

CRS Report for Congress

State and Local Economic Sanctions: Constitutional Issues

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Summary

States and localities have often proposed or enacted measures restricting their agencies' economic transactions with firms that do business with or in foreign countries whose conduct the 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 such statutes impermissibly invade federal commerce and foreign affairs authorities and in some cases may be preempted by federal law. 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 a federal Burma statute. In *American Insurance Association v. Garamendi*, a 2003 case, the Court reaffirmed the relevance of the dormant federal foreign affairs power to preempt state law, but the scope of the 5-4 decision is unclear.

Due to the current situation in Darfur, a number of states have recently proposed or enacted some type of divestment legislation against Sudan. In the 109th Congress, House-passed H.R. 3127, the Darfur Peace and Accountability Act, provided that federal statutes were not to be construed to preempt certain state sanctions against Sudan, but the final, enacted version (P.L. 109-344) does not contain the provision. On February 23, 2007, a federal district court held Illinois' Sudan sanctions law to be unconstitutional and permanently enjoined its enforcement. Two 110th Congress bills — H.R. 180 (Lee) and S. 831 (Durbin) — contain provisions in support of state Sudan-related divestment measures. This report will be updated.

Contents

Types of State and Local Economic Sanctions	1
Overview of Constitutional Issues	2
Foreign Commerce Clause	3
Intrusion into Foreign Affairs	5
Federal Preemption	6
Recent Judicial Rulings on State Sanctions	7
Some Future Prospects	11
110 th Congress Legislation	12

State and Local Economic Sanctions: Constitutional Issues

States and localities have often proposed or enacted measures restricting governmental transactions with firms doing business or having financial ties with foreign countries whose conduct the state or locality has found objectionable, particularly in the human rights area. This report summarizes constitutional arguments made for and against these laws and discusses *Crosby v. National Foreign Trade Council* and *American Insurance Association v. Garamendi*, U.S. Supreme Court decisions that address the constitutionality of state laws affecting U.S. foreign affairs. The report also discusses *National Foreign Trade Council v. Giannoulis*, a 2007 federal district court decision holding an Illinois Sudan sanctions law unconstitutional. It also suggests some possible legal ramifications of recent case law for future state and congressional action in this area and identifies legislation introduced in the 110th Congress addressing state economic sanctions.

Types of State and Local Economic Sanctions

State and local sanctions measures 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 states or local agencies from investing public funds in such companies. A variation of the latter is the state or local divestment law, which, for example, may require divestment by state pension funds of stock in companies that do business with or in a named country. In the 1990s, a number of state laws focused on conditions on Burma (Myanmar), while others targeted Nigeria, Tibet, Cuba, Indonesia, Switzerland, and Northern Ireland. Other state laws addressed poor foreign labor practices regardless of country. At least one state has passed legislation prohibiting pension fund investment in debt instruments issued by any nation designated by the State Department as supporting or engaging in terrorism.¹

¹ Mich. Comp. Laws Ann. § 38.1133 (West 2005); see also La. Rev. Stat. Ann. § 11:312 (West 2006), requiring state pension and retirement funds to provide semiannual reports on any investments in firms with facilities or employees in Iran, Libya, North Korea, Sudan or Syria. Missouri has administratively adopted policies to screen investments by two Missouri state funds and to require divestment from those firms known to sponsor terrorism or to operate with the government or government agencies in countries on the State Department's terrorist list. See statements of Missouri policies at [<http://www.treasurer.mo.gov/antiterrorinvest.asp>]. Other states are currently considering legislation aimed at divestment of state funds from companies doing business with the same. See, e.g., *California Seeks to Ban Investment in Iran*, N.Y. Times, April 2, 2007, at 14;

(continued...)

