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The Politics of International Economic Law

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The Politics of Divestment

Perry S. Bechky

Divestment¹ is back. Notably associated with the anti-apartheid movement,² when “as many as 140 states, cities, and localities” in the United States divested from South Africa over twenty years,³ divestment largely faded from public view with the end of apartheid. Even when Massachusetts and various cities took up the cause of promoting democratization in Burma during the 1990s, they restricted government procurement of goods and services rather than divesting shares.

¹ In this chapter, I use the word “divestment” to describe investment-related actions motivated principally by concern for noneconomic objectives. “Divestment” in this sense can involve selling shares in a target company, refusing to buy new shares, and engaging with management to change the behavior of concern. Although “divestment” and “engagement” are often regarded as opposing strategies, I treat them together on the ground that it is prudent to try to persuade management before selling shares and appropriate to sell shares when management fails to respond to shareholder concerns.

² The economic sense of the word “divestment” apparently first acquired the political connotations of interest here during the anti-apartheid movement. See “Princeton to End Credit in R.O.T.C.; Faculty Also Votes to Set Up Black Studies Program,” *New York Times* (March 4, 1969) (“students have demanded divestment of \$127-million in university investments in 29 American companies with dealings in South Africa”). The first usage with this connotation in the *Compact Oxford English Dictionary* (2nd ed. 1991), also concerning South Africa, is – surprisingly – nine years later.

³ Cleveland, “Crosby and the ‘One-Voice’ Myth in U.S. Foreign Relations,” 46 *Vill. L. Rev.* (2001) 975, at 995 and note 140.

Note: I presented an earlier version of this chapter at the biennial conference of the International Economic Law Interest Group of the American Society of International Law, when I was a Visiting Assistant Professor at the University of Connecticut School of Law. I am grateful to the conference organizers for inviting me to participate; to the University of Connecticut for funding my participation; to Jack Kirkwood, Orde Kittrie, Adam Sterling, conference participants, and the editors for their helpful comments; and to Patrick Mott and Nicole Trask for their research assistance. All mistakes are my own. The information in this chapter is updated through February 1, 2010.

State and local divestment emerged again to prominence (if not at 1980s levels) in response to the horrors of Darfur. By the end of 2008, twenty-seven states and the District of Columbia had divested from Sudan, as had twenty-two cities.⁴ In December 2007, Congress enacted an unprecedented federal law – the Sudan Accountability and Divestment Act (SADA) – authorizing states to divest, within important bounds, from companies that do business in Sudan.⁵ The Darfur movement also sparked wider interest in divestment.⁶ Most notably, at least nineteen states and the District of Columbia have divested from companies investing in Iran’s energy sector.⁷

The media are showing renewed interest in divestment as well. The word “divestment” appeared in 18 articles in the *New York Times* in 2005, more than in any year since 1990, the year South Africa released Nelson Mandela from prison. The *Times*’ median annual use of the word since 2005 (13 articles per annum) is greater than during any five-year period since 1980, except for the height of the anti-apartheid movement in the late 1980s (61 articles per annum). Similarly, the word appeared in the industry newspaper *Pensions & Investments* over five times more since 2005 than in the preceding decade (295 articles to 52).⁸

Divestment also surfaced during the 2008 U.S. Presidential Election campaign. Barack Obama and John McCain spoke in favor of divestment from Iran.⁹ Mr. Obama, Mr. McCain, and Sarah Palin announced that they had divested their personal assets from Sudan, while Joseph Biden confirmed that

⁴ See Sudan Divestment Task Force, Divestment Statistics, available at <http://sudandivestment.org/statistics.asp> (last accessed on October 2, 2009), listing divesting jurisdictions.

⁵ See Pub. L. No. 110-174, § 3(b) (2007).

⁶ See Dobris, “SRI – Shibboleth or Canard (Socially Responsible Investing, That Is),” 42 *Real Prop. Prob. & Tr. J.* (2008) 755, 758 and note 12 (describing Darfur as a “specific-event catalyst” fueling interest in divestment).

⁷ See S. REP. NO. 111-99 (2009), at 6.

⁸ These data are based on a year-by-year search for the word “divestment,” using the search engines on www.nytimes.com and www.pionline.com. These data are both overinclusive and underinclusive: they omit articles containing synonyms and even closely related words (e.g., divest) and they capture some noise (e.g., articles using “divestment” to describe ordinary commercial transactions or referring back to the anti-apartheid movement).

