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State and Local Economic Sanctions: Constitutional Issues

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Summary

States and localities have occasionally enacted measures restricting their agencies from conducting economic transactions with entities that do business with or in foreign countries whose conduct these jurisdictions find objectionable. While some maintain that sub-federal entities may enact such laws under sovereign proprietary powers and other constitutional prerogatives, others argue that these measures impermissibly invade federal commerce and foreign affairs authorities and may, in some cases, be preempted by federal statute. In 2000, the U.S. Supreme Court unanimously held in *Crosby v. National Foreign Trade Council* that a Massachusetts law restricting state transactions with firms doing business in Burma was preempted by federal statute. In its 2003 decision in *American Insurance Association v. Garamendi*, the Court reaffirmed the relevance of the dormant federal foreign affairs power to preemption analysis when it struck down a California law requiring certain businesses to disclose information regarding Holocaust-era insurance policies sold in Europe, but the scope of the 5-4 decision is unclear.

In recent years, a number of states have proposed or enacted some type of divestment legislation against Sudan in response to the troubled situation in Darfur. States have also considered or adopted divestment legislation involving Iran, Cuba, or terrorist states in general. In February 2007, a federal district court held Illinois's Sudan sanctions law unconstitutional and permanently enjoined its enforcement (*National Foreign Trade Council v. Giannoulias*). Illinois subsequently repealed its statute, and the state's appeal in the case was dismissed as moot later that year. In 2012, a U.S. federal district court issued a preliminary injunction barring the enforcement of a Florida statute which, among other things, restricted the state or local governments from entering into contracts with certain entities that do business in Cuba.

In recent years, Congress has enacted legislation authorizing states to prohibit investments in, or divest assets from, Sudan and Iran. The Sudan Accountability and Divestment Act of 2007 (P.L. 110-174) authorizes states and local governments to adopt divestment or investment prohibition measures involving (1) persons the state or local government determines are conducting business operations in the Sudanese energy and military equipment sectors or (2) persons having a direct investment in or carrying on a trade or business with Sudanese entities or the Government of Sudan, provided certain notification requirements are met. The Comprehensive Iran Sanctions, Accountability, and Divestment Act (P.L. 111-195) which was enacted in 2010, includes provisions authorizing state and local governments to divest from those businesses making investments of $20 million or more in Iran's energy sector after adequate investigation and notification have occurred. Both laws provide that a measure falling within the scope of the authorization is not preempted by any federal law or regulation.

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States and localities have at times proposed or enacted measures restricting governmental transactions with entities doing business or having financial ties with foreign countries whose conduct is found objectionable, particularly because of terrorism or human rights concerns.[1] This report summarizes constitutional arguments made for and against these laws and discusses the Supreme Court's decisions in *Crosby v. National Foreign Trade Council* and *American Insurance Association* v. *Garamendi*, where the Court addressed the permissibility of state laws having implications upon U.S. foreign affairs. The report also discusses a 2007 federal district court decision which held that an Illinois law that imposed sanctions upon Sudan was unconstitutional, along with a 2012 federal district court decision preliminarily enjoining the enforcement of a Florida statute which, among other things, restricts the state or local governments from entering contracts with certain entities that do business in Cuba. The report also suggests some possible legal ramifications of recent case law for future state and congressional action in this area, and summarizes recent federal enactments addressing state economic sanctions.

Types of State and Local Economic Sanctions

State and local sanctions have generally taken the form of (1) selective purchasing or contracting laws, which generally prohibit state or local agencies from contracting with or procuring goods and services from companies that do business in a named country, or (2) selective investment laws, which prohibit state or local agencies from investing public funds in such companies. A variation of the latter is a state or local divestment law which, for example, may require divestment by state pension funds of stock in companies that either do business within a named country or with that country's government. In the 1990s, a number of state laws focused on conditions in Burma (Myanmar), while others targeted Nigeria, Tibet, Cuba, Indonesia, Switzerland, and Northern Ireland. Other state laws addressed poor foreign labor practices regardless of country.

Due to the troubled situation in Darfur, between 2006 and 2010 a number of states proposed or enacted divestment legislation focused on Sudan.[2] Other states have passed legislation prohibiting pension fund investment in debt instruments issued by any nation designated by the State Department as supporting or engaging in terrorism.[3] Other pending or enacted state legislation is aimed at divestment of state funds from companies engaged in certain business activities in Iran, in either Iran or Sudan, or in state sponsors of terrorism.[4]

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[1] *See* generally National Conference of State Legislatures, State Divestment Legislation, at http://www.ncsl.org/issues-research/labor/state-divestiture-enacted-laws-legislation.aspx (last updated Apr. 9, 2008).

[2] The Government Accountability Office reported in 2010 that 35 states had enacted laws or adopted non-legislative policies regarding state investments in Sudan. U.S. Gov't Accountability Office, *Sudan Divestment: U.S. Investors Sold Assets but Could Benefit from Increased Disclosure Regarding Companies' Ties to Sudan* 13, GAO-10-742, June 22, 2010. Between 2006 and 2010, state fund managers divested or froze about $3.5 billion in assets related to Sudan. *Id.* at 11.

[3] The State Department, pursuant to Section 6(j) of the Export Administration Act, currently lists Cuba, Iran, Sudan, and Syria as countries whose governments have repeatedly provided support for acts of international terrorism. *See* Dep't of State, *Country Reports on Terrorism 2011* (2012), *available at* http://www.state.gov/documents/organization/195768.pdf.

[4] *See* **Appendix**.

In February 2007, a federal district court held that an Illinois statute, which restricted the deposit of state funds to institutions having customers with ties to Sudan and barring the investment of state pension funds with Sudanese-connected entities, was constitutionally impermissible. The state's appeal to the U.S. Court of Appeals for the Seventh Circuit was subsequently dismissed as moot.[5]

Overview of Constitutional Issues

State and local economic sanctions that target foreign government behavior ordinarily raise three constitutional issues: (1) whether they burden foreign commerce in violation of the Foreign Commerce Clause and, if so, whether they are protected by the market participant exception to the Clause; (2) whether they impermissibly interfere with the federal government's exclusive power to conduct the nation's foreign affairs; and (3) where Congress or the President has acted, whether they are preempted by federal law.[6]

Foreign Commerce Clause

The Constitution provides Congress with the authority to regulate both interstate and foreign commerce (Art. I, §8, cl. 3). In addition to this affirmative grant of constitutional authority, the Supreme Court has recognized that the Commerce Clause implies a corresponding restraint on the authority of the states to interfere with commerce, even absent Congressional action.[7] This inferred restriction arising from congressional inaction is generally referred to as the "dormant"

[5] National Foreign Trade Council v. Giannoulias, 523 F.Supp.2d 731 (N.D.Ill. 2007).