Due to the current situation in Darfur, a number of states have recently proposed or enacted some type of divestment legislation against Sudan.² H.R. 3127, the Darfur Peace and Accountability Act, as originally passed the House, 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 without the state law provision, and the House later agreed to the Senate amendment (P.L. 109-344). On February 23, 2007, in *National Foreign Trade Council v. Giannoulis*, an Illinois federal district court struck down the Illinois Sudan sanctions statute as unconstitutional.³

Overview of Constitutional Issues

State and local economic sanctions targeted at what is perceived as objectionable 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.⁴

¹ (...continued)

Calpers Pressed to Drop Iran 'Terrorism' Investments (Update 1), Mar. 19, 2007, at [<http://www.bloomberg.com>]. The State Department, pursuant to section 6(j) of the Export Administration Act, currently lists Cuba, Iran, North Korean, Sudan, and Syria as countries whose governments have repeatedly provided support for acts of international terrorism. See 15 C.F.R. Part 742, Supp. No. 2, para. (a), at [<http://www.access.gpo.gov/bis/ear/pdf/742.pdf>].

² State statutes include Or. Rev. Stat. § 293.814 (2005); N.J. Stat. Ann. § 52:18A-89.9 (2005); 15 Ill. Comp. Stat. Ann. 520/22.5-22.6 and 5/1-110.5 (2006); 2006 Me. Legis. Serv. Ch. 537 (West); 2006 Conn. Legis. Serv. P.A. 06-51 (West); 2006 Cal. Legis. Serv. Ch. 442 (West).

³ For further discussion, see *infra* notes 34-45 and accompanying text.

⁴ For legal background, see, e.g., Cong. Research Service, *The Constitution of the United States of America*, 2004 Supp. at 11-14 (H.Doc. 108-19)[hereinafter *Constitution Annotated*]; Louis Henkin, *Foreign Affairs and the United States Constitution* 149-69 (2d ed. 1996)[hereinafter *Henkin*]; 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. Dhooze, *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); Brandon P. Denning, *American Insurance Ass'n v. Garamendi, and Deutsch v. Turner Corp.*, 97 Am. J. Int'l L. 950 (2003); 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); Robert Stumberg, *Preemption & Human Rights: Local Options After Crosby v. NFTC*, 32 Law & Poly Int'l Bus. 109 (2000); Brandon P. Denning & Jack H. McCall, *Crosby v. National Foreign Trade Council*, 94 Am. J. Int'l L. 750 (2000); Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local* (continued...)

Foreign Commerce Clause

In granting Congress exclusive power to regulate interstate and foreign commerce (Art. I, § 8, cl. 3), the Constitution also impliedly prohibits states and localities from unreasonably burdening or discriminating against such commerce unless they are authorized by Congress to do so.⁵ 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*, 441 U.S. 434 (1979), 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, stating that “a more extensive constitutional inquiry is required” in foreign commerce cases for two reasons: (1) the “enhanced risk of multiple taxation” and (2) the possibility that the disputed measure “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.’”⁶ The Court made clear that “[i]f a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.”⁷

In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 194 (1983), the Court upheld a state income tax law at variance with federal policy, indicating that state law may have “merely foreign resonances” without implicating foreign affairs and stating that a differing state tax law “will violate the ‘one voice’ standard if it *either* implicates foreign policy issues which must be left to the Federal

⁴ (...continued)

Sanctions, 39 Harv. Int’l. L. J. 443 (1998) [hereinafter Price & Hannah]; 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]; 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].

⁵ *New York v. United States*, 505 U.S. 144, 171 (1992); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87-93 (1984); note, e.g., *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.”).

⁶ *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-48, 451 (1979).

⁷ *Id.* at 451.

Government or violates a clear federal directive.”⁸ The Court noted that the second of these factors “is, of course, essentially a species of preemption analysis.”⁹ The Court later concluded in *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298 (1994), 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 in a solo international trade voice 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*, 477 U.S. 1 (1986), in which the Court upheld a state tax on jet fuel purchased by foreign airlines, suggest that “Congress may more passively indicate that certain state practices do not ‘impair federal uniformity in an area where federal uniformity is essential,’ ...; it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce....”¹⁰

Where Congress has not clearly immunized a state selective purchasing or divestment law for Foreign Commerce Clause purposes, arguments that the law impermissibly burdens foreign commerce¹¹ may be countered by invocation of the market participant doctrine. First articulated in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the doctrine exempts 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.¹² 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.¹³

⁸ *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 194 (1983).

