudan Peace Act, § 2(16)(A-E), 50 U.S.C. § 1701 (2000). Section 6 of the Act requires numerous reports from the president and the secretaries of the treasury and state regarding ongoing efforts to resolve the conflict, U.S. efforts to oppose the extension of loans, credits, and guarantees by international financial institutions to the Sudanese government, the state of the Sudanese oil and gas industry and the status of human rights and respect for humanitarian law in the country. *Id.* §§ 6(b)(1)(A-D), 6(d), 8 (1-4), 11(a-b). The Act empowers the president to impose sanctions, including instructions to U.S. directors of international financial institutions to actively oppose the extension of any loan, credit, or guarantee to the Sudanese government, the downgrading or suspension of diplomatic relations, consideration of all "necessary and appropriate steps" to deny the Sudanese government access to oil revenues to purchase military equipment or finance military operations and introduction of a resolution in the U.N. Security Council imposing an arms embargo. *Id.* § 6(b)(2)(A-D). Finally, the Comprehensive Peace in Sudan Act became law on December 23, 2004. The Comprehensive Peace Act extends the Sudan Peace Act to include events in Darfur. Comprehensive Peace in Sudan Act, § 4(a), 50 U.S.C. § 1701 (2000). The Comprehensive Peace Act also instructs the president to seek the imposition of a multilateral sanctions regime through a Security Council resolution in the event of noncompliance by the Sudanese government with the N'Djamena Agreement or previous Security Council resolutions on Darfur. *Id.* § 4(b)(6)(A). These sanctions include an embargo on the importation of Sudanese oil, a freeze on the assets of Sudanese government and military officials participating in genocide in Darfur as well as businesses controlled by the Sudanese government, and restrictions upon the transit of such officials. *Id.* § 4(b)(6)(C)(i-ii). These sanctions may also be unilaterally imposed by the United States. *Id.* §§ 4(b)(7-8), 6(a-c). The Comprehensive Peace Act also directs the Secretary of State to prepare reports regarding the sources and status of financing and construction of infrastructure and pipelines for oil exploitation and the ability of the government to finance military operations utilizing proceeds derived from oil exploitation, the relationship between Sudan's arms industry and "major foreign business enterprises," and the status of human rights and respect for humanitarian law in

First, critics have called upon the Bush Administration to transform the African Union monitors into “a sizable, effective multinational force.”⁷⁸ Second, the Bush Administration has been urged to increase pressure on SLA and JEM to unify their negotiating positions as well as on the Sudanese government with respect to power sharing and equitable allocation of natural resources in Darfur.⁷⁹ Third, critics have urged the United States to place additional pressure on states whose involvement in the conflict has proven destructive or destabilizing, specifically, Chad, Eritrea, and Libya.⁸⁰ Finally, the Bush Administration was urged to support the Darfur Peace and Accountability Act, which the President ultimately signed into law on October 13, 2006.⁸¹

the country. *Id.* § 8(a-b).

⁷⁸ See, e.g., Obama & Brownback *supra* note 76, at A25. Obama and Brownback contend that this goal may be achieved through increasing the number of monitors, pressuring the Sudanese government to permit advisers from Western states to embed with the African Union monitors, providing additional military equipment to such monitors and urging the monitors to undertake additional efforts to protect civilians. *Id.* There are recent indications that a peacekeeping force under the control of the U.N. may ultimately be deployed in Darfur. See Colum Lynch, *U.N. Seeks Plan for Peace Force in Sudan*, WASH. POST, Feb. 4, 2006, at A14 (describing a request by the Security Council to the Secretary-General to prepare contingency plans to authorize a peacekeeping force for deployment in Darfur); see also Michael A. Fletcher, *Larger Darfur Force Needed, Bush, Annan Say*, WASH. POST, Feb. 14, 2006, at A12. In February 2006, President Bush called for the deployment of 7,000 international troops to serve under U.N. command to supplement forces provided by the African Union. See Jim VandeHei & Colum Lynch, *Bush Calls for More Muscle in Darfur*, WASH. POST, Feb. 18, 2006, at A1. These forces would receive planning and logistical assistance from NATO. *Id.*

⁷⁹ Obama & Brownback *supra* note 76, at A25.

⁸⁰ *Id.*

⁸¹ Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344, 120 Stat. 1869. The Darfur Peace and Accountability Act initially blocks assets and restricts visas of any individual determined to be “complicit in, or responsible for, acts of genocide, war crimes, or crimes against humanity in Darfur, including the family members or any associates of such individual[s] to whom assets or property . . . was transferred on or after July 1, 2002.” *Id.* §5. These sanctions were extended to Janjaweed “commanders and coordinators” who “impede the peace process, constitute a threat to stability in Darfur and the region, commit violations of international humanitarian or human rights law or other atrocities.” *Id.* The Act instructs the president to support expansion of the mission of and provide assistance to the African Union Mission in Sudan (AMIS), including assistance from NATO. *Id.* § 6. This section also denies entry into U.S. ports for cargo ships and oil tankers engaged in either trade activities relating to oil activities or the shipment of goods utilized by the Sudanese military. *Id.* This denial ends as soon

II. The Illinois Divestment Act

The Illinois Act was signed by Governor Rod R. Blagojevich on June 25, 2005 after receiving overwhelming support in both chambers of the Illinois legislature.⁸² Entitled the “Act to End Atrocities and Terrorism in the Sudan,” the Illinois Act amended two existing state statutes. Initially, the Act amended one section and added a new section to the Deposit of State Moneys Act.⁸³ Section 22.5 of the Deposit of State Moneys Act was amended to grant discretion to the state treasurer, with the approval of the governor, to “invest or reinvest any State money in the treasury which is not needed for current expenditure . . . in any [b]onds, notes, debentures[,] or other similar obligations of a foreign government, other than the Republic of Sudan, that are guaranteed by the full faith and credit of that government.”⁸⁴ The state treasurer was also free to invest such monies in short term obligations of corporations organized pursuant to American law with assets in excess of \$500 million as long as the corporation was not a “forbidden entity” as defined in Section 22.6 of the

as the Janjaweed is demobilized and demilitarized, humanitarian assistance is permitted to flow without interruption, and refugees and other internally displaced persons are permitted to return to their homes. *Id.* U.S. foreign assistance to countries violating U.N. Security Council resolutions with respect to Sudan is to be discontinued. *Id.* Previously-imposed restrictions and sanctions are continued until such time as Sudan implements all peace agreements with respect to Darfur and the country as a whole, disarms, demobilizes, and demilitarizes the Janjaweed and other militias, and adheres to all applicable resolutions of the U.N. Security Council. *Id.* § 7. The president is instructed to report periodically to the U.S. Congress on AMIS, the status of sanctions imposed against Sudan, and the nature and effectiveness of military assistance provided in an effort to quell continuing bloodshed in the region. *Id.* § 9. Perhaps most importantly, the Act as amended by the U.S. Senate and agreed to by the House of Representatives, omitted Section Eleven, which provided that “[n]othing in this Act (or any amendment made by this Act) or any other provision of law shall be construed to preempt any State law that prohibits investment of State funds, including State pension funds, in or relating to the Republic of Sudan.” Darfur Peace and Accountability Act, H.R. 3127, 109th Cong. § 11 (2005).

⁸² The Act passed the Ill. Senate unanimously and received 89 of the 118 available votes in the Ill. House of Representatives. *See* S.B. 23, 94th General Assembly, House Roll Call (Ill. 2005), *available at* http://www.ilga.gov/legislation/votehistory/94/house/09400SB0023_05172005_023000T.pdf; *see also* Borrus, *supra* note 12, at 72.

⁸³ *See* 15 ILL. COMP. STAT. 520/0.01-23 (2006).

⁸⁴ 520/22.5(2.5).

Deposit of State Moneys Act.⁸⁵

“Forbidden entities” are defined in a new section of the Deposit of State Moneys Act as consisting of one of five entities, including the Republic of Sudan, its agencies, political units, and subdivisions.⁸⁶ Companies that are “wholly or partially managed or controlled” by the Sudanese government or any of its agencies, political units, or subdivisions are also included in this definition.⁸⁷ In addition, all companies established or organized pursuant to Sudanese law or which have their principal place of business in Sudan are also “forbidden entities.”⁸⁸ Two categories of private enterprises are also considered “forbidden entities.” The first category is any company identified by the Office of Foreign Assets Control in the United States Treasury Department as “sponsoring terrorist activities or [having been] fined penalized or sanctioned by the Office of Foreign Assets Control . . . for any violation of any United States rules and restrictions relating to the Republic of Sudan . . . [after] the effective date of this Act.”⁸⁹

Most broadly, “forbidden entities” include any company failing to certify under oath to the absence of connections with Sudan or any company domiciled in Sudan.⁹⁰ These impermissible connections include the ownership or control of property or assets, the existence of employees or facilities, the provision or obtaining of goods or services, the existence of distribution agreements, the issuance of credits or loans, the purchase of bonds or commercial paper, or any investment in Sudan or any company domiciled therein.⁹¹ Companies, other than agencies of the government of Sudan, which are certified as non-

⁸⁵ 520/22.5(7)(iv).

⁸⁶ 520/22.6(b)(1).

⁸⁷ 520/22.6(b)(2). The term “company” is defined to include “any entity capable of affecting commerce, including but not limited to (i) a government, government agency, natural person, legal person, sole proprietorship, partnership, firm, corporation, subsidiary, affiliate, franchisor, franchisee, joint venture, trade association, financial institution, utility, public franchise, provider of financial services, trust or enterprise and; (ii) any association thereof.” 520/22.6(b).

⁸⁸ 15 ILL. COMP. STAT. 520/22.6(b)(3) (2006).

⁸⁹ 15 ILL. COMP. STAT. 520/22.6(b)(4) (2006).

⁹⁰ 15 ILL. COMP. STAT. 520/22.6(b)(5) (i-ii) (2006).

⁹¹ 15 ILL. COMP. STAT. 520/22.6(b)(5) (i-ii) (2006).

governmental organizations by the United Nations or engaged solely in humanitarian assistance, the promotion of “welfare, health, religious[,] and spiritual activities and education for humanitarian purposes[,]” or “journalistic activities” are excluded from this definition.⁹² The Illinois state treasurer is prohibited from depositing funds or contracting with any financial institution unless it annually certifies that it has implemented “policies and practices that require loan applicants to certify that they are not forbidden entities.”⁹³ The absence of such certification or any transaction between a financial institution and a company in violation of the Act is “void or voidable at the joint discretion of the Treasurer and the financial institution.”⁹⁴

The Act also added a new section to the Illinois Pension Code.⁹⁵ Section 110.5 prohibits fiduciaries of retirement systems or pension funds established pursuant to state law from “transfer[ing] or disburs[ing] funds to, deposit[ing] into, acquir[ing] any bonds or commercial paper from, or otherwise loan[ing] to or invest[ing] in any entity” unless the company charged with managing the assets of the retirement system or pension fund provides an appropriate certification.⁹⁶ This certification, to be prepared at no additional cost to the fiduciary and in a form established by the state treasurer, must state that the fund managing company has not “loaned to, invested in[,] or otherwise transferred any of the retirement system or pension fund’s assets to a forbidden entity any time after the effective date of this Act.”⁹⁷ The definition of “forbidden entities” and exemptions thereto is identical to those set forth in the Deposit of State Moneys Act with two important additions.⁹⁸ Initially,

⁹² 520/22.6(b). The Act also exempts “linked deposits” made in return for an institution’s commitment to “provide, through loans or other financial support, agreed benefits in projects undertaken in the community and the purchase of depository, custodial, processing and advisory services that are necessary to fulfill the Treasurer’s obligations and responsibilities.” 520/22.6(d).