⁹ After Mr. McCain called for divestment from Iran, Mr. Obama retorted, “I was interested to see Senator McCain propose divestment as a source of leverage.... It’s a good concept but not a new one; I introduced legislation over a year ago.” John McCain, Speech to the AIPAC Policy Conference 2008 (June 2, 2008), at 10; Barack Obama, Speech to the AIPAC Policy Conference 2008 (June 4, 2008), at 8. Both speeches are available at <http://www.aipac.org/about.AIPAC/Learn.About.AIPAC/12161.htm> (last accessed on February 16, 2010). Faced with the prospect of endorsing a policy already associated with his opponent, Mr. McCain seems to have stopped speaking publicly about divestment for the remainder of the campaign.

he owned no investments in companies targeted for divestment.¹⁰ Ms. Palin also invoked divestment in an effort to substantiate her competence to handle foreign policy – not an insignificant challenge when running against the Chairman of the Senate Foreign Relations Committee to be a “heartbeat away from the presidency.” In their much-anticipated vice presidential debate, Ms. Palin responded to Mr. Biden’s call for a “no-fly zone” in Darfur by agreeing with his proposal and claiming to lead an effort to enact divestment legislation in Alaska as a second policy regarding Darfur.¹¹ Ms. Palin thus effectively claimed that the job of governor today includes, to some extent, foreign affairs. This claim – unlike some of Ms. Palin’s other claims to foreign policy experience¹² – did not attract significant public criticism. The silence is telling. Criticism, even “mock[ery],” should have followed if the American public accepted the traditional dualist notion that foreign affairs is the exclusive preserve of the federal government – a field in which the states “do[] not exist,” according to the Supreme Court’s hoary phrase.¹³

To be fair, the data show a downtick in interest in divestment in 2009. This downtick raises the question of whether divestment is bound again for obscurity after a brief second life. Recognizing the wisdom of Yogi Berra’s warning that “It’s tough to make predictions, especially about the future,” one might

¹⁰ See Sudan Divestment Task Force, “Governor Sarah Palin Divests from Sudan, Joins Senators Obama and McCain” (October 10, 2008), available at <http://sudandivestment.org/statistics.asp> (last accessed on October 2, 2009). For additional details, see also Mullins, “Obama Sells Investment with Link to Sudan,” *Wall Street Journal* (May 16, 2007), available at <http://blogs.wsj.com/washwire/2007/05/16/obama-sells-investment-with-link-to-sudan/> (last accessed on February 16, 2010); Rood, “McCain Urges Sudan Divestment – after Wife Dumps Her Holdings,” *ABC News*, available at <http://www.abcnews.go.com/Blotter/story?id=4861297> (last accessed on February 16, 2010).

¹¹ See “Transcript: The Vice-Presidential Debate” (October 2, 2008), available at <http://elections.nytimes.com/2008/president/debates/transcripts/vice-presidential-debate.html> (last accessed on February 16, 2010). Ms. Palin’s claim to leadership on divestment had the disadvantage of “significant omissions or exaggerations,” in the judgment of the fact-checker at *The Washington Post*, because “[t]he legislative record shows that her administration was late in embracing the [divestment] campaign . . . and that it initially opposed the divestiture.” See “Palin Team Opposed Divesting of Holdings to Protest Darfur,” *Washington Post* (October 4, 2008), at A6 (awarding “two Pinocchios” on a scale of zero to four). After the election, Ms. Palin introduced new Sudan divestment legislation and secured the endorsement of the board of the Alaska Permanent Fund, but then resigned with the bills still pending before the state legislature.

¹² Ms. Palin’s early effort to claim relevant experience by virtue of Alaska’s proximity to Russia was “mocked,” a problem that she admitted but then compounded by defending her claim on the ground that, when “Putin rears his head and comes into the air space of the United States,” he flies over Alaska. See “Transcript: Katie Couric Interview of Sarah Palin,” *CBS Evening News* (September 25, 2008; on file with author).