⁹ *Id.*

¹⁰ *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 323 (1994).

¹¹ *See Price & Hannah, supra* note 4, at 478-82; *Schmahmann & Finch, supra* note 4, at 189-91.

¹² *Carvajal, supra* note 4, at 270-74 (1998); DOJ Opinion, *supra* note 4, at 53-59 (1986)(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.

¹³ *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 4, at 482-90; *Schmahmann & Finch, supra* note 4, at 191-97.

The Court of Appeals in *National Foreign Trade Council v. Natsios*, 138 F.3d 38 (1st Cir. 1999), *infra* note 24, 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

(continued...)

Intrusion into Foreign Affairs

In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Supreme Court struck down an Oregon law prohibiting nonresident aliens from inheriting property if they could not satisfy the state courts that their home country allowed U.S. nationals to inherit estates on a reciprocal basis and that payments to foreign heirs from the Oregon estate would not be confiscated. Although the federal government had not exercised its power in the area, the Court nonetheless found that the inquiries required by the state 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.”¹⁴ The Court distinguished *Clark v. Allen*, 331 U.S. 503 (1947), 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 law.¹⁵ Although *Zschernig*’s parameters have been viewed as unclear,¹⁶ it is argued that selective procurement laws are directed at influencing or scrutinizing foreign behavior in the manner that the *Zschernig* Court found objectionable¹⁷ and that courts that have upheld restrictive procurement laws attacked on *Zschernig* grounds have emphasized that the 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.¹⁸

¹³ (...continued)

court also found that in any event the state would not be shielded from Foreign Commerce Clause scrutiny because of questions as to whether the 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 did not take up the Foreign Commerce Clause issue in its ruling on the Massachusetts law.

¹⁴ *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

¹⁵ *Id.* at 433-36.

¹⁶ *See, e.g.*, Henkin, *supra* note 4, at 162-65; Bilder, *supra* note 4, at 825-26; or further discussion, *see* *Constitution Annotated*, *supra* note 4, at 11-14.

¹⁷ *E.g.*, Price & Hannah, *supra* note 4, at 457-65; Schmahmann & Finch, *supra* note 5, at 198-99.

¹⁸ *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); and generally Price & Hannah, *supra* note 5, at 469-71. Prior to the lower court rulings on the Massachusetts Burma law, *see infra* note 24, 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. 221 (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 4, at 63-64, quoting *Reeves, Inc. v. Stake*, 447 U.S. at 437-38.

Federal Preemption

In exercising its delegated powers, Congress may, by virtue of the Supremacy Clause (Art. VI, cl. 2), preempt state and local laws that conflict with or are incompatible with federal legislation and thus limit the use of powers that a state or locality may exercise concurrently with Congress. 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,¹⁹ and *conflict preemption*, in which “compliance with both federal and state regulations is a physical impossibility,”²⁰ or where the state law, as described by the Supreme Court in *Hines v. Davidowitz*, 312 U.S. 52 (1941), “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” 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. In *Hines*, which invalidated a state alien registration statute on conflict grounds, 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,” distinguishing the states’ limited authority with regard to aliens from their broadly-based power to tax.

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 sanctions law may thus argue that, absent express preemption, a state law may conflict with federal laws and policies targeted at a specific country with respect to the activities and persons covered, or that there is reason to presume that Congress intended that all state and local measures targeting a particular country be preempted.²¹ 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.²² 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.”²³

¹⁹ See, e.g., *Wardair Canada Inc. v. Florida Dep’t of Revenue*, 477 U.S. 1, 6 (1986).