⁹³ 520/22.6(a).

⁹⁴ 520/22.6(c).

⁹⁵ See 40 ILL. COMP. STAT. 5/1-101-20 (2006).

⁹⁶ 5/1-110.5(a).

⁹⁷ 5/1-110.5(a)(1). The Act became effective on January, 27, 2006, seven months after becoming law. 5/1.110.5(c).

⁹⁸ 5/1-110.5(b)(1-6).

forbidden entities include publicly traded companies who have been identified by “an independent researching firm that specializes in global security risk” as having certain enumerated contacts with Sudan or any company domiciled in Sudan.⁹⁹ These contacts include: (1) ownership or control of property or assets in Sudan; (2) the presence of employees or facilities located in Sudan; (3) the provision or obtaining of goods or services to or from Sudan; (4) the existence of distribution agreements; (5) the issuance of credits or loans; or (6) the purchase of bonds or commercial paper or the existence of any other type of investment.¹⁰⁰ The second addition to the Act is the inclusion of language encompassing non publicly-traded companies. These companies are required to submit a sworn affidavit to the fund managing company by an authorized officer that they do not own or control property or assets or transact “commercial business” in Sudan.¹⁰¹

The document to be provided by fund management must contain additional certifications. The fund manager must certify that the fund has not “loaned to, invested in, or . . . transferred” assets to any “forbidden entity” after the effective date of the Act.¹⁰² Sixty percent of the assets of the fund must be divested from “forbidden entities” by twelve months from the effective date of the Act with divestiture complete within eighteen months after the effective date.¹⁰³ The effect of these provisions is to require a gradual divestment of state retirement systems and pension funds from investment in companies maintaining defined commercial contacts with Sudan, to be completed by December 25, 2006.¹⁰⁴

⁹⁹ 40 ILL. COMP. STAT. 5/1-110.5(b)(5)(i-ii) (2006). The definition of the term “company” in the Illinois Pension Code is identical to the definition set forth in the Deposit of State Moneys Act. 5/1.110.5(b).

¹⁰⁰ 5/1-110.5(b)(5)(i-ii).

¹⁰¹ 5/1-110.5(b)(6). The term “commercial business” is undefined by the Act but presumably encompasses all activities carried on for profit in Sudan.

¹⁰² 5/1-110.5(a)(1).

¹⁰³ 5/1-110.5(a)(2-3).

¹⁰⁴ According to the Genocide Intervention Fund, there are six state and local pension funds or retirement systems in Illinois maintaining investments in companies doing business in Sudan. See GENOCIDE INTERVENTION FUND, *supra* note 11, at 1-2. These funds are the Illinois State Teachers’ Retirement System (thirty-two companies totaling \$727.2 million), the Public School Teachers’ Pension and Retirement Fund of

Two additional provisions of the amended Pension Code are worthy of mention. In a manner similar to the Deposit of State Moneys Act, the Pension Code provides that any transaction in violation of the Act is “void or voidable, at the sole discretion of the fiduciary.”¹⁰⁵ Furthermore, the amendments to the Deposit of State Moneys Act and the Pension Code are to remain in full force and effect until repeal by the Illinois legislature or the President’s rescission of Executive Order 13,067.¹⁰⁶

III. The Illinois Divestment Act and the Commerce Clause

A. Federal Authority over Commerce

In the majority opinion in *Gonzales v. Raich*, United States Supreme Court Justice John Paul Stevens provided a modern perspective on the United States Constitution’s Commerce Clause

Chicago (nineteen companies totaling \$476.5 million), the Illinois State Board of Investment (twenty-seven companies totaling \$368 million); the State Universities’ Retirement System (thirty-one companies totaling \$320.1 million), the Illinois Municipal Retirement Fund (eleven companies totaling \$97.2 million), and the Chicago Policemen’s Annuity and Benefit Fund (seven companies totaling \$53.5 million). *Id.* According to the U.S. Census Bureau, there are 371 state and local government employee retirement systems in Illinois. *See* U.S. CENSUS BUREAU, STATE AND LOCAL GOVERNMENT EMPLOYEE RETIREMENT SYSTEMS, at tbl. 5 (2003), *available at* <http://www.census.gov/govs/retire/ret03t5.html>. The Genocide Intervention Fund thus surveyed only 1.6% of the state and local government employee retirement systems in Illinois. These systems maintain cash and investment holdings in excess of \$92.8 billion. *Id.* at tbl. 4, *available at* <http://www.census.gov/govs/retire/ret03t4.html> (concluding that state government employee retirement systems have cash and investment holdings of \$54.5 billion as compared to \$38.3 billion for local government employee retirement systems). *Id.* Assuming the accuracy of the Genocide Intervention Fund’s \$2 billion estimate for investments in companies doing business in Sudan by state and local government employee retirement systems and pension funds in Illinois, investments banned under the Act constitute 2.2% of the total cash and investment holdings of such systems and funds. This percentage increases to 2.8% if consideration of the holdings of state and local government employee retirement systems is limited to their investments in the private sector and 3.4% if consideration of the holdings is limited to investments in bonds, stocks, and international securities. *See id.* (finding that state and local government employee retirement systems in Illinois maintain private investments totaling \$73.5 billion, including stock (\$34.5 billion), bonds (\$17 billion), international securities (\$8.2 billion), trust funds (\$8.2 billion), mortgages (\$147.6 million), and other private investments (\$5.5 billion)).

¹⁰⁵ 40 ILL. COMP. STAT. 5/1-110.5(c) (2006).

¹⁰⁶ 5/1-110.5(c). For a discussion of Executive Order 13,067, see *supra* note 77 and accompanying text in footnote.

jurisprudence.¹⁰⁷ Justice Stevens characterized the Commerce Clause as “the Framers’ response to the central problem giving rise to the Constitution itself[—]the absence of any federal commerce power under the Articles of Confederation.”¹⁰⁸ From the time of the ratification of the Constitution through the late nineteenth century, the Commerce Clause primarily served to preclude state legislation which was discriminatory towards other states.¹⁰⁹ In 1937, the Supreme Court reconsidered the reach of the Commerce Clause in response to the expansion of federal authority as memorialized in the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890.¹¹⁰ This so-called “new era” of Commerce Clause jurisprudence recognized three general categories of commercial activities subject to congressional regulation: the channels of interstate commerce, the instrumentalities of persons and things in interstate commerce, and activities that substantially affect interstate commerce.¹¹¹

The Interstate Commerce Clause empowers Congress “to regulate Commerce . . . among the several States.”¹¹² The Clause has been characterized as “both an affirmative grant of legislative power to Congress and an implied limitation on the power of state and local governments to enact laws affecting . . . commerce.”¹¹³ The aspect of the Commerce Clause which acts as an implied limitation upon the power of state and local governments to affect commerce is the so-called “dormant” or “negative” Commerce Clause.¹¹⁴ Analysis of the dormant Commerce Clause shows that it permits state laws that evenhandedly effectuate legitimate local interests in a circumscribed manner with only incidental impact

¹⁰⁷ 545 U.S. 1 (2005) (holding that the criminalization of the cultivation, distribution, or possession of marijuana pursuant to the Controlled Substances Act and its application to intrastate users and growers of marijuana for medical purposes pursuant to the California Compassionate Use Act did not violate the Commerce Clause).

¹⁰⁸ *Id.* at 16.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 16-17 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

¹¹² U.S. CONST. art. I, § 8, cl. 3.

¹¹³ *Board of Trustees v. City of Baltimore*, 562 A.2d 720, 749 (Md. 1989).

¹¹⁴ *See Cooley v. Bd. of Wardens*, 53 U.S. (1 How.) 299, 320 (1852).

upon interstate commerce.¹¹⁵ This analysis attempts to accommodate local needs with the federal necessity of ensuring the free flow of national commerce.

In determining the constitutionality of state laws affecting interstate commerce, the Supreme Court has distinguished “between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions.”¹¹⁶ Affirmative discrimination against interstate commerce renders a state statute virtually invalid *per se*.¹¹⁷ In order to sustain such a statute, the state must demonstrate that the law serves a legitimate local purpose that could not be served equally as well by any available nondiscriminatory means.¹¹⁸ Both the purported legitimate local purpose and the absence of nondiscriminatory alternatives are subject to strict scrutiny.¹¹⁹ By contrast, state statutes that regulate even-handedly to effectuate a legitimate local public interest with only incidental effect upon interstate commerce will be sustained “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”¹²⁰ Recent Supreme Court opinions have strongly suggested that such laws are legitimate exercises of state sovereignty.¹²¹

The Commerce Clause also contains a provision that empowers Congress “to regulate Commerce with foreign Nations.”¹²² The Clause recognizes that “[f]oreign commerce is

¹¹⁵ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹¹⁶ *Maine v. Taylor*, 477 U.S. 131, 138 (1986); see also *Air Transp. Ass’n of America v. City & County of San Francisco*, 992 F. Supp. 1149, 1164 (N.D. Cal. 1998); *Board of Trustees*, 562 A.2d at 754.

¹¹⁷ See, e.g., *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (“state laws violate the Commerce Clause if they mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter’”); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994); *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 332, 334 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

¹¹⁸ See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

¹¹⁹ See *id.* at 337.

¹²⁰ *Pike*, 397 U.S. at 142.

¹²¹ See, e.g., *Alden v. Maine*, 527 U.S. 706, 748 (1999).

¹²² U.S. CONST. art. I, § 8, cl. 3.

preeminently a matter of federal concern.”¹²³ In case law dating back 179 years, the Supreme Court has voided state regulations that discriminate against or obstruct the free flow of foreign commerce or impede the ability of the federal government to “speak with one voice when regulating commercial relations with foreign governments.”¹²⁴ These considerations are applicable even in the absence of federal legislation, thereby lending the Foreign Commerce Clause a dormant aspect similar to that of the Interstate Commerce Clause.¹²⁵

Despite this similarity, the scope of federal power with respect to foreign commerce is broader than that of interstate commerce.¹²⁶ As such, judicial scrutiny of state regulations which intrude upon foreign commerce is more rigorous and searching than when states burden interstate commerce.¹²⁷ A state law may survive constitutional scrutiny only if it “merely has foreign resonances, but does not implicate foreign affairs.”¹²⁸ By contrast, a state law that “either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive” will not survive scrutiny.¹²⁹ State laws that interfere with the ability of the federal government to “speak with one voice” in matters affecting relations with foreign governments will also be invalidated.¹³⁰ This rigorous scrutiny serves a similar purpose to that of the limitation upon the ability of states with respect to foreign affairs, specifically, to “prevent individual states from adversely affecting relations with foreign countries that are properly coordinated on a national level.”¹³¹

Applying these general principles to the Illinois Act leads to

¹²³ *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979).

¹²⁴ See, e.g., *Brown v. Maryland*, 25 U.S. (1 Wheat.) 419, 448 (1827); *Japan Line*, 441 U.S. at 449; *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976).

¹²⁵ See *Japan Line*, 441 U.S. at 454-55.

¹²⁶ See *id.* at 448.