[6] For legal background, *see, e.g.,* Cong. Research Service, The Constitution of the United States of America, 2010 Supp. at 29-32 (H.Doc. 110-17)[hereinafter Constitution Annotated]; Louis Henkin, Foreign Affairs and the United States Constitution 149-69 (2d ed. 1996)[hereinafter Henkin]; Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 Seton Hall L. Rev. 201 (2011); Judith Resnick, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 Emory L. J. 31 (2007); Adrian Barnes, *Do They Have to Buy From Burma?: A Preemption Analysis of Local Antisweatshop Procurement Laws*, 107 Colum. L. Rev. 426 (2007); Lucien J. Dhooge, *Condemning Khartoum: The Illinois Divestment Act and Foreign Relations*, 43 Am. Bus. L. J. 245 (2006); Todd Steigman, *Lowering the Bar: Invalidation of State Laws Affecting Foreign Affairs Under the Dormant Foreign Affairs Power After* American Insurance Association v. Garamendi, 19 Conn. J. Int'l L. (2004); David D. Caron, *The Structure and Pathologies of Local Selective Procurement Ordinances: A Study of the Apartheid-Era South Africa Ordinances*, 21 Berkeley J. Int'l L. 161 (2003); Brandon P. Denning, American Insurance Ass'n v. Garamendi, *and* Deutsch v. Turner Corp., 97 Am. J. Int'l L. 950 (2003); Brandon P. Denning & Jack H. McCall, Crosby v. National Foreign Trade Council, 94 Am. J. Int'l L. 750 (2000); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 Sup. Ct. Rev. 175; Robert Stumberg, *Preemption & Human Rights: Local Options After* Crosby v. NFTC, 32 Law & Pol'y Int'l Bus. 109 (2000); Alejandra Carvajal, *State and Local 'Free Burma' Laws: The Case for Sub-National Trade Sanctions*, 29 Law & Pol'y Int'l Bus. 257 (1998) [hereinafter Carvajal]; Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 Harv. Int'l. L. J. 443 (1998) [hereinafter Price & Hannah]; Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997); David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 Vand. J. Transnat'l L. 175 (1997)[hereinafter Schmahmann & Finch]; Richard B. Bilder, *The Role of States and Cities in Foreign Affairs*, 83 Am. J. Int'l L. 821 (1989); Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 Am. J. Int'l L. 832 (1989); Constitutionality of South African Divestment Statutes Enacted by State and Local Governments, 10 Op. Off. Legal Counsel 49 (1986) (concluded that certain state divestment laws were constitutional) [hereinafter DOJ Opinion]. *See also* Timothy J. Conlon, Robert L. Dudley, & Joel F. Clark, *Taking on the World: The International Activities of American State Legislatures*, 34 Publius: The Journal of Federalism 183 (Summer 2004).

[7] *See, e.g.,* Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. 299 (1851).

Commerce Clause. Under this established principle, states and localities are impliedly prohibited from unreasonably burdening or discriminating against either interstate or foreign commerce unless they are authorized by Congress to do so.[8] In a series of cases involving state taxes, the Supreme Court has set out criteria for examining whether state measures impermissibly burden *foreign* commerce where affirmative congressional permission is absent. In sum, the Court has required a closer examination of measures alleged to infringe the Foreign Commerce Clause than is required for those alleged to infringe its interstate counterpart, but has also provided scope for state measures in situations where a federal role is not clearly demanded.

In *Japan Line, Ltd. v. County of Los Angeles*,[9] the Supreme Court struck down on Foreign Commerce Clause grounds a California state statute that applied an ad valorem property tax on foreign cargo containers. In doing so, the court identified two reasons why "a more extensive constitutional inquiry is required" in foreign commerce cases than those involving "purely interstate commerce."[10] First, there is an "enhanced risk of multiple taxation" upon goods involved in foreign commerce than in the case of domestic goods.[11] Secondly, a state tax upon an instrumentality in foreign commerce "may impair federal uniformity in an area where federal uniformity is essential," or, in other words, may "prevent [] the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'"[12] The Court made clear that "[i]f a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause."[13]

Four years later in *Container Corp. of America v. Franchise Tax Board*,[14] the Court upheld a state income tax law challenged by a multinational enterprise, finding that it did not infringe upon the federal government's authority over foreign commerce. The Court viewed the case as involving several facts which made it distinguishable from the state tax which had been struck down in

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[8] *See* New York v. United States, 505 U.S. 144, 171 (1992) ("While the Commerce Clause has long been understood to limit the States' ability to discriminate against interstate commerce, that limit may be lifted…by an expression of the 'unambiguous intent' of Congress.") (internal citations omitted); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87-93 (1984). *See also* Kraft Gen. Foods v. Iowa Dept. of Revenue, 505 U.S. 71, 81 (1992)("Absent a compelling justification ... a State may not advance its legitimate goals by means that facially discriminate against foreign commerce.").

[9] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

[10] *Id.* at 445-446. With respect to state taxes affecting *interstate* commerce, the Court has stated that "[a]bsent congressional approval... [the tax] will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State." Barclays Bank Plc v. Franchise Tax Bd., 512 U.S. 298, 310-311 (1994).

[11] *Japan Line, Ltd.*, 441 U.S. at 446. The Court elaborated on the reasons why goods in foreign commerce faced a greater risk of multiple taxation than those in interstate:

> In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value. The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full. "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. . . . Otherwise there would be multiple taxation of interstate operations." The basis for this Court's approval of apportioned property taxation, in other words, has been its ability to enforce full apportionment by all potential taxing bodies. Yet neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign.

Id. at 446-447 (internal citations omitted).

[12] *Id*., at 446-48, 451.

[13] *Id.* at 451.

[14] Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983).

Japan Line, Ltd.[15] In upholding the California state income tax law, the Court also elaborated upon its prior recognition in *Japan Line, Ltd.* that a state tax may be impermissible if it prevents the federal government from speaking with "one voice" on international trade issues. Here, the Court indicated that state action may have "merely foreign resonances" without impermissibly treading upon the federal government's authority over foreign affairs. A state tax "will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive."[16] The Court noted that the second of these factors "is, of course, essentially a species of preemption analysis."[17]

The Court later concluded in *Barclays Bank PLC v. Franchise Tax Board of California*,[18] a case examining California's income-based corporate franchise tax, that even a state statute that may make it more difficult for the federal government to speak with a single voice on international trade will be sustained if there is no clear indication that Congress had intended to bar the state practice. The Court stated that *Container Corporation* and a subsequent case, *Wardair Canada Inc. v. Florida Dep't of Revenue*,[19] in which the Court upheld a state tax on jet fuel purchased by foreign airlines, suggested that "Congress may more passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential....'" Moreover, Congress "need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce...."[20]

Where Congress has not clearly immunized a state selective purchasing or divestment law for Foreign Commerce Clause purposes, arguments that any such law impermissibly burdens foreign commerce[21] may be countered by invocation of the market participant doctrine. First articulated in the Supreme Court's 1976 ruling in *Hughes v. Alexandria Scrap Corp.*,[22] the doctrine exempts

[15] The Court explained:

> Nevertheless, there are also a number of ways in which this case is clearly distinguishable from *Japan Line*. First, it involves a tax on income rather than a tax on property. We distinguished property from income taxation in [prior cases]… suggesting that "[the] reasons for allocation to a single situs that often apply in the case of property taxation carry little force" in the case of income taxation. Second, the double taxation in this case, although real, is not the "[inevitable]" result of the California taxing scheme. *Cf. Japan Line*, 441 U.S., at 447. In *Japan Line*, we relied strongly on the fact that one taxing jurisdiction claimed the right to tax a given value in full, and another taxing jurisdiction claimed the right to tax the same entity in part -- a combination resulting necessarily in double taxation. *Id.,* at 447, 452, 455. Here, by contrast, we are faced with two distinct methods of allocating the income of a multinational enterprise. The "arm's-length" approach divides the pie on the basis of formal accounting principles. The formula apportionment method divides the same pie on the basis of a mathematical generalization. Whether the combination of the two methods results in the same income being taxed twice or in some portion of income not being taxed at all is dependent solely on the facts of the individual case. The third difference between this case and *Japan Line* is that the tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States. We specifically left open in *Japan Line* the application of that case to "domestically owned instrumentalities engaged in foreign commerce," *id*., at 444, n. 7, and -- to the extent that corporations can be analogized to cargo containers in the first place -- this case falls clearly within that reservation.