²⁰ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

²¹ *Price & Hannah*, *supra* note 4, at 472-78; *Schmahmann & Finch*, *supra* note 4, at 184-89.

²² See, e.g., DOJ Opinion, *supra* note 4, at 64-65.

²³ 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 4, at 261-65.

Recent Judicial Rulings on State Sanctions

In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the Supreme Court unanimously ruled that a Massachusetts selective purchasing law targeted at Burma was preempted by federal Burma sanctions contained in the Foreign Operations Appropriations Act, 1997, P.L. 104-208.²⁴ 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. Although various Supreme Court cases had 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.²⁵

Although Congress had not expressly preempted state laws in the federal Burma statute, the Court, applying conflict preemption, found that the state law served as “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” as 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.”²⁶

After rejecting the state’s argument that the law could not be preempted because it was based on the state’s spending power, the Court found that the law lacked the flexibility inherent in the federal statute: the former had stringent application requirements and no termination provision, while the latter 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

²⁴ 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).

²⁵ *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 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.

²⁶ *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373-74 (2000).

all sanctions imposed in the statute.²⁷ The state law was also found to exceed federal authorities in covering most state contracts, foreign and domestic firms, and firms already operating in Burma, whereas 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.²⁸ Finally, the state law had impeded the President's ability to pursue the multilateral strategy envisioned in the federal act, the Court citing 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.²⁹

Finally, the Court rejected the state's argument that in not expressly preempting the state law Congress had implicitly permitted it, the state noting that Congress was aware of the Massachusetts law when it adopted the federal Burma statute in 1996. 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, citing *Hines*, 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."³⁰ The Court found that in this case Congress' silence was ambiguous and as such insufficient to warrant the state's inference of congressional intent.³¹

More recently, in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), 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 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 evident in the German agreement, as well as in similar agreements with Austria and France, and in 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.³² 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

²⁷ *Id.* at 374-77.

²⁸ *Id.* at 377-80.

²⁹ *Id.* at 380-86.

³⁰ *Id.* at 387-88.

³¹ *Id.* at 388.

³² *American Insurance Association v. Garamendi*, 539 U.S. 396, 425, 427 (2003).

authority, “congressional silence is not to be equated with congressional disapproval.”³³

In *National Foreign Trade Council v. Giannoulis*, 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.³⁴ At issue in the February 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 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 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 not only the firms described above, but also any publicly traded company that owned or controlled Sudan-related property or assets or engaged in other Sudan-related transactions, and 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 and did not transactions business 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), the Comprehensive Peace in Sudan Act (2004), and the Darfur Peace and Accountability Act (2006). None of these statutes contains a provision addressing state law preemption and, as noted earlier, a “no preemption” provision in the House-passed version of the 2006 enactment was not included in the final statute.

Addressing the statutory preemption argument, the court held that, with respect to the amendment to the Deposit of State Moneys Act, the 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

³³ *Id.* at 429.

³⁴ *National Foreign Trade Council v. Giannoulis*, No. 06 C 4251, slip op., 2007WL 627630 (N.D. Ill. Feb. 23, 2007), available at [<http://howappealing.law.com/NFTC.pdf>].

federal law.³⁵ On the other hand, the pension amendments were found not to be preempted, since federal law did not expressly address divestment, and, in the court's view "the potential effects of pension divestment on the national government's ability to conduct foreign policy are highly attenuated."³⁶ 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, citing *Crosby*, 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."³⁷

Regarding foreign affairs preemption, 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*."³⁸ 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.³⁹ 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 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.⁴⁰ 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 firms' willingness to do business in Sudan.⁴¹

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"⁴² and that "[w]ithout the protection of the market participant exception, the amendment to the Pension Code

³⁵ *Giannoulis*, slip op. at 17. 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 32-33.

³⁶ *Id.* at 17.

³⁷ *Id.* at 17-18.

³⁸ *Id.* at 22.

³⁹ *Id.* at 23.

⁴⁰ *Id.*

⁴¹ *Id.* at 23-26.