¹²⁷ See *Reeves v. Stake*, 447 U.S. 429, 438 n.9 (1980); see also *Japan Line*, 441 U.S. at 446.

¹²⁸ *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

¹²⁹ *Id.*

¹³⁰ *Japan Line*, 441 U.S. at 449 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

¹³¹ *Board of Trustees v. City of Baltimore*, 562 A.2d 720, 752 (Md. 1989).

three separate conclusions. First, the Illinois Act lacks a valid underlying purpose. Even assuming the purpose of the Act is valid, there is no nexus between the Act and its stated purpose. Second, the effect of the Act is to expand state power into an area of exclusive federal concern, thereby interfering with American foreign policy. The Act also places an impermissible burden on commerce, is discriminatory, lacks the likelihood of success, and is not the least restrictive alternative available to Illinois. Finally, previously-issued legal opinions on the subject matter of state divestment initiatives, including application of the market participation doctrine, are outdated, and thus unable to serve as a constitutional basis for the Act. These conclusions are addressed separately below.

B. The Purpose of the Illinois Act

It may be contended that the Illinois Act serves an important state interest in the investment of funds in government-sponsored retirement plans and pension funds.¹³² Such an interest is undoubtedly a vital and mandatory function that goes to the core of state sovereignty. The power to determine with whom an individual state may deal is reserved to the states by the Tenth Amendment.¹³³ The Illinois Act merely provides a rational basis upon which the state could rely in making those determinations. If all state investment activities having some impact upon commerce were subject to invalidation, the result would be constant judicial scrutiny of such activities or de facto federal annexation of state and local retirement systems and pension funds.

Furthermore, it may be argued that moral interests as established by the Illinois Act were legitimate criteria for state investment decisions.¹³⁴ State governments are empowered to

¹³² See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) considering “the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted”.

¹³³ U.S. CONST., amend. X (providing that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”)

¹³⁴ See, e.g., Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 822 (1989); Wendy L. Wallace, Note, *Are States Denied a Voice?: Citizen-Driven Foreign Policy After Crosby v. National Foreign Trade Council*, 52 CASE W. RES. L. REV. 793, 808 (2002). *But see* Howard N. Fenton III, *The Fallacy of*

advance the moral interests of their citizens as “guardian[s] and trustee[s] of [their] people.”¹³⁵ This is especially true in the field of state and local retirement systems and pension funds where the state has been entrusted with the responsible investment of monies on behalf of its employees.¹³⁶ Nevertheless, assuming the management of retirement systems and pension plans is an essential state function that lies within the purview of the Tenth Amendment, such function still must be conducted in a manner that does not transgress constitutional limitations.

Illinois’ purported interests must be disregarded for several reasons. Initially, the subject matter of the Act is outside the widely recognized areas of traditional state competence and concern. The United States Supreme Court has recognized a number of disparate topics and fields of law as traditional areas of state concern. These topics include labor, business regulation, consumer protection, real property, natural resources, domestic relations, and insurance.¹³⁷ The Illinois Act does not implicate any

Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions, 13 Nw. J. INT’L L. & BUS. 563, 574 (1993) (condemning moral justifications as “*post hoc* rationalizations” designed to influence the attitudes of the parties with whom the state transacts business and, through them, to influence the domestic policies of foreign states).

¹³⁵ *Reeves, Inc. v. Stake*, 447 U.S. 429, 483 (1980).

¹³⁶ *See, e.g., Board of Trustees*, 562 A.2d at 755 (upholding a local ordinance requiring the divestiture of municipal pension funds in companies transacting business in South Africa, in part, upon the basis that the municipal government had a duty to ensure that its funds were not invested in a manner that was morally offensive to many of its residents and fund beneficiaries); see also *Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 Op. Off. Legal Counsel 49, 51 n.6 (1986) [hereinafter OLC Opinion] concluding that state and local divestment legislation survives Commerce Clause scrutiny because, “[s]ince their inception, states have legislated to reflect the moral sentiments of their communities, and we find nothing in logic or case law to suggest that the representation of community sentiments may not be a legitimate basis for state investment . . . decisions”. According to the Office of Legal Counsel, the strength of the state’s interest as guardian and trustee of its citizens is not lessened by the fact that the legislation may impact foreign, as opposed to interstate, commerce. *Id.* at 54.

¹³⁷ *See, e.g., California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 330, 334 (1997) (prevailing-wage laws); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 294 (1997) (regulation of local gas franchises); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers’ Ins. Corp.*, 514 U.S. 645, 649-50, 655 (1995) (regulation of hospital billing); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (real property); *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*,

such traditional interests. Rather, the Act trumpets moral concerns as its primary motivation. The Court has never once suggested that moral concerns regarding human rights conditions abroad are an area of traditional state concern.¹³⁸ As such, “[r]ecognition of a state’s ‘moral’ interest in severing economic ties with [Sudanese-related businesses] as a ‘legitimate’ justification for impeding . . . commerce would be unprecedented.”¹³⁹

Second, the Act has an insufficient connection with the state of Illinois to withstand constitutional scrutiny. Despite its purported concern with the maintenance of integrity of state investments, the Illinois Act is directed at the activities of multinational corporations and their subsidiaries residing in Sudan. These activities are outside of the Illinois marketplace and have little, if any, impact within the state. Not only are these activities outside of Illinois’ jurisdiction, but so are some of the parties engaging in these activities, specifically, those corporations whose sole contact with Illinois is the investment of state pension and retirement funds in their securities. Furthermore, the human rights violations that motivated adoption of the Act have no connection with Illinois. Although it may be sympathetic to the plight of the

489 U.S. 493, 510-12, 514 (1989) (natural resources); *Rose v. Rose*, 481 U.S. 619, 626, 628 (1987) (domestic relations); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 742-44 (1985) (insurance); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (weights and measures on product packaging).

¹³⁸ See *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 70-71 (1st Cir. 1999). In *Natsios*, the First Circuit held that the “Massachusetts Selective Purchasing Act” violated the federal government’s exclusive control over foreign affairs and the Foreign Commerce Clause and was preempted by economic sanctions imposed by federal law. *Id.* at 57-77. Adopted in June 1996, the Massachusetts Selective Purchasing Act restricted the state’s ability to purchase goods or services from persons maintaining business relations with Burma. Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), ch. 130, 1996 Mass. Acts 239 (codified at MASS. GEN. LAWS, ch. 7, § 22H(a) (West Supp. 1998)). A procuring agency could only award a contract to a person doing business with Burma if the agency certified in writing that its procurement was essential, and if compliance with the Act would eliminate the only bid or offer or otherwise result in inadequate competition. § 22H(b). In the case of competitive bidding procedures, the Act prohibited the agency from awarding a contract to a person maintaining business relations with Burma unless there was no other bid or the only bid from a person not doing business with Burma was ten percent greater than the lowest bid submitted. § 22H(d). Any contract in violation of the Act was deemed void. § 22L.

¹³⁹ Peter J. Spiro, Note, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 834 (1986).

unfortunate victims of the ongoing conflict in Darfur, Illinois has no legitimate interest in the health, safety, and welfare of such persons sufficient to support the Act and justify its impact on commerce.¹⁴⁰ Assuming Illinois has a valid interest in protecting the sanctity of the state's investment processes and such interest is primary to other considerations, such interest is insufficient to validate a legislative act that regulates conduct and relates to persons outside of the state's jurisdiction.¹⁴¹ Appealing though it may be to local constituencies, such an interest is also "unlikely to be sufficient justification for state action deemed offensive to federal constitutional priorities."¹⁴²

The purported local interest underlying the Illinois Act is further undermined by the intent of the legislation. The very title of the Illinois Act betrays its intended reach far beyond state investment policy. The intent of the Act was also memorialized in previously-referenced statements of its legislative sponsors and Governor Blagojevich.¹⁴³ The Act's intended impact in Sudan is further apparent in the provision tying the end of the investment prohibition and divestment requirement to the improvement of conditions in Sudan as determined by the lifting of the prohibitions contained in Executive Order 13,067.¹⁴⁴ Had the state been truly motivated by legitimate concerns such as risk and protection of the investments of state and local employees, the restrictions would only be lifted upon improvement in the investment environment, and the Act would have required divestment in companies doing business in countries presenting similar investment risks to Sudan.¹⁴⁵ Rather, the primary purpose of the Illinois Act is to establish an economic boycott of a single identified country for the purpose of encouraging it to change its policies with respect to its

¹⁴⁰ See *Bonaparte v. Tax Ct.*, 104 U.S. 592, 594 (1881) ("No state can legislate except with reference to its own jurisdiction.")

¹⁴¹ See *Natsios*, 181 F.3d at 63-64.

¹⁴² Fenton, *supra* note 134, at 574.

¹⁴³ See *supra* notes 7-9 and accompanying text.

¹⁴⁴ 40 ILL. COMP. STAT. 5/1-110.5(c) (2006).

¹⁴⁵ See Fenton, *supra* note 134, at 575 (contending that if legitimate state concerns with respect to risk and rate of return were the true motivation for divestment initiatives, states would reevaluate their investments in companies doing business in Latin America and Africa or countries engaged in military action or combating an insurgency).

governance of a single province within its national borders.¹⁴⁶ The stated intent of preserving the sanctity of investment practices is merely tangential to this primary purpose.¹⁴⁷ This purpose is outside the scope of legitimate local concern, and Illinois cannot “use the gloss of legitimate intentions [to the extent preservation of the sanctity of investment practices is a legitimate state interest] to mask the shortcomings of illegitimate ones.”¹⁴⁸

Legislative sponsors of the Act cited Illinois as the first state in the United States to terminate its investments in South Africa in response to the system of apartheid.¹⁴⁹ At least one recent case supports the relevancy of the historical context to Commerce Clause analysis. In *Air Transport Association of America v. City*

¹⁴⁶ See Carol E. Head, Note, *The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries*, 42 B.C. L. REV. 123, 161 (2000). Head contends that state and local divestment laws are implicitly and predominantly motivated by objectionable policies of foreign sovereigns. *Id.*

¹⁴⁷ See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003) (holding that the primary purpose of the California Holocaust Victim Insurance Relief Act had only a “tangential relation to present-day insuring in the State” so as to excuse its intrusion upon the authority of the federal government with respect to the conduct of foreign relations). The California Holocaust Victim Insurance Relief Act required any insurer doing business in the state to disclose information pertaining to “life, property, liability, health, annuities, dowry, educational[,] or casualty insurance policies . . . [issued] to persons in Europe” between 1920 and 1945. CAL. INS. CODE § 13804(a) (2006). “Persons in Europe” were not limited to Holocaust victims but rather covered all persons in Europe between 1920 and 1945. § 13804(a). The disclosure requirement included “related companies,” which were defined as “any parent, subsidiary, reinsurer, successor in interest, managing general agent[,] or affiliate company of the insurer” regardless of whether the companies were related at the time of the sale of the policy. §§ 13802(b), 13804(a). Insurers were required to report the current status of each policy, the city of origin, domicile or address of each policyholder and the names of the beneficiary. § 13804(a). This information was to be placed in a registry open to the public. § 13803. Penalties for failure to comply with the disclosure requirement included mandatory suspension of the insurer’s license to do business in California and misdemeanor criminal sanctions for misrepresentations with respect to the payment of claims and identity of those receiving such payments. §§ 13804(b), 13806. The Act was intended to enhance enforcement of California’s unfair business practice statute (which defined unfair business practices to include failure to pay a valid insurance claim of a Holocaust survivor) and facilitate the filing of civil lawsuits in state courts on insurance claims arising from acts perpetrated during the Holocaust. § 790.15(a); see also CAL. CIV. PROC. CODE § 354.5 (2006).