Container Corp. of America, 463 U.S. at 187-189.

[16] *Id.* at 194.

[17] *Id.*

[18] Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298 (1994).

[19] Wardair Canada Inc. v. Florida Dep't of Revenue*,* 477 U.S. 1 (1986).

[20] Barclays Bank PLC, 512 U.S. at 323.

[21] *See* Price & Hannah, *supra* note 6, at 478-82; Schmahmann & Finch, *supra* note 6, at 189-91.

[22] Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

from the clause those laws in which the state or local government acts as a buyer or seller of goods rather than as a regulator.[23] It is counter-argued, however, that the doctrine is inapplicable where the state seeks to affect behavior beyond the immediate market in which it is operating; that it does not immunize laws from other constitutional challenges; and that, as suggested by the Supreme Court, it may not even apply in Foreign Commerce Clause cases.[24]

Intrusion into Foreign Affairs

"Power over external affairs is not shared by the States; it is vested in the national government exclusively."[25] State or local laws which encroach upon the federal government's authority over foreign affairs may be deemed constitutionally impermissible. In its 1968 decision in *Zschernig v. Miller*,[26] the Supreme Court struck down an Oregon law prohibiting nonresident aliens from inheriting property if they could not satisfy certain requirements. Namely, the Oregon statute required such aliens to demonstrate to the Oregon state courts that their home countries allowed U.S. nationals to inherit estates on a reciprocal basis and that payments to foreign heirs from the Oregon estates would not be confiscated.

Although the federal government had not exercised its power in the area, the Supreme Court nonetheless found that the inquiries required by the Oregon statute would result in "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[27] The Court distinguished its earlier decision in *Clark v. Allen*,[28] which had upheld a similar California statute, on the ground that the statute in that case could be implemented through "a routine reading of foreign law" and did not require the particularized inquiries demanded by the Oregon statute.[29]

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[23] Carvajal, *supra* note 6, at 270-74; DOJ Opinion, *supra* note 6, at 53-59 (concluded that state divestment laws were constitutional). *Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903, 909-913 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991), applied the doctrine to a state "Buy America" law.

[24] *See, e.g.*, South Central Timber Dev., Inc. v. Wunnicke, 467 U.S. at 99 (downstream effects); United Building & Construction Trades Council v. Mayor & Council of Camden, 465 U.S. 208 (1984)(no immunity from other constitutional challenges); Reeves, Inc. v. Stake, 447 U.S. 429, 437-38, n.9 (1980)(application in Foreign Commerce Clause cases unclear). *See generally* Price & Hannah, *supra* note 6, at 482-90; Schmahmann & Finch, *supra* note 6, at 191-97.

The Court of Appeals in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), concluded that the State of Massachusetts was not acting as a market participant in enacting its Burma sanctions law because it was "attempting to impose on companies with which it does business conditions that apply to activities not even remotely connected to such companies' interactions with Massachusetts." *Id.* at 63. The court also found that in any event the state would not be shielded from scrutiny under the Foreign Commerce Clause because of questions as to whether the market participant exception "applies at all (or without a much higher level of scrutiny) to the Clause." *Id.* at 65. *See also* Antilles Cement Corp. v. Acevedo Vilá, 408 F.3d 41, 46-47 (1st Cir. 2005). As indicated *infra*, the Supreme Court in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), did not take up the Foreign Commerce Clause issue in its ruling on the Massachusetts law.

[25] United States v. Pink, 315 U.S. 203, 232 (1942). *See also, e.g.,* Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (The Federal Government, representing as it does the collective interests of the…states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

[26] Zschernig v. Miller, 389 U.S. 429 (1968).

[27] *Id.* at 432

[28] Clark v. Allen, 331 U.S. 503 (1947).

[29] *Zschernig*, 389 U.S. at 433-36.

Many observers have characterized the parameters of the *Zschernig* ruling as unclear.[30] Application of the ruling is often an issue in litigation concerning state or local measures which restrict economic transactions with companies doing business with foreign entities whose conduct the state or locality finds objectionable. It has been argued, for example, that state or local selective procurement laws, through which jurisdictions condition eligibility for a public contract upon business entity refraining from certain activities within or in relation to a foreign country, are directed at influencing or scrutinizing foreign behavior in the manner that the *Zschernig* Court found objectionable.[31] Courts that have upheld restrictive procurement laws that were challenged on *Zschernig* grounds have emphasized that the challenged laws applied neutrally to all foreign products, and thus did not require the assessment of a particular government's policies that might result in constitutional infirmity.[32]

Preemption by Federal Enactment

The Supremacy Clause of the Constitution establishes that federal statutes, treaties, and the Constitution itself are "the supreme Law of the Land."[33] Accordingly, states can be precluded from taking actions that are otherwise within their authority if federal law is thereby thwarted. The extent to which federal law preempts, or supersedes, state law in a given area is entirely within the control of Congress. Congress may, by clearly or expressly stating its intent, choose to preempt all state laws, no state laws, or only certain state laws. Absent an express statement from Congress, an act of Congress may also impliedly preempt state or local action in a given area. Where Congress has not expressly preempted state and local laws, two types of implied federal preemption may be found: *field preemption*, in which federal regulation is so pervasive that one can reasonably infer that states or localities have no role to play,[34] and *conflict preemption*, in which "compliance with both federal and state regulations is a physical impossibility,"[35] or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[36] The delineation between preemption categories, and in particular between conflict and field preemption, is not rigid.[37]

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[30] *See, e.g.*, Henkin, *supra* note 6, at 162-65; Bilder, *supra* note 6, at 825-26; for further discussion, *see* Constitution Annotated, *supra* note 6, at 29-32.

[31] *E.g.,* Price & Hannah, *supra* note 6, at 457-65; Schmahmann & Finch, *supra* note 6, at 198-99.

[32] *See Trojan Technologies*, 916 F.2d 903; K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 381 A.2d 774 (N.J. 1977). *See generally* Price & Hannah, *supra* note 6, at 469-71. Prior to the lower court rulings on the Massachusetts Burma law, *see infra* note 25, at least one state "Buy America" law had been struck down on foreign affairs grounds. Bethlehem Steel Corp. v. Bd. of Comm'rs of the Dep't of Water & Power of Los Angeles, 276 Cal. App. 2d 221 (Cal. Ct. App. 1969).

It has also been argued that while state and local divestment measures may well survive *Zschernig* scrutiny, the principles underlying the market participant doctrine—that the Commerce Clause was not intended "to limit the ability of the States themselves to operate freely in the free market" and that judicial restraint in the area is "counseled by considerations of state sovereignty, the role of each state as 'guardian and trustee of its people,'"—should make the doctrine generally applicable and thus state proprietary actions should not be subject to the *Zschernig* principle. DOJ Opinion, *supra* note 6, at 63-64, *quoting* Reeves, Inc. v. Stake, 447 U.S. at 437-38.