⁴² *Id.* at 27.

violates the Foreign Commerce Clause.”⁴³ 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 that the doctrine had a role in Foreign Commerce Clause cases, was inapplicable in this situation.⁴⁴ With respect to the state’s control of its own pension funds, the court held that, even were it to find that the amendment was constitutional if only applied to these funds, it could not sever the unconstitutional portion of the statute and thus struck down the pension amendment as a whole.⁴⁵

Defendants in the case requested and were granted an extension until April 30, 2007, to file a notice of appeal.⁴⁶ The motion for the extension noted that the Illinois General Assembly was currently contemplating legislation that would repeal or modify the state law at issue and that any such legislation could render the appeal moot or otherwise materially affect a decision on the issue.⁴⁷

Some Future Prospects

Where state or local sanctions are held to be preempted by federal statute, Congress could choose expressly to authorize such measures in new legislation.⁴⁸ It is also possible that a sub-national sanctions law could be written so as not to conflict with a federal enactment. Where Congress has not enacted 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 — among them, whether in a Foreign Commerce Clause challenge legislative silence would be construed as implied authorization of a state sanctions law or, instead, as a manifestation of an overriding federal policy

⁴³ *Id.* at 31.

⁴⁴ *Id.* at 29-30.

⁴⁵ *Id.* at 31-32.

⁴⁶ Notification of Docket Entry, *National Foreign Trade Council v. Madigan*, (N.D. Ill. Mar. 27, 2007)(No. 06 CV 4251).

⁴⁷ Defendants’ Agreed Emergency Motion for Extension of Time to File Notice of Appeal Pursuant to Federal Rule of Appellate Procedure 4(a)(5), *National Foreign Trade Council v. Giannoulis* (N.D. Ill. Mar. 26, 2007)(No. 06 CV 4251).

⁴⁸ 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 may also be removed by virtue of the federal enactment. Moreover, *Garamendi* does not preclude that such a state law would prevail over an exercise of independent executive foreign affairs power. *See* 539 U.S. at 427; note *Barclays Bank*, 512 U.S. at 328-30; *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2774, n.23 (2006); and *id.* at 2799-804 (Kennedy, J., concurring).

that a particular country not be subject to restrictive U.S. measures.⁴⁹ 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, *Garamendi* suggests that executive agreements or statements might preempt any state action, despite a lack of specific agreement language showing the intent to do so.⁵⁰ 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."⁵¹

110th Congress Legislation

Two bills introduced in the 110th Congress contain provisions in support of state divestment measures related to Sudan. H.R. 180 (Lee), the Darfur Accountability and Divestment Act of 2007, introduced January 4, 2007, provides that "Congress recognizes and supports ... States and cities that have divested or are in the process of divesting State and city funds from companies that conduct business operations in Sudan" (§ 3) and contains a non-preemption provision similar to that contained in House-passed H.R. 3127, 109th Cong., discussed earlier.⁵² In addition, S. 831 (Durbin), the Sudan Divestment Authorization Act of 2007, provides, at § 5, that "any State may adopt measures to prohibit any investment of State assets in the Government of Sudan or in any company with a qualifying business relationship with Sudan during any period in which the Government of Sudan, or the officials of such government" are subject to federal sanctions, and states that the provision would

⁴⁹ 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.

⁵⁰ *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.

⁵¹ *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" in 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 4, at 13-14.

⁵² H.R. 6140, the Darfur Accountability and Divestment Act of 2006 (Lee), introduced September 21, 2006, also included such a provision.

apply to state legislation enacted before, on, or after the date of enactment.⁵³ In addition, the bill would express the sense of Congress that “States and other governmental entities should be permitted to provide for” Sudan-related divestment of certain State assets, and that a divestment measure authorized under § 5 of the bill would not violate the U.S. Constitution on foreign commerce, foreign affairs, or preemption grounds (§ 3).

⁵³ The term “qualifying business relationship” is defined in the bill at § 4(3).