¹³ See *United States v. Belmont*, 301 U.S. 324, 331 (1937): “[I]n respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist.”

nevertheless be so bold as to predict that divestment has a future. A short-term dip might be explained by national absorption with the Great Recession, which has immersed governors and state legislatures in economic and budgetary crises, as well as a pause by activists early in the Obama Administration.¹⁴ By contrast, the Sudan and Iran movements demonstrated the feasibility of successful divestment campaigns outside the original anti-apartheid context. Indeed, these campaigns showed that divestment can attract support in both “red” and “blue” states and can avoid the legal problems – domestic and international – that plagued Massachusetts’ procurement restrictions regarding Burma. Establishing foreign policy credentials is a recurring challenge for governors seeking national office – although the successful candidacies of Governors Carter, Reagan, Clinton, and Bush show that the challenge is not insuperable. Other governors (and state legislators) are likely to conclude that divestment offers an attractive way to build their own foreign policy resumes – unless their power to do so is curtailed by the courts or the political branches of the federal government. In this regard, Robert Ahdieh aptly invokes the “endowment effect”: “[O]nce states and localities have been empowered to act against states such as Sudan, it may be difficult to strip them of that power. As with coffee mugs, so with legislative authority.”¹⁵

If divestment is to remain a feature of our political landscape, we may witness a shift toward the states of a power traditionally associated with the federal government. Depending on the extent and nature of that shift, it could have significant implications for the contemporary conception of federalism. These implications would not be limited to the United States, because the states can influence the ways in which the federal government interacts with the rest of the world.¹⁶ In a recent article, I described and (within limits) celebrated the potential of state divestment, deployed wisely and occasionally,

¹⁴ David Barron recently described this as the risk of “easing off” and warned against the possibility that “the creative local activism [of progressives] of recent years may give way to passivity” with the Democrats’ success in the national elections of 2006 and 2008. See Barron, “Foreword: Blue State Federalism at the Crossroads,” 3 *Harv. L. Pol’y Rev.* (2009) 1, at 6.

¹⁵ See Ahdieh, “Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination,” 73 *Mo. L. Rev.* (2008) 1185, at 1210 note 113, citing Korobkin, “The Endowment Effect and Legal Analysis,” 97 *Nw. U. L. Rev.* (2003) 1227, at 1236.

¹⁶ John Kincaid goes so far as to suggest that “constituent diplomacy” by subnational governments in federal systems challenges the “classic unitary, univocal conception of the nation-state and, thereby, the international order built upon that conception” and, together with the rise of nonstate actors in international affairs, could require “a redefinition of the nature and role of the nation-state and a recognition of the fact that the cartelistic international arena is a pluralistic interorganizational arena.” See Kincaid, “Constituent Diplomacy in Federal Politics and the Nation-State: Conflict and Co-operation,” in H. J. Michelmann and P. Soldatos (eds.), *Federalism and International Relations: The Role of Subnational Units* (1990), at 54, 74.

to contribute valuably to the domestic political process for the formulation of foreign policy. As an instrument of democratic process, state divestment may call public and federal attention to an underattended concern, influence societal attitudes about that concern, and build domestic political support for a more vigorous national response thereto.¹⁷ So, for example, state divestment may induce the federal government to impose new or tougher economic sanctions against a target country.

SADA is a remarkable federal embrace of state divestment, expressly authorizing, for the first time, state actions that some contend intrude unconstitutionally into the foreign relations prerogatives of the federal government. At the same time, SADA establishes federal bounds within which states are at least encouraged (if not required) to act. Acknowledging that state participation in the domestic process of formulating foreign policy has its costs, my previous article welcomed SADA's approach of bounded authorization and presented SADA as a case study for a new, "dialogic" understanding of federalism.¹⁸ This conception of federalism rejects the antiquated notion that our nation does and must speak with only one voice about international matters in favor of a more pluralistic vision that both more accurately describes the reality of our national political processes and more fully accords with our democratic values, while still preserving ultimate federal control over foreign relations.

Nevertheless, in granting unprecedented federal approval to state divestment, SADA leaves unanswered questions about the theoretical underpinning for doing so. Did Congress "merely" move responsibility for divestment from the federal box to the state box in a traditional dualist model of federalism? Or did Congress challenge dualism itself by legitimizing a degree of concurrent responsibility on matters of foreign affairs? In other words, did Congress embrace a view about the role of the states in domestic and transnational discourse? Where might such a view lead?

This chapter strives to answer these questions. In so doing, it examines SADA together with other recent political developments, including the election of Barack Obama as President and Congress' ongoing consideration of SADA-like legislation to authorize state divestment from Iran.

Part 1 situates divestment in its constitutional and political contexts. Part 2 examines the extent of congressional support for dialogic federalism, as

¹⁷ See generally Bechky, "Darfur, Divestment, and Dialogue," 30 *U. Penn. J. Int'l L.* (2009) 823.

¹⁸ See Powell, "Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States," 150 *U. Penn. L. Rev.* (2001) 245. Among the variety of adjectives found in the federalism literature, I use "dialogic" here as best capturing the vertical, horizontal, and transnational conversations that state divestment is capable of furthering, while also offering a nice antidote to the flawed "one voice" metaphor.

evidenced in the Sudan and Iran bills. Part 3 concludes with a look forward at the continuing politics of divestment.