[33] U.S. CONST., Art. VI, cl. 2.

[34] *See, e.g.*, Wardair Canada Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 6 (1986).

[35] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

[36] Arizona v. United States, 132 S. Ct. 2492, 2501 (2012), *quoting* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) and *Hines*, 312 U.S. at 67. *See also, e.g.*, Sprietsma v. Mercury Marine, 537 U.S. 51, 64-65 (2002); *Crosby*, 530 U.S. at 372-373;Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248-49 (1984); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 (continued...)

In preemption cases involving foreign affairs, courts may well weigh the deference traditionally accorded areas subject to state and local regulation against the policy considerations implicated by the federal scheme affecting foreign affairs or commerce. For example, in the Supreme Court's ruling in the 1941 case of *Hines v. Davidowitz*, which invalidated a state alien registration statute, the Court reiterated the long-recognized, constitutionally based supremacy of federal authority in foreign affairs and made clear that any concurrent state power in the area must be "restricted to the narrowest of limits….."[38]

Depending on the nature of a state statute and the type of federal action taken to deal with a problematic foreign nation, opponents of a state sanctions law may thus argue that, even absent express preemption by a federal statute, (1) a state law may conflict with federal laws and policies targeted at a specific country with respect to the activities and persons covered, or (2) there is reason to presume that Congress intended that all state and local measures targeting a particular country be preempted.[39] In response, it might be maintained, *inter alia*, that federal limitations on the exercise of proprietary powers to contract and invest must be expressly intended or must result from a highly pervasive federal scheme.[40] Moreover, state laws may arguably mandate consequences that differ from federal remedies or that do not exist on the federal level so long as the federal legislation or action involved does not constitute a "complex and interrelated federal scheme of law, remedy and administration."[41]

Notable Federal Judicial Rulings on State Sanctions (2000-Present)

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000)

In *Crosby v. National Foreign Trade Council*, the Supreme Court unanimously ruled that a Massachusetts selective purchasing law targeted at Burma was impliedly preempted by federal sanctions against Burma contained in the Foreign Operations Appropriations Act, 1997 (P.L. 104-208).[42] At the time, the absence of well-developed case law directly addressing sub-federal sanctions had made the outcome of a constitutional challenge to state sanctions laws unclear.

(...continued)

U.S. 190, 203-04 (1983).

[37] English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990) ("By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation."); *Crosby*, 530 U.S. at 373 n.6.

[38] *Hines*, 312 U.S. at 68.

[39] Price & Hannah, *supra* note 6, at 472-78; Schmahmann & Finch, *supra* note 6, at 184-89.

[40] *See, e.g.*, DOJ Opinion, *supra* note 6, at 64-65.

[41] *See id.* at 65-66, *citing* Wisconsin Dep't of Industry, Labor, and Human Relations v. Gould, Inc., 475 U.S. 282, 286 (1986); Carvajal, *supra* note 6, at 261-65.

[42] The Supreme Court narrowed the ruling of the First Circuit Court of Appeals, which had held that the state law infringed the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by federal law. National Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999). The district court ruled that the statute was an unconstitutional infringement on the federal foreign affairs powers. National Foreign Trade Council v. Baker, 26 F.Supp.2d 287 (D.Mass.1998).

Although various Supreme Court cases had previously examined aspects of such laws, none directly ruled on such a statute. Moreover, the few state cases scrutinizing such measures on constitutional grounds differed in result.[43]

Although Congress had not expressly preempted state laws in the federal Burma statute, the Court found the Massachusetts law was impliedly preempted because it "undermines the intended purpose and 'natural effect' of at least three provisions of the federal Act, namely, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma."[44]

After rejecting the state's argument that the law could not be preempted because it was based on an exercise of the state's spending power, the Court found that the law lacked the flexibility inherent in the federal statute: the state law had stringent application requirements and no termination provision, while federal law authorized the President to lift federal measures in certain circumstances, allowed him to prohibit new investment based on his own findings, and provided waiver authority with regard to all sanctions imposed in the statute.[45] The state law was also found to exceed federal authorities. While the Massachusetts law covered most state contracts, foreign and domestic firms, and firms already operating in Burma, the federal law imposed sanctions solely on U.S. persons, authorized a prohibition on new investment only, and exempted purchase and sales contracts from any ban.[46] Finally, the Court ruled that the state law had impeded the President's ability to pursue the multilateral strategy envisioned in the federal act, with the Court noting formal protests from U.S. trading partners, World Trade Organization complaints, and the distraction caused by the state law in discussions with foreign countries regarding the situation in Burma.[47]

Finally, the Court rejected the state's argument that Congress had implicitly permitted the state law because it had failed to expressly preempt state sanctions against Burma. Massachusetts noted that Congress was aware of the state's law when it adopted the federal Burma statute in 1996. However, the Court found that "[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that the courts will dependably apply" and that "in any event, the existence of a conflict cognizable under the Supremacy Clause does not depend on express recognition that federal and state law may conflict."[48] The Court found that in this case Congress's silence was ambiguous and insufficient

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[43] *Compare, e.g.*, Bd. of Trustees of Employees' Retirement System v. Mayor of Baltimore City, 317 Md. 72, 562 A.2d 720 (Md. 1989), *cert. denied sub nom.* Lubman v. Mayor and City Council of Baltimore, 493 U.S. 1093 (1990)(municipal ordinance requiring city pension funds to divest their holding in companies doing business in South Africa upheld in face of preemption, foreign affairs and Foreign Commerce Clause challenges), *with* Springfield Rare Coin Galleries v. Johnson, 115 Ill. 2d 221, 503 N.E. 2d 300, 307 (Ill. 1986)(state could not use its constitutional taxing power to exempt from state taxes any coins and currencies issued by the United States or any foreign country except South Africa; creation of tax classification based on political and social policies of a single foreign nation impermissibly intruded into regulation of foreign affairs; "regulations which amount to embargoes or boycotts" found to be "outside the realm of permissible State activity"). Like the federal Burma law implicated in *Crosby*, the Comprehensive Anti-Apartheid Act of 1986, cited in *Bd. of Trustees*, *supra*, did not expressly preempt sub-federal laws.

[44] Crosby v. National Foreign Trade Council, 530 U.S. 363, 373-74 (2000).

[45] *Id.* at 374-77.

[46] *Id.* at 377-80.

[47] *Id.* at 380-86.

[48] *Id.* at 387-88.

to warrant an inference of congressional intent to permit states to adopt their own Burmese sanctions.[49]

American Insurance Association v. Garamendi, 539 U.S. 396 (2003)

In *American Insurance Association v. Garamendi*, the Supreme Court reaffirmed the *Zschernig* Court's finding of a dormant federal foreign affairs power. In a 5-4 vote, the Court struck down a California law, the Holocaust Victim Insurance Relief Act, which required any insurer doing business in the state to disclose information about all life insurance policies issued in Europe during the Nazi regime. An executive agreement with Germany signed by the President provided that the International Commission on Holocaust Era Insurance Claims would serve as the sole vehicle for voluntary insurance claims to reduce litigation between foreign nationals and German firms. Despite the lack of a specific preemption clause, the Court, citing the "kid glove" approach chosen by the executive branch that was evident in the German agreement and similar agreements with Austria and France, along with executive branch statements supporting this approach, determined that there was a "clear conflict" between the policies adopted by the executive and the "iron fist" that California sought to use.[50] The Court made clear that state law could be preempted by the President's exercise of his independent constitutional authority to conduct foreign affairs, noting that Congress had not acted on the matter addressed in the California law and that given this independent authority, "congressional silence is not to be equated with congressional disapproval."[51]

National Foreign Trade Council v. Giannoulias, 523 F. Supp. 2d 731 (N.D.Ill. 2007)

In *National Foreign Trade Council v. Giannoulias*, the first lower federal court decision since *Crosby* and *Garamendi* to address a state sanctions law, the U.S. District Court for the Northern District of Illinois held the Illinois Sudan Act unconstitutional and permanently enjoined its enforcement.[52] At issue in the February 23, 2007, decision was a statute that placed restrictions both on the deposit of state funds and the investment of state and municipal pension assets.