¹⁴⁸ Spiro, *supra* note 139, at 834.

¹⁴⁹ See *supra* note 7 and accompanying text.

& County of San Francisco, the United States District Court for the Northern District of California focused on San Francisco's "long-term interest in not indirectly supporting discriminatory business practices."¹⁵⁰ The court deemed this interest to be sufficient to insulate the city's prohibition upon contracting with firms that did not extend benefits to domestic partners from invalidity pursuant to the Commerce Clause.¹⁵¹ The court took particular note of the city's "long history of taking a principled stand against discrimination and of being in the forefront of efforts to ban discrimination based on sexual orientation."¹⁵² The ordinance was thus a permissible expression of the "city's sensitivity to the deep feeling of its citizens on [a] matter of fundamental human dignity."¹⁵³ The court also noted that a plurality of the United States Supreme Court recognized that local governments have a compelling interest in assuring that public revenues do not "serve to finance the evil of private prejudice."¹⁵⁴

Historical context, however, provides a dubious basis upon which to sustain the Illinois Act. Although states undoubtedly have a significant interest in the preservation of their history, this interest does not rise to the level of permitting derogation from the Commerce Clause. The potential ramifications for commerce in the event that every state and locality was permitted to indulge their historical traditions would be catastrophic. A multiplicity of conflicting traditions would result in a multiplicity of restrictions, sanctions and other encumbrances upon commerce. Such hindrances would overwhelm the effective operation and enforcement of the Clause itself. The recognition of such an exception in Commerce Clause litigation may inspire ad hoc rationalizations and fabricated historical traditions in support of legislation clearly designed to discriminate against foreign businesses. Furthermore, certain historical traditions, especially those arising from past interstate rivalries, may prove unworthy of preservation. The court's opinion in *Air Transport* can be

¹⁵⁰ 992 F. Supp. 1149, 1164 (N.D. Cal. 1998).

¹⁵¹ See *id.* at 1164.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion)).

classified as a judicial anomaly restricted to the locale and circumstances at issue therein. As such, it would be inappropriate to use the opinion in *Air Transport* as a foundation for the Illinois Act.

Although the shared interest between the federal and state policies in exerting pressure upon the Sudanese government to end its genocidal policies in Darfur is irrelevant in Commerce Clause analysis, there is actually direct conflict between the Illinois Act and the federal sanctions regime with respect to Sudan. Assuming Illinois is acting in a field of traditional competence, its sanction of all transactions with Sudan, its penalization of United States subsidiaries operating legally in Sudan as well as foreign companies, the absence of consultation, and hindrance of the president's authority and ability to broker international cooperation on resolution of the crisis in Darfur represent irreconcilable differences between federal and state interests in this instance. As such, Illinois' interest must give way to federal policy. As noted by the United States Supreme Court on two separate occasions, "the fact of a common end hardly neutralizes conflicting means."¹⁵⁵ Furthermore, the Court has deemed it "beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be."¹⁵⁶ This is especially true when the state's motivations are questionable and the selected methods are in conflict. These issues serve to negate consideration of the shared interests of the federal government and Illinois. Rather, the inescapable conclusion is that this is a matter best left to the federal government.

Finally, the divestment penalty is not the least restrictive alternative in promoting the state's interests. If the integrity of the state's investments was truly the Act's primary concern, Illinois could have considered an approach expressing an intention to disassociate itself from firms maintaining commercial ties with Sudan rather than imposing the penalty of absolute

¹⁵⁵ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425 (2003) (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000)).

¹⁵⁶ *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (quoting *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 426 (1925)).

disqualification. Alternatively, Illinois could have required extensive disclosures about the ethical conduct of current and potential investment targets, including the location and nature of their overseas operations. These disclosures could also have included compliance with internal codes of conduct or the requirement that such companies adopt a code of conduct appropriate to their business operations. Continuous reporting and disclosure requirements could have ensured the currency and accuracy of all information in the state's possession. In addition, Illinois could have adopted its own voluntary code of conduct for firms seeking state investment monies and publicized the names of those companies ascribing or refusing to ascribe to its code. A non-binding resolution condemning companies for their activities in Sudan was another option for the state. Another alternative would have been to forego condemnation of particular states but rather focus on general conditions such as human rights and environmental protection.¹⁵⁷ Although the constitutional status of these alternatives is uncertain, they are undoubtedly less onerous, and consequently less suspect, than the blanket disqualification inflexibly imposed by the Act.

C. The Effect of the Illinois Act

The failure of the Act to leave the matter of a response to the policies of the Sudanese government in Darfur to the federal government damages American commercial and foreign policy interests. By conditioning eligibility for continued state investment on conduct beyond state and national borders, the Act is an unconstitutional expansion of state jurisdiction upon federal authority.¹⁵⁸ Specifically, the Act impedes the ability of the federal government to speak with one voice with respect to Sudan.

¹⁵⁷ See Wallace, *supra* note 134, at 831 (contending that condition-specific divestment initiatives will survive constitutional scrutiny if combined with an articulated economic justification, a reasonable time frame for divestment, and minimization of ongoing state scrutiny of foreign affairs).

¹⁵⁸ See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 69-70 (1st Cir. 1999) (holding the conditioning of eligibility for state contracts on conduct beyond state and national borders as set forth in the Massachusetts Selective Purchasing Act to be an unconstitutional expansion of state jurisdiction upon federal authority); see also Wallace, *supra* note 134, at 810 (contending that divestment statutes targeting individual countries have a direct impact on foreign affairs).

The Illinois Act ignores the nuances of American policy toward Sudan as represented by Executive Order 13,067, the Sudan Peace Act, and the Comprehensive Peace in Sudan Act.¹⁵⁹ In its place, Illinois imposes a regulatory scheme that differs substantially from that of the United States government. The Illinois Act sanctions all transactions with Sudan rather than the seven separate transactions identified in Executive Order 13,067.¹⁶⁰ Furthermore, the Illinois Act sanctions United States subsidiaries that are operating legally in Sudan as well as foreign companies, both of which are outside the scope of the prohibitions within the Executive Order.¹⁶¹ The inclusion of foreign companies is particularly problematic as it threatens to undermine the spirit of international cooperation memorialized in the Sudan Peace and the Comprehensive Peace in Sudan Acts.

Mandatory divestment also may serve to interfere with the president's ability to obtain agreement for the imposition of sanctions by the international community as contemplated by federal legislation. The Sudan Peace Act instructs the president to consider all "necessary and appropriate steps" to deny the Sudanese government access to oil revenues.¹⁶² By contrast, the Illinois Act immediately penalizes companies serving as the source of such revenues without presidential consideration or consultation. The president's efforts to seek the imposition of an international sanctions regime at the United Nations as contemplated by the Comprehensive Peace in Sudan Act are also compromised by the Illinois Act. The Illinois Act may hinder the president's ability to obtain the cooperation of United Nations' members whose companies have suffered "blacklisting" and resultant loss of capital despite the legality of their investments in Sudan. Furthermore, the Comprehensive Peace in Sudan Act contemplates well-defined international sanctions limited to the

¹⁵⁹ See *supra* note 77 and accompanying text; see also Spiro, *supra* note 139, at 817 (criticizing state divestment initiatives with respect to South Africa as overshadowing private sector responses to apartheid and transcending federal policy as memorialized in applicable executive orders and legislation).

¹⁶⁰ Compare Exec. Order No. 13,067, *supra* note 77, § 2 with 15 ILL. COMP. STAT. 520/22.6(b)(1-5) (2006) and 40 ILL. COMP. STAT. 5/1-110.5(b)(1-6) (2006).

¹⁶¹ See 15 ILL. COMP. STAT. 520/22.6(b)(5)(i-ii) (2006); 40 ILL. COMP. STAT. 5/1-110.5(b)(5-6) (2006).

¹⁶² Sudan Peace Act, § 6(b)(2)(C), 50 U.S.C. § 1701 (2000).

freezing of assets of the Sudanese government and military officials and the encouragement of an embargo of Sudanese oil.¹⁶³ By contrast, the Illinois Act is a blunt instrument imposing an across-the-board penalty on any company maintaining a business relationship in or with Sudan as certified by a state government official utilizing sources the accuracy of which have not been subject to verification by the federal government.¹⁶⁴ The same comparison and conclusion applies to the limited United States sanctions contemplated by the Comprehensive Peace in Sudan Act.¹⁶⁵ As noted by the United States Supreme Court in its opinion striking down California's Holocaust Victim Insurance Relief Act, the state "seeks to use an iron fist where the President has consistently chosen kid gloves."¹⁶⁶ At the very least, the president's ability to seek, impose, waive, and lift national and international sanctions as necessary is shared with a state government official responsible for the administration of Illinois' separate sanctions regime.¹⁶⁷

The lack of specificity and required consultations with the federal government constitute further intrusions upon federal power and interferences with the ability of the United States to speak with one voice with respect to Sudan. The Illinois Act empowers the state treasurer to determine the existence of business relations between financial institutions, publicly traded and privately held companies and Sudan, as well as evaluate the credibility of certifications provided by such entities.¹⁶⁸ Such inquiries and evaluations are to proceed independently and without consultation of the federal government. Rather, the process relies on the initiative and discretion of the state treasurer who may rely on an unidentified "independent researching firm" to determine

¹⁶³ Comprehensive Peace in Sudan Act, § 4(b)(6)(C)(i-ii), 50 U.S.C. § 1701 (2000).

¹⁶⁴ See 40 ILL. COMP. STAT. 5/1-110.5(b)(5)(i-ii) (2006) (providing for certification of "forbidden entities" by "an independent researching firm that specializes in global security risk").

¹⁶⁵ Comprehensive Peace in Sudan Act, §§4(b)(7-8), 6(a-b).

¹⁶⁶ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003).

¹⁶⁷ See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000) (condemning state legislation that "compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments").

¹⁶⁸ See 15 ILL. COMP. STAT. 520/22.6(a) (2006); 40 ILL. COMP. STAT. 5/1-110.5(b)(6) (2006).

the existence of prohibited commercial relations.¹⁶⁹ The Act provides no other guidance to the treasurer with respect to the determination of prohibited commercial contacts or the evaluation of the credibility of the required certifications. The Act also empowers the Illinois legislature to determine whether the policies of the Sudanese government have changed such as to merit the lifting of the divestment penalty.¹⁷⁰ These policy changes are not defined in the Act. This lack of definition encourages the legislature to establish its own internal criteria by which to evaluate events occurring within Sudan without federal input, oversight, and control.

Finally, the Act increases the threat that foreign states may retaliate against the United States because of the commercial policies of one state.¹⁷¹ Two specific types of retaliation are possible. Initially, the Sudanese government may react negatively to Illinois' attempts to interfere in its internal affairs or damage its economy.¹⁷² This is an even more distinct possibility in the event Illinois succeeds in encouraging companies to withdraw from Sudan, thereby depriving its economy of needed financial and human capital.¹⁷³

The second type of potential foreign retaliation is of greater consequence. This retaliation would originate from foreign states whose multinational corporations or their subsidiaries were either driven from Sudan by the Act or suffered financial losses as a result of its mandatory divestment provisions. Such retaliation is a possibility given that the investments which Illinois seeks to penalize may be legal pursuant to the national laws applicable to these enterprises. Retaliatory measures could include greater scrutiny of the public filings of American companies required by

¹⁶⁹ 15 ILL. COMP. STAT. 520/22.6(c) (2006); 40 ILL. COMP. STAT. 5/1-110.5(b)(5)(i-ii) (2006).