1. DIVESTMENT IN CONTEXT

A. *The Constitutional Context of Divestment*

1. Contemporary Constitutional Theory

Federalism is often conceived as a dualist exercise in the vertical division of legal authority between the national and state governments, with each occupying “exclusive and non-overlapping spheres of authority.”¹⁹ Federalism today, however, is not so much about dividing power into neat boxes labeled “federal” and “state” as it is about managing concurrent exercises of power. The literature is replete with adjectives that capture the contemporary spirit of federalism: collaborative, cooperative, dialectic, dialogic, dynamic, interactive, polyphonic.²⁰

Federalism is a conversation.²¹ This conversation takes place among governments that share concurrent authority in many areas, sometimes cooperatively and other times contentiously.²² This conversation serves constitutional values, including democratic participation values²³ and at least the hope that conversation will improve policy through competition in the marketplace of

¹⁹ See Schapiro, “Toward a Theory of Interactive Federalism,” 91 *Iowa L. Rev.* (2005) 243, at 246–250 (criticizing “dual federalism” and advancing “interactive federalism” as a better alternative, descriptively and normatively).

²⁰ See Ahdieh, *supra* note 15, at 30.

²¹ So, for example, David Shapiro concludes his “dialogue” about the merits of federalism with the observation that “the true genius of American federalism lies in the continuing, and constitutionally assured, basis for dialogue – for moral, political, economic, and social debate over the merits of the allocation of power (both in general and in specific instances) among the various branches of government.” David Shapiro, *Federalism: A Dialogue* (1995), at 140.

²² See Schapiro, *supra* note 19, at 246 (citing “narcotics trafficking to securities trading to education” as examples where federal and state laws regulate the very same conduct); *Ibid.* at 249 (“Polyphony accepts a substantial role for dissonance as well as harmony.”). For a new look at “how the state’s status as servant, insider, and ally” under a cooperative approach to federalism “might enable it to be a sometime dissenter, rival, and challenger” to the federal government, see Bulman-Pozen and Gerken, “Uncooperative Federalism,” 118 *Yale L. J.* 1256 (2009).

²³ See Duchacek, “Perforated Sovereignities: Towards a Typology of New Actors in International Relations,” in Michelmann and Soldatos, *supra* note 16, at 1, 9 (“In all federal democratic frameworks, of course, elected officials of non-central governments and their staffs have always tried to have an influence or significant role in all federal policy-making, including the conduct of relations with foreign nations. Such lobbying . . . has always been consistent with both democratic and federal theory and practice”); Kincaid, *supra* note 16, at 73 (“Constituent diplomacy enhances the participation not only of state and local officials but also of citizens in national-policy-making. . . . [It] thus contributes to the democratization of national political processes by adding new voices to foreign-policy-making”).

ideas. State action may likewise prioritize problems, identify potential solutions, and “generally prod[] the federal government into action.”²⁴ This is all familiar in domestic matters, where Justice Brandeis famously described state legislatures as laboratories of democracy,²⁵ but it runs directly counter to the dominant metaphor of U.S. foreign relations law: that the nation speaks with “one voice” in its foreign relations, with the President as its “sole organ.”²⁶

A dialogic view of federalism recognizes that the federal government has the dominant role in making foreign policy, but this role has not been and need not be to the complete exclusion of the states. To the contrary, the federal government may tolerate, encourage, and even listen to and benefit from state expression of foreign policy preferences and priorities. The states may influence the democratic process of making foreign policy through attention getting, norm changing, and door opening; they may even assist the federal government in pursuing its foreign policy objectives.²⁷

2. Constitutional Doctrine

The anti-apartheid movement, which included divestment as a key locus, helped place opposition to apartheid on the national agenda. Congress certainly knew of state divestment from South Africa. It debated whether to expressly allow or ban divestment in the Comprehensive Anti-Apartheid Act of 1986, ultimately doing neither.²⁸

²⁴ See Schapiro, “Not Old or Borrowed: Truly New Blue Federalism,” 3 *Harv. L. Pol’y Rev.* (2009) 33, at 51 (“Blue state federalism consists in the states becoming actively engaged in these areas and generally prodding the federal government into action. The state measures are designed to complement federal efforts and generally require action by the federal government to achieve fully the desired ends. Blue state federalism empowers the states; it does not diminish the authority of the federal government.”); see also Bechky, *supra* note 17, at 847–861 (describing divestment as an instrument of democratic process).

²⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J. Brandeis, dissenting): “To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

²⁶ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (describing the “President as the sole organ of the Federal government in the field of international relations”); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 452–453 (1979) (holding that a California tax impeded the nation’s ability to “speak with one voice”); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (stating that Massachusetts’ Burma law “compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments”). For description and criticism of the “one voice” jurisprudence, see generally Cleveland, *supra* note 3; see also Bechky, *supra* note 17, at 865–881.

²⁷ These themes are further developed in Bechky, *supra* note 17, at 847–861.

²⁸ See Cleveland, *supra* note 3, at 1001–1002, discussing legislative history of the Comprehensive Anti-Apartheid Act.

This congressional avoidance left the question of the propriety of state divestment to the courts. The leading case upheld Baltimore's divestment ordinances against, *inter alia*, the three main challenges brought against state actions affecting foreign relations: preemption by federal statute; the "dormant" effects of the Foreign Commerce Clause; and intrusion into an exclusive zone of federal control over foreign relations (also known as the "dormant foreign affairs power").²⁹ That decision, however, was rendered by a state court (the Maryland Court of Appeals) and cannot be regarded as definitive. In the year 2000, the Supreme Court emphasized that it had never ruled on the constitutionality of state divestment. In a case brought against Massachusetts's Burma procurement law by the National Foreign Trade Council (NFTC), a leading business group, the Supreme Court held that a federal Burma statute implicitly preempted Massachusetts' law. The Supreme Court left unaddressed the lower court's constitutional holdings that the law also violated both the dormant Foreign Commerce Clause and the dormant foreign affairs power.³⁰ A 2003 decision striking down California's Holocaust Victim Insurance Relief Act further suggested that the Supreme Court would find preemption readily when state action allegedly interferes with federal foreign policy.³¹

Two years later, Illinois passed the first Sudan-specific state law. The Illinois law provided, *inter alia*, for divestment from Sudan of assets controlled by both the state and city governments. The NFTC sued. The federal district court in Chicago grounded its divestment holding on precedents in the Seventh Circuit concerning the relationship between state and city governments. The court struck down the Illinois law, but its reasoning suggested that it would uphold a revised statute that limited divestment to state-controlled assets, omitting city-controlled assets. The court also held that another part of the Illinois law, concerning banking services, intruded into the exclusive federal realm of foreign affairs, distinguishing that provision from divestment.³²

These lower-court decisions provide a nondefinitive degree of support for the constitutionality of state divestment absent SADA-like federal authority,

²⁹ See *Board of Trustees of Employees' Retirement System v. Mayor of Baltimore City*, 562 A.2d 720, 726 (Md. 1989).

³⁰ See *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). For further discussion of these decisions and their significance for contemporary divestment, see Bechky, *supra* note 17.

³¹ See *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

³² See *National Foreign Trade Council, Inc. v. Giannoulas*, 523 F. Supp. 2d 731, 742-45 (N.D. Ill. 2007). Illinois proceeded to enact new divestment legislation intended to conform with *Giannoulas* by omitting the provisions on city divestment and banking services. See 15 *Ill. Comp. Stat. Ann.* 520/22.5 (West, 2007).

as does a Reagan-era opinion of the Office of Legal Counsel.³³ Nevertheless, it also must be acknowledged that current doctrine casts some constitutional clouds over divestment – clouds that should neither be overstated nor ignored. The Sudan Divestment Task Force developed model divestment legislation, which was adopted by nineteen of the twenty-seven divesting states, designed to minimize difficulties under current constitutional doctrine.³⁴ For example, the task force's model legislation has several provisions to minimize conflict with federal policy, as well as other provisions to assure potential targets of fair process. Moreover, in practice, the task force recommended divestment from only a handful of companies with significant operations in Sudan, known as the "Highest Offenders."³⁵

B. *The Political Context of Divestment*

Business opposition to U.S. economic sanctions is generally led by the NFTC and a coalition it organized called USA*Engage. The business groups offer two main arguments against sanctions: They don't work, and they hurt U.S. businesses and their employees.³⁶ These might be characterized as the "effectiveness" and "economic" objections. A third objection – "unilateralism" – draws much of its initial force from its relationship with the other two: If U.S. sales to a target country are replaced by sales from competitors elsewhere, that weakens both the effectiveness of the sanctions and the position of U.S. companies vis-à-vis their competitors. Proponents of sanctions, recognizing both the costs of unilateralism and the difficulties of securing multilateral cooperation with U.S. sanctions initiatives, sometimes advocate "extraterritorial" application of U.S. sanctions as a means of squaring the circle. This is where the unilateralism objection acquires its own independent bite, generating arguments that extraterritoriality causes diplomatic controversy, violates international law (whether customary law or particular treaties such as the World Trade Organization Agreements), and risks retaliation against U.S. businesses.