The Illinois law amended the Deposit of State Moneys Act to prohibit the Illinois Treasurer from investing state funds in commercial instruments of Sudan and so-called "forbidden entities" and also from depositing state funds into any financial institution that did not certify that it "has implemented policies and practices that require loan applicants to certify that they are not 'forbidden entities.'" The category of "forbidden entities" included any company that had not certified that it did not own or control certain Sudan-related property or assets and did not engage in certain Sudan-related transactions.

The statute also amended the Illinois Pension Code to prohibit the fiduciary of any pension fund established under the Code from investing in any entity unless the company managing the funds' assets certified that the managing company had not transferred any assets of the Illinois

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[49] *Id.* at 388.

[50] American Insurance Association v. Garamendi, 539 U.S. 396, 425, 427 (2003).

[51] *Id.* at 429.

[52] National Foreign Trade Council v. Giannoulias, 523 F. Supp. 2d 731 (N.D.Ill. 2007).

retirement system or pension fund to a forbidden entity. The statute ultimately required that none of the assets of the system or fund be invested in "forbidden entities" by the end of July 2007. For purposes of the pension amendments, the term "forbidden entity" included (1) the firms described above; (2) any publicly traded company that owned or controlled Sudan-related property or assets or engaged in other Sudan-related transactions; and (3) any non-publicly traded company that failed to submit to the fund's managing company a sworn affidavit averring that the company did not own or control any Sudan-related property or conduct business transactions in Sudan. The statute was challenged on preemption, foreign affairs, and foreign commerce grounds.

In reaching its decision, the court set out federal law regarding Sudan, beginning with a 1997 Executive Order signed by President Clinton freezing Sudanese property in the United States and prohibiting various transactions between the United States and Sudan, and continuing with three subsequent public laws: the Sudan Peace Act (2002),[53] the Comprehensive Peace in Sudan Act (2004),[54] and the Darfur Peace and Accountability Act (2006).[55] None of these statutes contains a provision expressly preempting states from enacting their own sanctions against the Sudan.

Addressing the statutory preemption argument, the court held that, with respect to the amendment to the Deposit of State Moneys Act, the Illinois statute's "lack of flexibility, extended geographic reach, and impact on foreign entities interferes with the national government's conduct of foreign affairs," and was thus preempted by federal law.[56] On the other hand, the pension amendments were found not to be preempted, since federal law did not expressly address divestment, and, in the district court's view "the potential effects of pension divestment on the national government's ability to conduct foreign policy are highly attenuated."[57] The court stated that it had not been presented with evidence "suggesting that these pension funds' inability to purchase the securities of such companies would be in any way likely to affect their decision to do business in that country" and thus it had not been shown "that pension fund divestment stands as an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress' with regard to Sudan policy."[58]

Regarding the claim that the state measure impermissibly intruded upon the federal government's authority over foreign affairs, the court found scant prior case law on the issue, but concluded that the amendments to the Deposit of State Moneys Act "would have an impact on the national government's ability to deal with Sudan that is at least equal to or greater than the impact of the state laws in *Zschernig* and *Garamendi*."[59] The court considered that the amendments might cause multinational companies to pull out of Sudan, resulting in a "real and direct" effect on Sudan's economy, and that they thus clearly had "more than an incidental or indirect effect" in Sudan.[60] Noting as well the amendments' "substantive and direct impact on the national government's ability to carry out the flexible and measured approach to Sudanese relations that

[53] P.L. 107-245.

[54] P.L. 108-497.

[55] P.L. 109-344.

[56] *Giannoulias*, 523 F. Supp.2d at 741-42. Because of its adverse holdings on Sudan-related preemption and the foreign affairs infringement, the court did not address whether the banking amendments were preempted by the National Bank Act. *Id.* at 750.

[57] *Id.* at 742.

[58] *Id*. (citing *Crosby*, 530 U.S. at 372).

[59] *Id.* at 745.

[60] *Id*.

Congress and the president have created," the court held that they interfered impermissibly with the federal government's power to conduct the nation's foreign affairs.[61] At the same time, the court held that the pension amendments did not improperly intrude on the federal foreign affairs authority, finding that they did not place the same kind of pressure on firms to sever business ties with that country that flowed from the banking amendments and thus were not likely to affect the firms' willingness to do business in Sudan.

Because the court had already found the banking amendments unconstitutional on two grounds, it did not consider them in light of the Foreign Commerce Clause. Nevertheless, it did find that "there is little doubt that the conduct the Illinois Sudan Act seeks to proscribe involves foreign commerce"[62] and that "[w]ithout the protection of the market participant exception, the amendment to the Pension Code violates the Foreign Commerce Clause."[63] The court found that to the extent that the state was exercising control over municipal pension funds, however, it was acting as a market regulator and that the market participant doctrine, even if it were determined applicable in Foreign Commerce Clause cases, did not apply to this situation. With respect to the state's control of its own pension funds, the court held that, even if the amendment was constitutional if only applied to these funds, it could not be severed from the unconstitutional portion of the statute. The court therefore struck down the pension amendment as a whole.

The State of Illinois appealed the decision to the U.S. Court of Appeals for the Seventh Circuit. It also enacted new Sudan-related divestment legislation, which included a repeal of the invalidated provisions.[64] In October 2007, the state moved to dismiss the appeal as moot and to vacate the district court judgment. The appellate court granted the motion and remanded the case to the district court on November 30, 2007, with instructions to vacate the decision.

[61] *Id.*

[62] *Id.* at 747.

[63] *Id.* at 749.

[64] Ill. Pub. Act 095-0521 (S.B. 1168) (effective August 28, 2007), *available at* http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0521.

Faculty Senate of Florida International University v. Winn, 616 F.3d 1206 (11th Cir. 2010)

Faculty Senate of Florida International University v. Winn, a *per curiam* opinion of the U.S. Court of Appeals for the Eleventh Circuit, held that states can restrict the use of funds to sponsor travel by state education employees to specific countries for national security reasons.[65] At issue in *Winn* was a Florida statute prohibiting the allocation of both public and non-public funds for travel to countries that the federal government had identified as "State Sponsors of Terror."[66] Presented with plaintiff's arguments that the law impeded the federal foreign policy powers, the court distinguished *Crosby* and *Garamendi* by emphasizing that there were no penalties for traveling to these countries and that no conflict with a federal law existed.[67] The court also considered *Zschernig*, but found that Florida's willingness to follow the federal list of state sponsors rather than create its own criteria minimized the possibility of interference with the Executive's foreign affairs powers.[68] Finally, the Eleventh Circuit emphasized that this statute did not place broad limits on trade with or travel to these countries and thus lacked a large economic effect on the target nations.[69] The U.S. Supreme Court denied *certiorari* in the case on June 25, 2012.[70]

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[65] Faculty Senate of Fla. Int'l U. v. Winn, 616 F.3d 1206 (11th Cir. 2010) (per curiam).