¹⁷⁰ See 40 ILL. COMP. STAT. 5/1-110.5(c) (2006).

¹⁷¹ See *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 79 (1992).

¹⁷² See Spiro, *supra* note 139, at 837 (“[D]ivestment measures discriminate against one particular nation so as to make offense a virtual certainty and retaliation a strong possibility.”)

¹⁷³ See Wallace, *supra* note 134, at 810 (noting that divestment laws may have a direct impact on foreign relations to the extent they force companies to make choices between investment in the targeted country and the state's continued patronage).

foreign law and consequent delays and questions about their own investment activities such as the location of investments and complicity in human rights violations. The risk of such retaliation is very real given the controversial involvement of American corporations in locations such as Iraq and Myanmar. In any event, no matter how remote the risk of such retaliation, the mere possibility that foreign state action may offend American trading partners and result in foreign retaliation is an important aspect of Commerce Clause analysis.¹⁷⁴

Depending upon the form it takes, such retaliation may harm national commercial interests. In addition, such retaliation may harm national political interests as well as Illinois' interest in the peaceful resolution of the conflict in Darfur to the extent there is interference in international efforts to address the crisis. Under such circumstances, the Illinois Act would become an unnecessary distraction from the more important task of ending the continuing humanitarian catastrophe in Darfur. Nevertheless, Illinois adopted the Act despite the fact that it possessed, in the words of the United States Supreme Court in *Container Corporation*, "little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation."¹⁷⁵ Such competence has been entrusted by the Constitution to the federal government, acting on behalf of the country, rather than to its constituent parts acting in their own perceived self-interest.

The Illinois Act also has a discriminatory effect which violates the Commerce Clause. The Act discriminates against, or at the very least negatively impacts, two subsets of foreign commerce: commerce involving companies organized or operating in Sudan and commerce involving companies doing business in Sudan. Illinois has disqualified domestic and foreign companies maintaining any connection with Sudan from eligibility for any of the state funds available for investment. The Illinois Act further discourages domestic and foreign companies from having any future contact whatsoever with Sudan or any Sudan-based entity. These companies may decline to enter the Sudanese marketplace due to the potential that such entry would disqualify them from

¹⁷⁴ See *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

¹⁷⁵ *Id.*

future state investment. In addition to harming the Sudanese economy, the Act may also harm Illinois by encouraging negative perceptions of its business environment.

Furthermore, the Act's reach may go beyond companies in which Illinois pension funds and retirement systems maintain investments to include examination of affiliated companies, such as subsidiaries, and other companies in the distributive chain. These companies may operate independently in interstate and foreign commerce without maintaining any contact whatsoever with Illinois. Nevertheless, their commercial ties are relevant to the determination of whether companies in which Illinois pension funds and retirement systems maintain investments are engaged in commercial relations with Sudan. Thus, the potential impact of the Act extends far beyond Illinois' borders and serves to chill the free flow of commerce across national and international boundaries.

The Act may be defended on the basis that the Illinois legislature and governor did not intend to secure economic advantages for local businesses at the expense of businesses situated elsewhere.¹⁷⁶ This is undoubtedly true as demonstrated in the previous section discussing the purpose of the Act. However, the absence of discriminatory intent alone is irrelevant. The deciding factor remains the discriminatory *effect* of the Act, regardless of intent. As demonstrated above, the Illinois Act discriminates against all companies, foreign or domestic, maintaining any economic connection with Sudan.¹⁷⁷ Furthermore, the Act favors foreign and domestic companies absent from Sudan with the reward of state investment funds at the

¹⁷⁶ See *Board of Trustees v. Mayor of Baltimore*, 562 A.2d 720, 750 (Md. 1989) stating that, because the ordinance adopted by the City of Baltimore mandating divestment in companies doing business in or with the Republic of South Africa lacked discriminatory intent against nonresidents, it "pose[d] a smaller threat to the national common market than do . . . overtly discriminatory measures".

¹⁷⁷ See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 68 (1st Cir. 1999) (holding the Massachusetts Selective Purchasing Act to be discriminatory on the basis that it punished all businesses having any commercial tie to Burma). The First Circuit specifically noted that "[w]hen the Constitution speaks of foreign commerce, it is not referring only to attempts to regulate the conduct of foreign companies; it is also referring to attempts to restrict the actions of American companies overseas." *Id.* (emphasis omitted).

expense of companies maintaining such contacts,¹⁷⁸ despite the fact that such contacts may be permissible pursuant to the national laws applicable to such companies. In addition, the potential burdens placed upon commerce are clearly excessive in light of the minimal interest of the state in the status of human rights in Sudan and the conflict in Darfur.¹⁷⁹ The Act places an impermissible financial barrier around Illinois by requiring all companies to conform their conduct to its sense of morality or suffer loss of investment monies.¹⁸⁰

The Illinois Act may also be defended on the basis that it is unlikely to be effective. Specifically, it may be contended that the Act and related initiatives in other states will have no influence on the commercial activities of companies with respect to Sudan. As such, divestment laws “merely . . . communicate a moral or philosophical community position.”¹⁸¹ However, as has been aptly noted with respect to the divestment campaign directed at South Africa in the 1980s and is equally applicable to Sudan, “it is illogical to argue that state or local governments would craft such precise laws without intending any effects, when enacting simple resolutions of condemnation would communicate the same message[.]”¹⁸² Rather, Illinois, like its predecessors in the anti-apartheid movement, adopted the Act “on the basis of its presumed or potential impact on the target firms.”¹⁸³ The seriousness of Illinois’ intent is demonstrated by the significant amount of money subject to potential divestment, the probable negative impact upon the value of state retirement and pension funds as a result of divestment, and costs associated with such sales and necessary monitoring.¹⁸⁴ The provisions and penalties

¹⁷⁸ See Wallace, *supra* note 134, at 828 (“[A] law that discriminates against all firms, foreign and domestic, with business in [the target country] violates the Foreign Commerce Clause . . .”)

¹⁷⁹ See *Am. Trucking Ass’ns v. Michigan Pub. Serv. Comm’n*, 545 U.S. 429, 433-34 (2005); see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁸⁰ *Am. Trucking Ass’ns*, 545 U.S. at 433-34; see also *Am. Trucking Ass’ns v. Scheiner*, 483 U.S. 266, 284 (1987).

¹⁸¹ Fenton, *supra* note 134, at 577.

¹⁸² *Id.* at 578.

¹⁸³ *Id.* at 577.

¹⁸⁴ See *supra* notes 21-23 and accompanying text.

imposed by the Act are not the product of a state communicating a moral or philosophical position. Rather, the Act represents a gamble with the retirement savings and pensions of thousands of state workers with the potential for significant effect on national financial markets.

Even assuming the absence of discrimination, the Illinois Act places an impermissible burden upon commerce. United States foreign policy regarding permissible and impermissible commercial contacts with Sudan is clearly set forth in Executive Order 13,067 and the Sudan Peace and Comprehensive Peace in Sudan Acts.¹⁸⁵ However, as previously noted, Illinois has selected a policy significantly different from that adopted by the federal government or the vast majority of its sister states.¹⁸⁶ This multiple and conflicting regulation is a burden upon businesses engaged in foreign commerce. Instead of merely ensuring their operations conform to the requirements of United States law, such companies must now also ensure compliance with the more stringent state standards set forth in the Illinois Act or suffer the potential loss of investment monies. The net effect of such multiple policies is a proliferation of the regulation of international commercial activities, a result clearly sought to be prevented by the Foreign Commerce Clause.¹⁸⁷ The likelihood of further burdens upon foreign commerce is significant if the Illinois model is widely adopted by other states.

The compulsive nature of the Illinois Act and its effect upon foreign commerce cannot be overlooked. Although companies are free to do business within Sudan subject only to prohibitions contained in laws adopted by their national legal systems, such business comes at a significant cost in lost investment monies originating from the state of Illinois. The amount of this penalty is

¹⁸⁵ See *supra* note 77 and accompanying text.

¹⁸⁶ See discussion *supra* Part III.C.

¹⁸⁷ See *Granholt v. Heald*, 544 U.S. 460, 472 (2005) (condemning differing state standards with respect to the direct shipment of out-of-state wines as resulting in “a proliferation of trade zones”); see also *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420 (2003) (concluding that “a sufficiently clear conflict” existed such as to require preemption of the California Holocaust Victim Insurance Relief Act by executive agreements between the United States and Germany in July 2000 relating to the settlement of unpaid claims arising from the actions of German companies during World War II).

significant with a potential impact of more than \$368 million in required divestment plus indeterminate amounts relating to associated costs and loss of portfolio value.¹⁸⁸ This penalty may ultimately rise to several billion dollars in the event the Illinois model is adopted by other states.¹⁸⁹ Furthermore, the divestment penalty may be triggered at any time as the Act attaches continuing conditions upon the commercial dealings of companies seeking to remain eligible for state investments. This form of state economic compulsion has been condemned by the United States Supreme Court to the extent it differs from economic compulsion and other regulation imposed at the federal level.¹⁹⁰ In a manner similar to the California legislation at issue in *American Insurance Association v. Garamendi*, Illinois has elected to employ “a different state system of economic pressure” which has undercut federal authority and policies.¹⁹¹ As such, the Illinois Act would likely suffer the same fate as the failed California legislation if subjected to judicial scrutiny.

D. The Illinois Act and Previous Legal Opinions

1. The Opinion of the Office of Legal Counsel

A different approach to the Commerce Clause was adopted by the Office of Legal Counsel (OLC) in its opinion addressing the constitutionality of state and local divestment initiatives.¹⁹² Issued during the height of the anti-apartheid movement, the OLC’s opinion concluded that state statutes that required the divestment of state or local pension funds from companies doing business in South Africa were shielded from the strictures of the Commerce Clause by the market participation doctrine.¹⁹³ According to the OLC, divestment initiatives aimed at South Africa reflected the moral sentiments of state and local communities, whose governments were acting legitimately as the guardians and trustees

¹⁸⁸ See *supra* note 21 and accompanying text.

¹⁸⁹ See *supra* note 11 and accompanying text.

¹⁹⁰ *Garamendi*, 539 U.S. at 423-24.

¹⁹¹ *Id.* (citing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 376 (2000)).

¹⁹² OLC Opinion, *supra* note 136, at 51-59.