In its public objections to SADA, the NFTC seemed to acknowledge important differences between divestment and other sanctions. Critically, the U.S.

³³ See "Constitutionality of South African Divestment Statutes Enacted by State and Local Governments," 10 *U.S. Op. Off. Legal Counsel* (1986) 49.

³⁴ See Sudan Divestment Task Force, "Targeted Sudan Divestment: Model Legislation" (2008; on file with author).

³⁵ See Sudan Divestment Task Force, "Sudan Company Rankings" (2008; on file with author).

³⁶ For a good introduction to the business community's concerns about sanctions policy, see the Web site of USA*Engage (www.usaengage.org).

business community did not seem to perceive any real economic threat from divestment from Sudan – at least when the divestment was limited to a handful of companies, as under the Sudan Divestment Task Force model legislation adopted in most of the states divesting from Sudan. Indeed, because U.S. law already bars U.S. companies from conducting most business with Sudan, only one U.S. company has been named as a Highest Offender.³⁷ The Iran divestment movement likewise builds on existing U.S. sanctions against Iran, thus focusing on divestment from third-country companies doing business in Iran already barred for U.S. companies. This is a key difference between today's major divestment movements and their anti-apartheid predecessor, which developed in the absence of federal sanctions against South Africa and largely targeted U.S. companies. The only claim of economic harm in the NFTC's testimony opposing passage of SADA was that mutual funds would be burdened with compliance challenges.³⁸ The NFTC's actions seem to confirm its priorities: Although the NFTC sued Massachusetts over its procurement restrictions and Illinois over its statute with both divestment and procurement provisions, it has not challenged any pure divestment law. More proactively, the NFTC facilitated a meeting between its member companies and divestment advocates to foster dialogue about Sudan.³⁹

Nor does the "unilateralism" of divestment pose any real threat. It does not jeopardize the competitiveness of U.S. companies. It has not provoked any significant diplomatic controversy. Europe and Japan swiftly challenged the Helms–Burton Act against Cuba, the Iran and Libya Sanctions Act, and the Massachusetts–Burma law under the World Trade Organization's dispute settlement procedures, but they have not challenged any of the state divestment laws.

Absent a substantial objection to divestment itself, at least in its limited contemporary manifestations, NFTC opposition seems motivated mainly by an interest in setting markers to constrain future state-level sanctions – especially procurement restrictions like the Massachusetts–Burma law and the Illinois banking provisions. Those constraints would be optimized by a constitutional

³⁷ See Vivienne Walt, "U.S. Oil Firm Pulls out of Sudan," *Fortune* (September 14, 2007), discussing Weatherford's designation as a Highest Offender and subsequent decision to terminate a foreign subsidiary's activities in Sudan.

³⁸ Written Statement of William A. Reinsch before the Senate Committee on Banking, Housing, and Urban Affairs, S. Hrg. 110-933 (2007), at 91; see also Cummings, "NFTC and USA*Engage Express Disappointment over House Approval of Iran Divestment Bill" (October 14, 2009), available at <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&id=236&articleid=2019&category=All> (last accessed on February 16, 2010), stating objections to the Iran Sanctions Enabling Act without mention of any economic harm.

³⁹ Interview with Adam Sterling (September 26, 2009).

theory that forbids state sanctions, thereby limiting to one the number of regulators on matters affecting foreign relations. As a result, NFTC objections to divestment focus on “one voice” constitutional arguments treating divestment as a state intrusion into exclusive national prerogatives. This understanding of the nature of the business community’s interest in divestment suggests that the NFTC will continue to oppose any shift toward dialogism, preferring that any divestment authorization rest on the narrowest possible theory in an effort to maintain constraints minimizing the number and variety of state sanctions.