[66] *Id.* at 1207-08.

[67] *Id.* at 1209, 1211.

[68] *Id.* at 1211.

[69] *Id.* at 1210.

[70] Faculty Senate of Fla. Int'l Univ. v. Florida, 183 L. Ed. 2d 675, 80 U.S.L.W. 3016 (U.S. June 25, 2012) (No. 10-1139).

In response to the Court's invitation for U.S. government views on the case, the Solicitor General maintained that, as applied to petitioners, the Florida statute conflicted with federal law and was therefore preempted, but also stated that plenary review should be denied, mainly because the record in the case was "poorly developed" and the petitioners neither contended that the decision conflicted with another circuit court ruling nor identified any other state laws that might be affected by the decision. Brief for the United States as Amicus Curiae, at 20, Faculty Senate of Fla. Int'l Univ. v. Florida, No. 10-1139, at http://www.justice.gov/osg/briefs/2011/2pet/6invit/2010-1139.pet.ami.inv.pdf.

The Solicitor General argued, in part, that federal sanctions regimes involving countries designated as state sponsors of terror did not prohibit academic travel to these destinations, noting that 2011 regulations issued by the Treasury Department at the direction of the President further eased restrictions on such travel to Cuba. The U.S. government analogized the situation in *Crosby v. National Foreign Trade Council,* maintaining that "[b]y foreclosing the avenue through which financing of such travel occurs – *i.e.*, by barring the disbursement of state and even federal or private funds by state universities – Florida's Travel Act 'undermines the congressional calibration of force' against foreign designated nations, …'blunt[s] the consequences of discretionary Presidential action' with respect to those nations, … and 'compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments,' …." *Id.* at 16.

Addressing the proprietary nature of state spending decisions, the Solicitor General noted that in *Crosby,* the Court had rejected Massachusetts's argument that its statute was protected from preemption because it was an exercise of the state's proprietary rather than its regulatory power, adding that "[a]lthough a State's spending decisions in a proprietary capacity generally are unaffected by federal law, … the State [of Florida] correctly acknowledges … that the mere fact that a state law takes the form of a spending measure does not categorically insulate it from preemption." *Id.* at 17. In arguing against plenary review, however, the U.S. government maintained that the petitioners wrongly argued that the circuit court decision conflicted with *Crosby*: "*Crosby* recognized that a State's exercise of its spending power is not altogether immune from preemption, … but it did not overrule the distinction that this Court has drawn between a State's acts as a regulator and its acts as a proprietor. The court of appeals erred in holding that the [Travel] Act represents a permissible exercise of Florida's proprietary authority over its own fisc insofar as federal and private acts are concerned, but the court did not hold more broadly that Florida may always avoid preemption in 'the guise of setting budgetary priorities.'" *Id.* at 21.

(continued...)

Odebrecht Constr., Inc. v. Prasad, 876 F. Supp. 2d 1305 (S.D. FL, Jun. 29, 2012)

In *Odebrecht Constr., Inc. v. Prasad*, the U.S. District Court for the Southern District of Florida granted a preliminary injunction halting the enforcement of a Florida law that sought to prevent the state and local governments from awarding public contracts to companies with business connections to Cuba.[71] Specifically, the law prohibited companies "engaged in business operations in Cuba,"[72] from bidding on, or entering contracts with, state or local entities for "goods or services of $1 million or more."[73] In granting the preliminary injunction,[74] the court determined that there was a substantial likelihood that the Florida law was preempted by federal law, impermissibly interfered with the federal government's foreign affairs power, and violated the Foreign Commerce Clause.[75]

In holding that the statute was likely preempted by federal law, the court relied principally on the Supreme Court's decision in *Crosby*. Like the Massachusetts state law challenged in that case, the Florida law was found to likely conflict with federal law because it impermissibly "frustrates the President's discretion to carefully calibrate sanctions against Cuba," and "diminishes the President's bargaining power by imposing inconsistent sanctions."[76] In addition, the district court determined that the law would likely also fall under field preemption grounds, as "Congress has clearly intended to 'occupy the field' relating to this country's policy toward Cuba."[77]

(...continued)

In denying the petition for certiorari, the Court rejected the U.S. government's suggestion that further proceedings in the case may nonetheless be warranted. While arguing against plenary review, the U.S. government had proposed that the Court might wish to grant the petition, vacate the appellate decision, and remand for further proceedings in light of the new 2011 Cuba travel regulations, an action that, in the U.S. government's view, would also permit the appeals court "to focus more specifically on whether the State may validly decline to administer federal and private grants." *Id*. at 22.

[71] *Odebrecht Constr., Inc. v. Prasad*, 876 F. Supp. 2d 1305 (S.D. FL, Jun. 29, 2012) The law was challenged by a subsidiary of a Brazilian company that was involved in a $1 billion contract to expand the Cuban port of Mariel. The subsidiary, a Florida construction company, had previously been awarded a number of public projects.

[72] The law also applied to those companies with "business operations" in Syria; however, that aspect of the law was not challenged in *Odebrecht*.

[73] 2012 Fla. Laws 196 §2.

[74] The granting of a preliminary injunction is not equivalent to a decision on the merits. Rather, a court will issue such an injunction to prevent the implementation of the law until the court can reach a final decision on the merits of the challenge. Granting a preliminary injunction is an "extraordinary" remedy requiring that the party show that: (1) a substantial likelihood of success on the merits, (2) irreparable injury will result unless if the injunction is not granted (3) the threatened injury is outweighed by damage caused to the opposing party, and (4) the injunction is not contrary to the public interest. Thus, in granting the preliminary injunction, the district court did not invalidate the Florida law, but rather has temporarily barred its implementation due primarily to a conclusion that there is a "substantial likelihood" that the law is preempted, infringes on the federal government's foreign affairs power, and violates the foreign commerce clause. *Odebrecht*, 876 F. Supp. 2d 1313-1314.

[75] *Id*. at 1321.

[76] *Id*. at 1320-1323.

[77] *Id*. at 1325.

In addition to being preempted, the district court also held that the Florida statute was likely to infringe on the federal government's foreign affairs power by forcing "foreign companies to choose between doing business with Florida and lawful business with Cuba," and because the statute had the "potential for diplomatic disruption or embarrassment."[78] Finally, the court determined that the law also likely violated the Foreign Commerce Clause because it discriminated against foreign companies and regulated economic activity "beyond [the state's] borders that implicates foreign affairs and impairs federal uniformity."[79]

The district court's ruling has been appealed, but the Eleventh Circuit has yet to issue a ruling in the case.