¹⁹³ *Id.* at 51.

of their constituencies.¹⁹⁴ According to the OLC, there was “nothing in logic or case law to suggest that the representation of community sentiments may not be a legitimate basis for state investment or contractual decisions.”¹⁹⁵

Once the legitimacy of the underlying purpose of the legislation had been established, the OLC concluded that South African divestment initiatives were exercises of state proprietary powers rather than regulation. Specifically, the OLC concluded that, in adopting such initiatives, the state was “exercising the prerogatives and the powers that any private person or entity enjoys as a matter of contract and property rights.”¹⁹⁶ The states possessed these proprietary powers when the Constitution was adopted and they could not be displaced other than through “a specific limitation imposed by the Constitution or federal legislation passed pursuant to a constitutional grant of power to the federal government.”¹⁹⁷

The OLC concluded that the historical evidence did not sanction limiting upon the ability of states to purchase goods and services based upon the Commerce Clause, regardless of whether such purchases indirectly impact foreign or interstate commerce.¹⁹⁸ Rather, the Framers were concerned about state *regulatory* activity with respect to such commerce.¹⁹⁹ Under this argument, state divestment initiatives did not constitute regulation because the state did not possess monopoly power in the national securities markets in which they participated.²⁰⁰ As such, these divestment initiatives lacked the coercive power associated with regulation imposed by states in their sovereign capacities.²⁰¹ This characterization also led to the conclusion that such initiatives did not subject foreign companies to the risk of multiple regulation.²⁰²

¹⁹⁴ *Id.* at 51 n.6.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 53.

¹⁹⁷ *Id.* at 64.

¹⁹⁸ OLC Opinion, *supra* note 136, at 53-54.

¹⁹⁹ *Id.* at 54.

²⁰⁰ *Id.* at 52 n.7.

²⁰¹ *Id.*

²⁰² *Id.* at 55. Unlike the state tax on shipping containers used solely in foreign commerce that was struck down under the Foreign Commerce Clause in *Japan Line, Ltd.*

Furthermore, divestment legislation did not impose continuing conditions on businesses but only conditions precedent to eligibility for state investments.²⁰³ In so doing, states were not unconstitutionally imposing conditions in markets in which they were not participants.²⁰⁴ The OLC thus concluded that “[w]herever the state exercises its power as a buyer or investor to impose some contractual term on a company with which it deals, it is acting as [sic] in its proprietary rather than regulatory capacity.”²⁰⁵ The exercise of such proprietary powers was not subject to the restraints of the Commerce Clause.²⁰⁶

The OLC opinion and the potential application of its reasoning to the Illinois Act necessitate discussion of the market participation doctrine. The market participation doctrine serves to shield state procurement activities from Commerce Clause scrutiny in the absence of federal action and when the state is acting as a party to a commercial transaction rather than as a market regulator.²⁰⁷ The doctrine dates back to the 1940s. For example, in *Perkins v. Lukens Steel Co.*, the United States Supreme Court equated government purchases to those in the private sector in holding that “the Government enjoys the unrestricted power . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.”²⁰⁸ In order to assure an orderly and equitable contracting process, states were empowered to “lay down guideposts by which its agents are to proceed in the procurement of supplies, and which create duties to the [state] alone.”²⁰⁹

The market participant exception received its fullest

v. County of Los Angeles, 441 U.S. 434, 445-46 (1979), divestment initiatives do not carry with them the risk that foreigners will be subject to multiple regulations or taxation.

²⁰³ *Id.* at 56 (distinguishing divestment initiatives from the statute considered in *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 99 (1984), which required that all timber bought from Alaska be processed in Alaska).

²⁰⁴ OLC Opinion, *supra* note 136, at 56.

²⁰⁵ *Id.* at 57.

²⁰⁶ *Id.* at 55.

²⁰⁷ *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 210 (1983).

²⁰⁸ 310 U.S. 113, 127 (1940).

²⁰⁹ *Id.*

expression in two Supreme Court cases from the 1970s. In *Hughes v. Alexandria Scrap Corp.*, the Court upheld a program that paid a bounty for recycling abandoned cars formerly titled in Maryland.²¹⁰ However, the documentation requirements for receipt of the bounty were more lenient for Maryland processors than for non-Maryland processors.²¹¹ In upholding this difference, the Court held that the state was not regulating the processing of abandoned vehicles but “ha[d] entered into the market itself to bid up their price.”²¹² The Court determined that neither the Commerce Clause nor its underlying purposes “prohibits a [s]tate, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”²¹³

The Court further elaborated upon the market participant doctrine four years later in *Reeves, Inc. v. Stake*.²¹⁴ In *Reeves*, the Court upheld South Dakota’s policy of restricting sales from a state-owned cement plant to state residents during a shortage. The Court specifically held that, when acting as proprietors, states are free to exercise their independent discretion as to the parties with whom they will deal without constraint by the Commerce Clause.²¹⁵ Federal restraint in the area of state procurement was mandated by considerations of sovereignty and the role of each state to act as “guardian and trustee for its people.”²¹⁶ Furthermore, federal restraint was justified by the similarity between the state’s exercise of its proprietary powers and that of private industry.²¹⁷ The Court noted that private industry had long enjoyed the right to exercise its discretion as to the parties with

²¹⁰ 426 U.S. 794 (1976).

²¹¹ *Id.* at 800-01.

²¹² *Id.* at 806.

²¹³ *Id.* at 810.

²¹⁴ 447 U.S. 429 (1980).

²¹⁵ *Id.* at 439.

²¹⁶ *Id.* at 438. (quoting *Heim v. McCall*, 239 U.S. 175, 191 (1915)). The Court noted that a state’s participation in the marketplace in the same manner as private industry is an example of the constitutional exercise of state sovereignty in an area involving traditional governmental functions. *Id.* at 438 n.10. The Court thus concluded that “[s]tates may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal.” *Id.*

²¹⁷ *Id.* at 439.

whom it chose to contract.²¹⁸ Fundamental fairness thus dictated that this same freedom be granted to states when acting in a proprietary role.²¹⁹ While acknowledging that there may be limits to this similarity and hence the doctrine itself, the Court declined to elaborate upon such boundaries.²²⁰ Rather, the Court reasoned that Congress was better situated to impose such limitations, since the issues arising from application of the doctrine were “subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis.”²²¹

Nevertheless, the doctrine is not *carte blanche* for states to cloak regulatory activity under the guise of market participation. States cannot utilize the doctrine for non-proprietary purposes or in order to exercise influence in markets beyond those in which they participate. For example, in *South-Central Timber Development, Inc. v. Wunnicke*, the Supreme Court struck down an Alaskan statute that required all timber sold from designated state-owned property to be processed within the state.²²² The Court observed that Alaska was not “merely choosing its own trading partners,” but rather was “attempting to govern the private, separate economic relationships of its trading partners.”²²³ The market participant exception did not grant the state the freedom “to impose any conditions that [it] ha[d] the economic power to dictate.”²²⁴ Nor did the exception validate any condition merely because of the fact that it was imposed upon someone with whom the state was in contractual privity.²²⁵ The state’s proprietary interest ended with the removal of the timber from state land and hence could not support the imposition of downstream conditions such as the processing requirement.²²⁶ Courts must look, therefore, beyond the state’s designation of its activities as proprietary and examine their actual purpose and effect. The

²¹⁸ *Id.* at 438-39.

²¹⁹ *Id.* at 439

²²⁰ *Reeves, Inc.*, 447 U.S. at 439 n.12.

²²¹ *Id.* at 439.

²²² 467 U.S. 82 (1984).

²²³ *Id.* at 99.

²²⁴ *Id.* at 97.

²²⁵ *Id.*

²²⁶ *Id.* at 99.

state's designation of its activities as proprietary must be disregarded if they are in fact regulatory in nature.

There are serious questions regarding the continued viability of the OLC opinion. The intervening twenty year period has brought the United States Supreme Court's opinions in *Crosby v. National Foreign Trade Council*²²⁷ and *American Insurance Association v. Garamendi*,²²⁸ as well as the United States Court of Appeals' decision in *National Foreign Trade Council v. Natsios*.²²⁹ These decisions have raised significant obstacles to the intrusion of state and local governments into the realm of foreign commerce. Although not expressly referencing the OLC opinion, the conclusion that inevitably flows from these opinions is an affirmation of the limited role of both local and state governments with respect to the exercise of proprietary powers that impact foreign commerce.

In addition to the holdings in these cases, there is serious doubt that the market participation doctrine is applicable to exempt state activities from scrutiny pursuant to the Foreign Commerce Clause. The United States Supreme Court expressly reserved this question in *Reeves* and has not directly revisited the issue.²³⁰ However, in *National Foreign Trade Council v. Natsios*, the United States Court of Appeals for the First Circuit expressed doubt that the Massachusetts Selective Purchasing Act was shielded from constitutional scrutiny by a market participant exception to the

²²⁷ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Here, the Court struck down the Massachusetts Selective Purchasing Act on the bases that it denied the federal government the ability to speak with one voice with respect to foreign affairs, and was preempted by the existing U.S. sanctions regime with respect to Burma. *Id.* at 380, 388.

²²⁸ 539 U.S. 396 (2003). Here, the Court concluded that "a sufficiently clear conflict" existed such as to require preemption of the California Holocaust Victim Insurance Relief Act by executive agreements between the United States and Germany in July 2000 relating to the settlement of unpaid claims arising from the actions of German companies during World War II. *Id.* at 420.

²²⁹ 181 F.3d 38, 45 (1st Cir. 1999) (striking down the Massachusetts Selective Purchasing Act on the bases that it denied the federal government the ability to speak with one voice with respect to foreign affairs, violated the Foreign Commerce Clause, and was preempted by the existing U.S. sanctions regime with respect to Burma).

²³⁰ *Reeves v. Stake*, 447 U.S. 429, 438 n.9 (1980) ("[w]e have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause").

Foreign Commerce Clause.²³¹ Rather, the risk of retaliation against the nation as a whole and the weakening of the federal government's ability to speak with one voice in foreign affairs militated against the extension of the exception to the Foreign Commerce Clause.²³²

The application of the doctrine is further inadvisable given the risk of retaliation by foreign powers whose companies have been negatively affected by the operation of the divestment legislation.²³³ This retaliation could "multiply the burden on . . . commerce by increasing the harm to the discriminating state."²³⁴ These foreign powers are "unlikely to be interested in the fine distinction between a state divestment statute that forces [companies] to divest as a practical matter and a state regulation of those [companies] that forces them to divest as a legal matter."²³⁵ The re-characterization of the state's activities as regulatory or proprietary would not serve to lessen the potential for conflict and retaliation.²³⁶

The application of the market participation doctrine to divestment legislation would also ignore the greater scope of the Foreign Commerce Clause and the resultant higher standard of proof necessary to sustain state infringements.²³⁷ As foreign commerce is "preeminently a matter of federal concern," any such exception extended to a state which places a burden on foreign commerce or foreign affairs would be narrow and judicial scrutiny would be more rigorous.²³⁸ The Illinois Act is unlikely to survive such scrutiny due to its conflict with federal policy, the possibility of damage to United States foreign relations, and the ability of the

²³¹ 181 F.3d 38, 66 (1st Cir. 1999).

²³² *Id.*

²³³ Kevin Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 484 (1987).

²³⁴ *Id.*

²³⁵ *Id.* at 485.

²³⁶ *Id.*

²³⁷ *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 95-96 (1984); *see also* Fenton, *supra* note 134, at 587 ("[I]t is unlikely that the Court would permit states to insulate their actions from judicial review by imposing them through the states' economic leverage rather than through political power.")

²³⁸ *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979).

federal government to speak with one voice with respect to foreign affairs.²³⁹

Additionally, the market participation doctrine applies only in the absence of federal action.²⁴⁰ Such was not the case with respect to federal policy toward Sudan as memorialized in Executive Order 13,067, the Sudan Peace Act, and the Comprehensive Peace in Sudan Act. The Illinois Act flies directly in the face of these pronouncements by punishing commercial activity outside the scope of federal sanctions and imposing a significantly different state sanctions regime. Perhaps Congress and the president could have spoken in a clearer voice with respect to their elaboration of federal policy or expressly preempted state divestment initiatives. Nevertheless, to permit state and local dissonance in the presence of a federal regulatory scheme is to invite balkanization of foreign commerce contrary to the clear intent of the Commerce Clause.