Conversely, divestment advocates will often lack any real interest in challenging “one voice.” If an advocate’s objective is to secure either state divestment from a particular target or express federal approval of such divestment, the prospects for success are likely to be maximized by hewing to prevailing constitutional doctrine. According to Adam Sterling, former executive director of the Sudan Divestment Task Force, “[w]e never intended to confront ‘one voice.’ Targeted divestment could be done within the ‘one voice’ frame.”⁴⁰

2. DIVESTMENT IN CONGRESS

A. *Divestment from Sudan*

In January 2007, Representative Barbara Lee of California – where the “targeted approach” was initially developed⁴¹ – introduced the first federal bill to authorize state divestment from Sudan.⁴² Just two weeks after the court decision in the Illinois case, Senator Richard Durbin of Illinois introduced a parallel bill in the Senate.⁴³ These bills drew widespread support: The Lee bill passed the House of Representatives by a vote of 418 to 1, and the Durbin bill attracted 32 cosponsors, including then-Senator Obama.

After the House passed the Lee bill, Senate Democrats tried for quick passage in the Senate as well, but Senate Republicans (presumably in coordination with the Bush Administration) insisted on fuller consideration in the Senate Banking Committee.⁴⁴ That led to the introduction of a new – and

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² See the Darfur Accountability and Divestment Act, H. Rep. 180 (110th Cong. 1st sess., introduced January 4, 2007).

⁴³ See the Sudan Divestment Authorization Act, S. 831 at § 3 (110th Cong. 1st sess., introduced March 8, 2007).

⁴⁴ See Schor, “Shelby Blocks Fast Track for Darfur Bill,” *The Hill* (August 15, 2007).

ultimately successful – bill sponsored solely by the Chairman, Senator Christopher Dodd.⁴⁵ The Banking Committee report confirms that the statute’s purpose was “to address the issues raised in the Illinois case and the issue more broadly, by clearly authorizing divestment decisions made consistent with the standards it articulates.”⁴⁶

SADA authorizes the states to divest – within important bounds – from companies that do business in Sudan.⁴⁷ The key provision of this unprecedented statute provides

Authority to Divest – Notwithstanding any other provision of law, a State or local government may adopt and enforce measures that meet the requirements of subsection (e) to divest the assets of the State or local government from, or prohibit investment of the assets of the State or local government in, persons that the State or local government determines, using credible information available to the public, are conducting or have direct investments in business operations described in subsection (d).⁴⁸

In authorizing (but not requiring) states to divest from Sudan, Congress left to each state the decision *whether* to divest state-controlled assets from Sudan. Should a state decide to divest from Sudan, it also has considerable discretion to decide *how* to do so. As the aforementioned provision makes clear, however, SADA also bounds its authority to divest in various respects intended to ensure the compatibility of state actions with federal policy.⁴⁹

SADA defines a space where a particular form of state expression is plainly authorized under particular circumstances, even though that speech concerns international matters. SADA thus seems to move past the dualist notion that our nation only and necessarily speaks with one voice toward respect for the possibilities offered by welcoming a multiplicity of voices, while still preserving the ultimate dominance of the federal voice.

Although SADA resonates with the theory of dialogic federalism, it is not clear whether Congress intended to embrace this theory when enacting SADA.

⁴⁵ This is not to say that Senator Dodd’s staff wrote the bill alone or that they ignored the views of other actors. To the contrary, I understand that the Dodd bill reflected a serious effort to accommodate the views of a number of active participants, including (at the least) the Bush Administration, Committee Republicans, Senator Durbin, Representative Lee, the NFTC, and the Sudan Development Task Force.

⁴⁶ S. Rep. No. 110–213, at 3 (2007).

⁴⁷ Pub. L. No. 110–174, 21 Stat. 2516 (2007).

⁴⁸ See SADA § 3(b).

⁴⁹ See SADA §§ 3–5, 12; see also Bechky, *supra* note 17 (describing six limitations on SADA’s authority to divest).

At the least, Congress seems to have wished not to be seen to embrace it. SADA includes this declaration:

It is the sense of Congress that the United States Government should support the decision of any State or local government to divest from . . . a person that the State or local government *determines poses a financial or reputational risk*.⁵⁰

The Banking Committee report explains that it put this language in the statute to make clear that divestment is “conducted for purposes of mitigating a ‘financial or reputational risk’” in light of “the Constitutional concerns about states’ enacting legislation which touches on international relations.”⁵¹ The report further refers to “balancing” the states’ proprietary interests against the “singular” federal authority to conduct foreign policy.⁵² This, needless to say, is not the language of foreign relations multipolarism. It suggests, rather, a continuing adherence to dualism – albeit with a (still notable) willingness to assign divestment to the state side of the federal–state divide.