Some Ongoing Legal and Practical Concerns

Where state or local sanctions are held to be preempted by federal statute, Congress may choose expressly to authorize such measures in new legislation.[80] It is also possible that a state or local sanctions law could be written so as not to conflict with a federal enactment. Where Congress has not enacted or authorized sanctions against a particular country, state or local sanctions directed at that jurisdiction may be challenged on dormant foreign affairs or Foreign Commerce Clause grounds, given that *Crosby* did not address, and thus did not foreclose or limit the use of, these constitutional arguments. At the same time, questions remain as to the outcome of these arguments in a particular case. For example, if state or local sanctions were challenged on Foreign Commerce Clause grounds, would congressional silence be construed by a reviewing court as implied authorization of these measures or, instead, as a manifestation of an overriding federal policy that a particular country not be subject to restrictive U.S. measures?[81] Whether the market participant exception applies in Foreign Commerce Clause cases also remains unclear.

Where a state law is challenged as intruding into the federal foreign affairs power, the Supreme Court's ruling in *Garamendi* suggests that executive agreements or statements might preempt

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[78] *Id*. at 27.

[79] *Id*. at 32-33.

[80] A sub-federal sanctions law enacted under a congressional authorization could be challenged on statutory preemption grounds as having exceeded the scope of the authorization. Were it found to be included, however, negative inferences to be drawn from the dormant Foreign Commerce Clause and dormant foreign affairs power might also be removed by virtue of the federal enactment. Moreover, *Garamendi* does not preclude that such a state law authorized by Congress would prevail over an exercise of independent executive foreign affairs power. *See Garamendi,* 539 U.S. at 427; note also *Barclays Bank*, 512 U.S. at 328-30; Further, five years after it decided *Garamendi*, the Supreme Court recognized in *Medellin v. Texas*, 552 U.S. 491 (2008), that not every invocation of foreign affairs authority by the President has preemptive effect. There, the Court ruled that a presidential memorandum ordering a Texas court to re-open a criminal case, so as to give effect to a non-self-executing treaty requirement, did not constitute federal law preempting the state's procedural default rules. The Court noted that it had previously recognized in *Garamendi* and other cases that the exercise of the Executive's "narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement" may serve as a basis for preempting inconsistent state law. *Id.* at 532.However, the *Medellin* Court characterized this authority as applicable in "narrow set of circumstances"; it cannot serve as a basis for preempting each and every state action which is deemed inconsistent with the Executive's foreign policy goals. *Id.* at 531-532 (noting as well that the President's use of executive agreements to settle claims was supported by a "'particularly longstanding practice' of congressional acquiescence").

[81] As shown in *Crosby*, in the context of statutory preemption, an ambiguous congressional silence does not warrant an inference of implied permission of a state law where there exists considerable evidence of a conflict between the state and federal enactments.

state action, despite a lack of specific agreement language showing the intent to do so.[82] At the same time, the Court recommended following Justice Harlan's standard from the *Zschernig* case as a minimum threshold for foreign affairs preemption, that is, that the state legislation should "produce something more than incidental effect in conflict with express foreign policy of the National Government."[83]

Some commentators have provided practical criticisms of the state divestment laws. For instance, state investors rely on private organizations to identify firms with business interests in targeted countries. The particular concern is that this information might be inaccurate or fail to take account of the federal government's interests. This could lead to divestment activities inconsistent or directly counter to U.S. foreign policy goals. In response, the National Conference of State Legislatures has asked the federal government to provide U.S. investors with "authoritative information" regarding foreign and domestic firms with financial and investment activities in states that sponsor terrorism.[84]

There are also overarching concerns about whether public plans are suitable means for achieving foreign policy goals. Besides questions of their efficacy in changing foreign government behavior, divestment measures could diminish the rate of return on investment. There are increased administrative costs related to screening investments for ties to targeted nations. Broad restrictions on investment in certain companies could also undermine the goal of a diversified portfolio. These risks are likely to be especially problematic because there may well be limited overlap between those authorizing and making divestment decisions and the stakeholders whom these decisions will affect.[85]

Notable Federal Enactments

Sudan Accountability and Divestment Act

The Sudan Accountability and Divestment Act of 2007 (P.L. 110-174), enacted into law on December 31, 2007, authorizes state and local governments to adopt divestment measures involving (1) federally identified persons with investments and business in the Sudanese energy and military equipment sectors or (2) persons having a direct investment in or carrying on a trade or business with Sudan or the Government of Sudan, provided certain notification requirements are met; the statute also provides that a measure falling within the scope of the authorization is

[82] *See Garamendi*, 539 U.S. at 424-25. The dissent would have left the California law intact absent a clear statement or formal expression by the federal government disapproving it. *See id.* at 430.

[83] *See id.* at 420. Applying principles ordinarily used in statutory preemption analysis, Justice Souter suggests that a state law should be preempted under field preemption with or without action by the national government if the state acts in a domain of foreign affairs not traditionally allocated to it; in the event of conflict between the federal foreign policy interest and an act of a state within its sphere of "traditional competence" that affects foreign affairs, a balancing test between the two interests might occur. *Id.* at 420, n.11. The Court does not establish a precise threshold, although, citing *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507-508 (1988), it suggests that, "in an area of uniquely federal interest," "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary preemption." For additional discussion of *Garamendi*, *see* Constitution Annotated, *supra* note 6, at 26, 29.

[84] *Divestment Policy – NCSL 2010 Legislative Summit*, National Conference of State Legislatures, at http://www.ncsl.org/default.aspx?TabId=20933 (last visited Jan. 17, 2013).

[85] Alicia H. Munnell, *Should Public Plans Engage in Social Investing?*, 7-12 An Issue In Brief: Ctr. for Ret. Research at Boston Coll. (2007), *available at* http://crr.bc.edu/images/stories/Briefs/ib_7-12.pdf.

not preempted by any federal law or regulation.[86] The enactment is based on S. 2271, an original bill of the Senate Committee on Banking, Housing, and Urban Affairs (S.Rept. 110-213). H.R. 180 (Lee) and S. 831 (Durbin) also addressed Sudan divestment by state and local governments; H.R. 180 passed the House on July 31, 2007. President George W. Bush, upon signing the act, stated that "the executive branch shall construe and enforce this legislation in a manner that does not conflict" with the federal government's "exclusive authority" to conduct foreign relations.[87]

Comprehensive Iran Sanctions, Accountability, and Divestment Act

The Comprehensive Iran Sanctions, Accountability, and Divestment Act (P.L. 111-195), enacted into law on July 1, 2010, includes provisions authorizing state and local governments to divest or prohibit investments of public monies in Iran.[88] Responding to state and local divestment activities related to Iran, Congress designed Title II's divestment provisions to "remove [] any doubt as to the constitutionality of these measures."[89] Specifically, states can require public divestment from businesses making investments of (or extending credit to persons who will make investments of) $20 million or more in Iran's energy sector.[90] States must provide notice to those affected by divestment measures and give those affected the opportunity to comment or challenge the measures' applicability to their business dealings.[91] If 90 days elapse after notice is given without the notified company changing its behavior, divestment can occur.[92] The statute clearly states that no federal laws or regulations preempt actions taken by the states under these provisions.[93]

[86] Federal legislation proposed in 2006 to immunize state Sudan divestment laws was not enacted into public law. H.R. 3127, the Darfur Peace and Accountability Act, as originally passed the House in April 2006, provided that federal laws were not to be construed to preempt certain Sudan-related state sanctions. In September 2006, the Senate passed an amended version of the legislation without the state law provision; the House later agreed to the Senate amendment. *See* P.L. 109-344.