Assuming the market participation doctrine is applicable, the Illinois Act nevertheless fails the test for application of the doctrine on two separate grounds. Initially, the Illinois Act is not proprietary, as it represents an economically irrational action that would not be taken by a private contracting party. A private market participant would not automatically refuse to invest in a company that does business in a particular foreign country because of objections to that country's human rights record. Furthermore, the Act does not confer an economic benefit upon Illinois or its citizens.²⁴¹ To the contrary, the Act may result in the ultimate divestment of billions of dollars in scores of profitable

²³⁹ *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (providing that a state law may survive constitutional scrutiny only if it does not implicate foreign affairs or violate a clear federal directive); see also *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976).

²⁴⁰ *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 684-85 (1999).

²⁴¹ See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 64 (1st Cir. 1999) (refusing to apply the market participation doctrine to the Massachusetts Selective Purchasing Act due to the absence of provisions favoring Massachusetts' residents or securing substantive benefits for them); see also Fenton, *supra* note 134, at 587 condemning divestment statutes on the basis that they lack "direct, local, economic advancement objectives."

companies.²⁴² As a result, the Act has been condemned due to the economic harm it could cause investors as well as the costs associated with divestment.²⁴³ Illinois may suffer non-quantifiable injury to its reputation in the national and international business communities as a desirable location within which to do business. These effects may be exacerbated by the fact that Illinois is among a small number of states presently requiring divestment. Governments act as market participants only when they make “economically rational” decisions.²⁴⁴ Economically unsound decisions or those that would not have been reached by a private participant constitute government regulation.²⁴⁵

The overbreadth of the Illinois Act also prevents the application of the market participation doctrine. The doctrine excludes state activities that attempt to govern “the private, separate economic relationships of [state] trading partners.”²⁴⁶ The Illinois Act attempts to govern these separate economic relationships by mandating the severance of all commercial ties with Sudan in order for a company to remain eligible for the investment of state funds. All commercial relations are deemed anathema regardless of the presence of any nexus between these relations and the state. The sole method of avoidance of sanctions

²⁴² See *supra* note 21 and accompanying text; see also Spiro, *supra* note 139, at 824 (condemning state divestment initiatives with respect to South Africa on the grounds that implementation would deprive state portfolios of preferred traditional conservative investment choices and would cause difficulty in structuring “a properly diversified and statutorily acceptable portfolio”).

²⁴³ See *supra* notes 21-23 and accompanying text.

²⁴⁴ *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1335-37 (D.C. Cir. 1996).

²⁴⁵ *Id.* There are admittedly different roles for private industry and local governments. While profit maximization within the bounds of law provides a sensible standard for private industry, the same cannot be said for government participants. Rather, government participants are also charged with the duty to act as “guardians and trustees” of the public good. While economically rational decisions presumably serve the public good, there are other considerations like ethics and morality that may weigh heavier on government participants than on private industry. Nevertheless, some requirement of economic rationality must be applied to governmental participants. This requirement is necessitated by the exemption that would be granted to activities deemed to be market participation. If governments are to avail themselves of this broad exemption, they must earn it by following the basic assumptions inherent in the private marketplace.

²⁴⁶ *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 98-99 (1984).

is complete withdrawal by companies seeking to remain eligible for state investments.

The mandatory nature of the Illinois Act also bears a greater resemblance to regulation than to market participation. A state is not engaged in proprietary activity as a market participant “when it dictates to a private industry how to conduct its business.”²⁴⁷ In a manner similar to the statute condemned in *Garamendi*, the Illinois Act pays no heed to diplomatic discretion but rather contains elements of economic compulsion designed to coerce companies to completely disengage from Sudan or suffer the penalty of loss of state investment funds.²⁴⁸ Divestment statutes possessing qualities of coercion, penalization, finality, and inflexibility most likely will be viewed by courts as regulatory rather than proprietary in nature.²⁴⁹

The Illinois Act is also overbroad to the extent that it attempts to influence the political atmosphere in Sudan. Although it is unclear what effect, if any, the Act has had or will have upon private investment in Sudan and, consequently, the Sudanese government, there is little doubt that it was motivated by intent to punish the government and precipitate an end to its role in the ongoing humanitarian crisis in Darfur. While undoubtedly a noble purpose, an attempt by a state to exert political influence within a foreign country exceeds the narrow scope of the market participation doctrine. Rather, the satisfaction of state interests unrelated to the need for commercial freedom bears greater similarity to regulatory activity.²⁵⁰

Finally, the OLC opinion is limited to state and local initiatives applying to United States-based companies. As demonstrated by the Illinois Act and its procurement cousin, the Massachusetts Selective Purchasing Act, state initiatives are less likely to limit their application in such a manner. Rather, these efforts have

²⁴⁷ Anne R. Bowden, *North Carolina's South African Divestment Statute*, 67 N.C. L. REV. 949, 961 (1989).

²⁴⁸ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 423 (2003) (striking down the California Holocaust Victim Insurance Relief Act on the bases that it was a regulatory sanction, was coercive, and imposed “a different state system of economic pressure” on insurers doing business in the state).

²⁴⁹ Bowden, *supra* note 247, at 961.

²⁵⁰ Lewis, *supra* note 233, at 486-87.

condemned investments by companies regardless of their nationality and thus precipitated foreign entanglements and potential retaliation.

2. *The Board of Trustees v. City of Baltimore Opinion*

Any discussion of the constitutionality of the Illinois Act must include discussion of the sole United States court to directly address the relationship between local divestment initiatives and the federal government's authority with respect to commerce. In *Board of Trustees v. City of Baltimore*, the Maryland Court of Appeals upheld an ordinance requiring the divestiture of three municipal employee pension funds from companies doing business in South Africa.²⁵¹ The court found the ordinance to be immune from constitutional attack on the basis of the Commerce Clause for two reasons.

Initially, the court found divestment as mandated by the ordinance to be shielded from constitutional scrutiny by the market participation doctrine.²⁵² Based upon "the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal," the court concluded Baltimore could elect not to deal with companies doing business in South

²⁵¹ 562 A.2d 720 (Md. 1989), *cert. denied*, Lubman v. Mayor & City Council of Baltimore City, 493 U.S. 1093 (1990). Adopted in July 1986, the ordinance provided that no funds of Baltimore's three municipal employee retirement systems were to remain invested in or be invested in the future in banks or financial institutions that made loans to South Africa or Namibia or companies "doing business in or with" those states. *Id.* at 724 (citing BALTIMORE, MD., CODE, ORDINANCE NO. 765, § 1(i) (1986)). Entities doing business in or with South Africa or Namibia were identified through reference to the most recent edition of the *Unified List of United States' Companies with Investments or Loans in South Africa and Namibia* published annually by the Africa Fund. *Id.* (citing § 1(ii)). Divestment was to be completed within a two year period commencing on January 1, 1987. *Id.* (citing § 2(b)). However, the board of trustees of each of the retirement systems could suspend divestment within this period of time through adoption of a resolution finding that the rate of return would be substantially lower as a result of divestment than the average of the annual earnings on the funds over the previous five years, making divestment inconsistent with generally accepted investment standards and causing financial losses. *Id.* (citing § 2(d)). The period of suspension could not exceed ninety days, and the two year period for divestment was tolled during any suspension. *Id.* (citing § 2(f)).

²⁵² *Board of Trustees*, 562 A.2d at 750.

Africa “unhindered by the constraints of the Commerce Clause.”²⁵³ The court found that the ordinance posed a lesser threat to the “national common market” due to the absence of overtly discriminatory measures favoring local residents.²⁵⁴ Additionally, the ordinance was not punitive, as its primary purpose was removal of “a perceived moral taint” from Baltimore’s portfolio rather than punishment of entities maintaining investments in South Africa.²⁵⁵ Rather, any sanction, to the extent such was imposed by the ordinance, was not protracted and subject to cessation upon the immediate termination of business relations with South Africa.²⁵⁶ The court also distinguished the Supreme Court’s holding in *South-Central Timber Development, Inc. v. Wunnicke* on the basis that Baltimore’s ownership of securities gave rise to “an ongoing commercial relationship in which the city retain[ed] a continuing proprietary interest in the firm in which it invests” rather than imposing conditions having a regulatory effect outside of the market in which it participated.²⁵⁷ The court also concluded that the ordinance was not inconsistent with national policy or the views of the federal government.²⁵⁸ As a result, the court concluded that enforcement of the ordinance was consistent with Baltimore’s interest in the proper investment of funds and did not interfere with the private commercial transactions of affected companies.²⁵⁹ This result was obtained regardless of whether the ordinance impacted foreign or interstate commerce.²⁶⁰

Regardless of the existence and applicability of the market participation doctrine, the court upheld the ordinance on the basis that it could be justified by Baltimore’s legitimate local interests in

²⁵³ *Id.* (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 438-39 (1980)).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 751 (distinguishing *Wis. Dep’t of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986)). In *Gould*, the Court struck down a Wisconsin statute prohibiting the state, for a period of three years, from purchasing products manufactured or sold by entities to have been found to have violated the National Labor Relations Act on the basis that the imposition of this sanction was tantamount to regulation and not consistent with the activities of private purchasers of services. *Gould*, 475 U.S. at 289.

²⁵⁶ *Board of Trustees*, 562 A.2d at 751.

²⁵⁷ *Id.* at 752.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 753.

²⁶⁰ *Id.*

investing in a socially responsible manner, avoiding the moral taint associated with businesses maintaining apartheid and expressing sensitivity to the “deep feeling of [Baltimore’s] citizenry.”²⁶¹ As the court found that these purposes were legitimate, the question then became one of degree.²⁶² The court weighed these interests against the burden imposed on commerce through their expression in the ordinance.²⁶³ The issue was whether the burden on commerce caused by the divestment scheme was excessive in relation to Baltimore’s legitimate local interests.²⁶⁴ In the court’s judgment, the ordinance’s burden on the sale of securities did not outweigh Baltimore’s “unique and profound local concerns.”²⁶⁵

Those seeking to defend the Illinois Act on the basis of the decision in *Board of Trustees* should exercise considerable caution. Leaving aside its status as a state court decision purporting to opine on the reach of the Commerce Clause, the opinion in *Board of Trustees* is a shaky precedent upon which to rest arguments with respect to the constitutionality of the Illinois Act. Initially, as noted with respect to the OLC opinion, there are serious questions regarding the continued viability of the holdings in *Board of Trustees* as a result of the opinions in *Crosby*, *Garamendi*, and *Natsios* in the intervening twenty years.²⁶⁶ While for the most part, these opinions did not reference the holding in *Board of Trustees*, the First Circuit strongly indicated its belief that the case had been wrongly decided.²⁶⁷ Although the United States Supreme Court opinions did not expressly reference nor overrule *Board of Trustees*, they undoubtedly confirmed the limited role of state and local governments with respect to foreign commerce. It is also important to note the previous discussion regarding the inapplicability of the market participant doctrine to state divestment initiatives.²⁶⁸

²⁶¹ *Id.* at 755.

²⁶² *Board of Trustees*, 562 A.2d at 754.

²⁶³ *Id.* at 754-55.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 755.

²⁶⁶ See *supra* notes 227-229 and accompanying text.

²⁶⁷ *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 55-56 (1st Cir. 1999).

²⁶⁸ See *supra* notes 230-250 and accompanying text.

Assuming that *Board of Trustees* remains viable precedent, the ordinance it upheld can be distinguished from the Illinois Act. The Baltimore ordinance possessed greater credibility than the Illinois Act to the extent it identified the source to be utilized in determining the existence of prohibited financial relations with South Africa. By contrast, the Illinois Act leaves the determination of sanctionable financial connections with Sudan to an unidentified “independent researching firm.”²⁶⁹ These differences also are important to the extent they permitted the trustees of the Baltimore pension funds in question to exercise discretion in implementing divestment.²⁷⁰ Although not expressly permitting suspension of divestment due to conflicts with the Commerce Clause, there was at least some ability to reconsider the sanctions. By contrast, such discretion does not exist in the Illinois Act, which provides no basis for exemption from certification or suspension of divestment by the state treasurer. Rather, the mandate of the Illinois Act is stark and unquestionably specific. For example, the Act mandates that the completion of divestment from “forbidden entities” was to occur by December 25, 2006.²⁷¹

More importantly, as noted in *Natsios*, the *Board of Trustees* case was mistakenly decided.²⁷² Despite their differences, the Baltimore ordinance and the Illinois Act have an unconstitutional intent. The “unique and profound concerns” of state and local governments as reflected in divestment legislation do not trump the national interest in a unified policy with respect to economic sanctions, including prohibitions upon investment.²⁷³ Protestations to the contrary notwithstanding, the motivation for such legislation is clear from their provisions. The Baltimore ordinance and Illinois Act were aimed directly at two foreign governments maintaining reprehensible policies. Although the Baltimore ordinance did not expressly provide for its nullification upon the abolition of apartheid in South Africa, it is fair to conclude that

²⁶⁹ Compare BALTIMORE, MD., CODE, ORDINANCE NO. 765, § 1(ii) (1986) with 40 ILL. COMP. STAT. 5/1-110.5(b)(5)(i-ii) (West 2002).

²⁷⁰ BALTIMORE, MD., CODE, ORDINANCE NO. 765, § 2(d) (1986).

²⁷¹ 40 ILL. COMP. STAT. 5/1-110.5(a)(3) (2006).

²⁷² *Natsios*, 181 F.3d at 55-56.

²⁷³ *Board of Trustees v. City of Baltimore*, 562 A.2d 720, 755 (Md. 1989).

eliminating the policy that motivated the adoption of the ordinance in the first place would cause the divestment sanction to be lifted. The Illinois Act is more explicit than the Baltimore ordinance in its provision creating a nexus between the lifting of the divestment sanction and certification by the United States government that factors motivating the imposition of federal sanctions have ended.²⁷⁴ The intent of the Baltimore ordinance and the Illinois Act to influence events beyond their boundaries is further evident in the punishment meted out to those companies that fail to comply with the mandate to withdraw from foreign countries whose governments engage in policies lacking approval by state and local governments. The withdrawal of these companies from such locations will undoubtedly impact their former hosts, a result which most certainly could not have been lost upon the Baltimore City Council and the Illinois legislature. As noted by one commentator, despite contentions that such laws have no influence on the companies affected and are motivated solely by a desire to “communicate a moral or philosophical community position,” it defies credibility to argue that state and local governments would adopt such precise laws without intending for them to have an effect in the target states.²⁷⁵

The Maryland Court of Appeals’ reliance on the broad consistency of Baltimore’s divestment ordinance with federal policy is misplaced. The court was uncertain whether the ordinance was consistent with federal policy towards South Africa or merely failed to frustrate congressional objectives underlying applicable federal legislation.²⁷⁶ As noted in *Crosby* and *Garamendi*, the convergence of federal and municipal objectives with respect to foreign affairs is irrelevant to the ultimate question of constitutionality.²⁷⁷ What is relevant to the determination of this issue is the divergence of the selected means to accomplish

²⁷⁴ 40 ILL. COMP. STAT. 5/1-110.5(c) (2006).

²⁷⁵ Fenton, *supra* note 134, at 577-78.

²⁷⁶ See *Board of Trustees*, 562 A.2d at 744, 757 concluding that, to the extent the ordinance discourages investment in South Africa, it “cannot be said to frustrate the narrow congressional objectives” and is “‘broadly consistent’ with federal policy towards South Africa.”

²⁷⁷ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 425 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 379 (2000).

the common objective. To the extent *Board of Trustees* subordinates such divergence to the commonality of objectives, it has been overruled by *Crosby* and *Garamendi*. In any event, unlike the federal laws relating to South Africa in *Board of Trustees*, there is no manifest congressional intent in applicable federal law exempting state divestment initiatives with respect to Sudan.²⁷⁸

Finally, *Board of Trustees*, as is undoubtedly also the case with respect to the OLC opinion issued three years earlier, is an outdated relic of a bygone era. It is trite but no less true to note that the world in the twenty-first century is a far different place than that which confronted the Maryland Court of Appeals in 1989. In Europe, a wall fell and an empire turned to dust. The Cold War has been won as has one war in Iraq. The outcomes of a second war in Iraq and the so-called “War on Terror” remain uncertain. In Asia, predictions of imminent second-class status for the U.S. economy as a result of Japanese entrepreneurialism have been replaced by anxiety over the burgeoning economic and military power of the awakening Chinese giant. Regardless of location or politics, all states warily eye the incarnation of political ideologies purportedly based on the teachings of Islam. In South Africa, apartheid is part of the quickly receding past; its most visible opponent having risen to the rank of president and revered spokesperson for human rights throughout the world. In turn, the policies of racial inequality in South Africa have been replaced by more vicious struggles between peoples of different nationalities and creeds as evidenced most vividly by the Balkan wars and the genocide in Rwanda.

In their brief before the First Circuit Court of Appeals in *Natsios*, seven former federal government officials responsible for conducting United States foreign policy stated that “[i]n an era of burgeoning international trade, economic globalization, and the rapid movement of capital and means of production, the importance of having a unified, coordinated international trade policy is magnified and especially sensitive.”²⁷⁹ Although this

²⁷⁸ *Board of Trustees*, 562 A.2d at 743 (finding “strong evidence” that the U.S. Congress had no intent to preempt state and local divestment initiatives directed at South Africa).

²⁷⁹ See Brief of Amici Curiae William E. Brock, Samuel M. Gibbons, Alexander M.

statement was made in the context of state procurement practices, the same rationale applies to investment policies in the twenty-first century. The reasoning of the Maryland Court of Appeals in *Board of Trustees* must give way to the need for an uninterrupted stream of commerce governed by unified and distinctly federal policies in response to the irresistible forces of modern globalization.

IV. Conclusion

The Illinois Act represents the first opportunity to examine the consistency of state and local divestment laws with the Commerce Clause since the decision of the Maryland Court of Appeals in *Board of Trustees*. The issues presented by the Illinois Act go directly to the heart of the Constitution, the fundamental relationship between the federal government and the states, and the allocation of power between them. The potential for fragmentation of United States foreign policy must be weighed against functions traditionally delegated to state and local governments. The stakes in this dispute are heightened by the millions of lives and billions of dollars at issue.

As such, there is a need for the voice of a federal court to be heard on this issue. Commercial relations with respect to Sudan and potentially scores of other countries should not rest on the judgments of a single state court and legislature, no matter how well-intended their actions. Despite state and local divestment laws dating back to the zenith of the anti-apartheid movement in the 1980s, there is a dearth of federal case law addressing the consistency of such laws with constitutional mandates. Although a clearer picture of impermissible state interference in interstate and foreign commerce may be discerned from recent Supreme Court case law, the precise boundaries of federal and state authority remain indistinct. As a result, state and local governments remain adrift to navigate the limits of their authority in a constitutional fog. It appears that such guidance will be forthcoming in the near future as a result of at least one recently filed judicial challenge based, in part, upon the Commerce

Clause.²⁸⁰

The voices of the other branches of the United States government must also be heard. At the risk of alienating those favoring the devolution of federal power, the Bush Administration must articulate a position with respect to mandatory state and local divestment initiatives. This position should emphasize the need for national uniformity with respect to commercial relations with foreign states and the ultimate responsibility of the executive branch for ensuring such uniformity. Congress must also make its will known in this area by clearly preempting state divestment regimes in any future legislation in this area.²⁸¹

Federal administrative agencies also have a crucial role in this area. For example, the Securities and Exchange Commission could collect and publish information about the investments and commercial relationships of publicly traded companies in or with Sudan and other states classified as sponsors of international terrorism.²⁸² In order to relieve pension funds of the obligation to investigate these investments, the United States Department of

²⁸⁰ Nat'l Foreign Trade Council v. Topinka, No. 06C-4251 (N.D. Ill. filed Aug. 7, 2006) (challenging the Illinois Act as an unconstitutional state interference with the federal government's authority with respect to foreign affairs and a violation of the Foreign Commerce and Supremacy Clauses and the National Bank Act). The plaintiffs consist of the boards of trustees of police pension funds located in Arlington Heights, Bloomington, Charleston, Crete, Lyons, Northlake, and Palos Hills, the board of trustees of the firefighters' pension fund in Charleston, eight retired local police officers and firefighters, one retired employee of the state of Illinois, and the National Foreign Trade Council. Formed in 1914, the National Foreign Trade Council is a business organization representing the interests of more than 300 companies. Nat'l Foreign Trade Council, Welcome to the NFTC, <http://nftc.org> (last visited Mar. 5, 2007). The defendants are the Illinois State Treasurer, the Illinois Attorney General and the Secretary of the Illinois Department of Financial and Professional Regulation. Most recently, on October 26, 2006, U.S. District Court Judge Matthew F. Kennelly denied the defendants' motion to dismiss for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). See Transcript of Proceedings on Motion to Dismiss at 2-5, Nat'l Foreign Trade Council v. Topinka, No. 06C-4251 (N.D. Ill. filed Aug. 7, 2006). The plaintiffs' request for a preliminary injunction was scheduled to be determined by January 27, 2007, as of the time of preparation of this article.

²⁸¹ The U.S. Congress eliminated the section of the Darfur Peace and Accountability Act which provided that it did not preempt state divestment initiatives with respect to Sudan, contained within the original version of the Act passed by the House of Representatives, it did not expressly preempt such initiatives, thereby requiring judicial determination of this issue. See *supra* note 81 and accompanying text.

²⁸² *Sleeping with the Enemy*, *supra* note 19, at 2.

State could identify those companies whose activities are linked to human rights violations and international terrorism.²⁸³ This approach would ensure that investors receive information from the most knowledgeable and reliable source and thus do not punish companies maintaining legal investments with no connection to such activities.²⁸⁴

Finally, the international business community must reconsider its continued investment in Sudan. Businesses must withhold their support of regimes that brutalize their citizens. The public shaming of companies through disclosure of their involvement in Sudan by the United States Department of State or the Securities and Exchange Commission may encourage voluntary divestment efforts. Although not ideal or certain of success, such disclosure and the results thereof are preferable to the continued interference of state and local governments in foreign commerce through mandatory divestment initiatives.

²⁸³ *Id.* at 2-3.

²⁸⁴ *Id.* at 3.