[87] Statement on Signing the Sudan Accountability and Divestment Act of 2007, 43 Weekly Comp. Pres. Doc. 1646 (December 31, 2007). Implicit in this statement is the argument that state divestment statutes could still be unconstitutional notwithstanding a federal statute authorizing their enactment. Criticism of President Bush's signing statement was aired at a February 2008 hearing of the House Committee on Financial Services. *Negative Implications of the President's Signing Statement on the Sudan Accountability and Divestment Act: Hearing Before the H. Comm. on Financial Services*, 110th Cong. (2008), at http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg41178/pdf/CHRG-110hhrg41178.pdf. Although the committee had invited the White House counsel or a designee to testify at the hearing, the invitation was declined on the ground that the hearing might touch on what the White House counsel considered to be privileged White House communications. *Id.* at 66 (letter from Fred F. Fielding, Counsel to the President, to Hon. Barney Frank, Chairman, House Committee on Financial Services (February 4, 2008)).

[88] 22 U.S.C. §8532. The Iran Threat Reduction and Syria Human Rights Act of 2012 amended this provision to clarify that state regulators retained the authority to "issue and enforce rules governing the safety, soundness, and solvency of a financial institution subject to its jurisdiction or the business of insurance." P.L. 112-158 §222, 112th Cong. (2012).

[89] H.Rept. 111-512, at 50. The statute grandfathered in previously enacted measures that met the listed procedural requirements. 22 U.S.C.A. §8532(i).

[90] 22 U.S.C.A. §8532(c).

[91] 22 U.S.C.A. §8532(d)(1)-(3).

[92] *Id.*

[93] 22 U.S.C.A. §8532(f). The enactment is based on H.R. 2194, introduced by Representative Howard Berman (D-CA). In the previous Congress, H.R. 2347 (Frank) and S. 1430 (Obama) addressed Iran divestment by state and local governments; H.R. 2347 passed the House July 31, 2007.

Appendix. State Enactments Relating to Divestment in Foreign Countries

Below is a list of state laws related to divestment of public funds from companies doing business in foreign countries. Unless otherwise indicated, the provided statute fits the general model of identifying companies doing business in a country and, after giving notice and opportunity to discontinue the offending activity, requiring divestment of public funds from these companies. Some, but not all, of these measures include language providing for their expiration in the event that Congress or the President take specified action.

State	Sudan	Iran	Other
Arizona	Ariz. Rev. Stat. Ann. §§35-391 to 391.06 (also barring the entering of government contracts with companies having scrutinized business operations in Sudan)	Ariz. Rev. Stat. Ann. §§35-393 to 393.06 (also barring the entering of government contracts with companies having scrutinized business operations in Iran)	Also requires divestment from companies operating in state sponsors of terrorism. Ariz. Rev. Stat. §35-392
California	Cal. Gov't Code §7513.6, Cal. Pub. Cont. Code §§10475-10490 (also barring bids on government contracts with companies having scrutinized business operations in Sudan)	Cal. Gov't Code §7513.7, Cal. Pub. Cont. Code §§2200 to 2208 (also barring bids on government contracts with companies having scrutinized business operations in Iran)	
Colorado	Colo. Rev. Stat. §§24-54.8-101 to 54.8-110		
Connecticut	Conn. Gen. Stat. Ann. §3-21e	Conn. Gen. Stat. Ann. §3-13g	
District of Columbia	D.C. Code §§1-335.01 to 335.07	D.C. Code §§1-336.01 to 336.06	
Florida	Fla. Stat. §215.473	Fla. Stat. §215.473	Also requires divestment from companies with business activities in Cuba; bars the entering of government contracts with companies having business operations in Cuba or Syria. Fla. Stat. §§215.471, 287.135
Georgia	Ga. Code Ann. §50-5-84 (barring bids on state contracts by companies with business operations in Sudan)	Ga. Code Ann. §47-20-83.1	
Hawaii	2007 Haw. Sess. Laws, Act 192, §§1 to 10		

State	Sudan	Iran	Other
Illinois	40 Ill. Comp. Stat. 5/1-110.6	30 Ill. Comp. Stat. 500/50-36; 40 Ill. Comp. Stat. 5/1-110.15 (also requiring notification of business activities in Iran by companies bidding for public contracts)	
Indiana	Ind. Code §§5-10.2-9-.03 to 5-10.2-9-36	Ind. Code §§4-13.6-6-5; 5-13-8-14; 5-16-1-9; 5-22-16.5-1 to 5-22-16.5-14; 5-23-1-5; 8-23-9-59; 21-37-7-1 to 21-37-7-2; (barring the entering of government contracts with companies having scrutinized business operations in Iran)	Also requires divestment from companies operating in state sponsors of terrorism. Ind. Code §§5-10.2-10-.03 to 5-10.2-10-30
Iowa	Iowa Code Ann. §§12F.2 to 12F.7	Iowa Code Ann. §§12H.2 to 12H.7	
Kansas	Kan. Stat. Ann. §74-4921c		
Louisiana	La. Rev. Stat. Ann. §§11:311 to 11:316 (reporting requirements relating to investments)	La. Rev. Stat. Ann. §§11:311 to 11:316 (reporting requirements relating to investments)	Also establishes reporting requirements relating to investments in North Korea and Syria. La. Rev. Stat. Ann. §§11:311 to 11:316
Maryland	Md. Code Ann., State Pers. & Pens. §21-123.1	Md. State Fin. & Proc. Code Ann. §§17-701 to 17-707; Md. Code Ann., State Pers. & Pens. §21-123.1 (also barring bids on government contracts by companies having scrutinized business operations in Iran)	
Michigan	Mich. Comp. Laws §38.1133c	Mich. Comp. Laws §38.1133d	Also requires divestment from certain companies operating in state sponsors of terrorism. Mich. Comp. Laws §§129.291- to 129.301
Minnesota	Minn. Stat. Ann. §11A.243	Minn. Stat. Ann. §11A.244	
Nevada		Nev. Rev. Stat. Ann. §286.723 (report on investments in companies doing business in Iran)	

State	Sudan	Iran	Other
New Jersey	N.J. Stat. Ann. §52:18A-89.9	N.J. Stat. Ann. §§52:18A-89.12; 52:32-55 to 52:32-60 (also barring bids on government contracts by companies having scrutinized business operations in Iran)	
North Carolina	N.C. Gen. Stat. §§147-86.41 to 147.86.49		
Oklahoma			Bars investment of state funds in bonds or similar obligations of a foreign government that is either totalitarian or is a state sponsor of terrorism. 62 Okl. St. §89.2
Oregon	Or. Rev. Stat. Ann. §§293.811 to 293.817		
Pennsylvania	72 Pa. Cons. Stat. Ann. §§3837.1 to 3837.10	72 Pa. Cons. Stat. Ann. §§3837.1 to 3837.104	
South Carolina	S.C. Code Ann. §9-16-55		
South Dakota		S.D. Codified laws §§4-5-48 to 4-5-60	
Texas	Tex. Gov't Code Ann. §§806.001 to 806.103		
Utah	Utah Code Ann. §63G-6-208 (provides that procurement rules must be consistent with provisions of the Sudan Accountability and Divestment Act of 2007 (P.L. 110-174) prohibiting a state agency from contracting with a person doing business in Sudan)	Utah Code Ann. §49-11-306 (report on investments in companies doing business in Iran)	

Source: Table produced from materials collected from state legislative databases by the Congressional Research Service.

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