Nevertheless, the committee report language cannot be accepted as the final word on this question. As the Bush Administration argued in opposition to SADA,⁵³ the statute’s operative language does not require any showing of “financial or reputational risk” as a condition of the authority to divest, or otherwise limit the grounds on which a state may decide to divest. Congress could have limited SADA’s authority to divestment done for the express purpose of mitigating risk – as Congress permits state regulation of nuclear plants depending upon the state’s stated regulatory purpose⁵⁴ – or to divestment where the state makes certain factual determinations about risk. It did not do so.

⁵⁰ See SADA § 3(a); emphasis added.

⁵¹ S. Rpt. 110-213, at 6; *Ibid.* at 1, 4.

⁵² S. Rpt. 110-213, at 3.

⁵³ See *Negative Implications of the President’s Signing Statement on the Sudan Accountability and Divestment Act: Hearing before the H. Comm. on Financial Serv.*, H. Rep. 110-87 (2008), at 67–68 (reprinting letter from Brian Benzckowski, Principal Deputy Assistant Attorney General, U.S. Dept. of Justice, to Richard Cheney, President of the U.S. Senate, giving the Department of Justice’s views on SADA): “This hortatory provision [about financial or reputational risk] provides virtually no limits on the State and local divestment the bill says the United States Government ‘should support.’ But the operative divestment authorization that follows it, which contains no limitations on the motivations covered by the bill, is even broader.”

⁵⁴ In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm’n*, 461 U.S. 190 (1983), the Supreme Court held that the Atomic Energy Act did not preempt California’s regulation of nuclear plants, reasoning that Congress occupied the field of nuclear safety, but left states free to regulate nuclear plants “for purposes other than protection against radiation hazards.” *Ibid.* at 210–216, quoting 42 U.S.C. § 2021(k). Indeed, the court “accept[ed] California’s avowed economic purpose as the rationale” for the statute at issue rather than

Moreover, the word “singular” ought not be read too far. Taken literally, it would mean that states could not send trade missions abroad, could not open overseas commercial offices, could not form sister-city relationships, could not pass resolutions or make other symbolic statements about foreign affairs, and so forth. Yet, states do all of this – and more – quite routinely, often with the federal government’s support.⁵⁵ It is simply implausible that the Senate Banking Committee meant to endorse, *sub silentio*, the complete abolition of all this state involvement in foreign affairs.

Three aspects of SADA’s legislative history shed light on the political choices made by Congress.

First, the Durbin bill – like the Lee bill in the House of Representatives – did not include the risk-based language ultimately found in SADA. To the contrary, it affirmatively embraced the language of federalist dialogue. It expressed the “sense of the Congress” that states should be permitted to divest as “an expression of opposition to the genocidal actions and policies of the Government of Sudan.”⁵⁶ The Durbin bill also would have expressly authorized state divestment with fewer bounds on the authority than are contained in SADA.⁵⁷

Second, according to Adam Sterling, the Sudan Divestment Task Force’s position “evolved over time” as it came to stress “financial and reputational” concerns about doing business with Sudan together with “moral” concerns. In his judgment, this strategy helped both to overcome pension fund objections to state divestment legislation and to respond to the “slippery slope” argument from businesses concerned about the volume and variety of social concerns. He considered it “easy to show the significant reputational risks” presented by doing major business with a regime declared by the U.S. Government to be committing genocide.⁵⁸

Third, SADA passed over the “grave constitutional” objections of the Bush Administration. The administration contended that SADA unconstitutionally and unwisely enabled states to “interfere with national foreign policy”:

[T]he bill purports to transfer to State and local governments, in a way that raises both constitutional separation of powers and federalism questions,

“become embroiled in attempting to ascertain California’s true motive,” because “inquiry into legislative motive is often an unsatisfactory venture.” *Ibid.* at 216 (emphasis added).

⁵⁵ Examples are available at Bechky, *supra* note 17, at 841–842.

⁵⁶ S. 831, *supra* note 43, at § 3.

⁵⁷ *Ibid.* at § 5(a): “Notwithstanding any other provision of law, 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 sanctions authorized under . . . Federal law or executive order.”

⁵⁸ Interview with Adam Sterling (September 26, 2009).

foreign policy authority that the Constitution places, for very good reasons, with the Federal government. We strongly object to this effort because it raises concerns under a long line of Supreme Court cases and because it could jeopardize, rather than strengthen, the robust and carefully calibrated response to the crisis in Darfur that the Federal government is pursuing. . . .⁵⁹

The Bush Administration's invocation of separation of powers is notable. Its objections were not only vertical but horizontal. In other words, it took the position that the exclusion of states from participation in foreign affairs is constitutionally fixed and the U.S. Congress is powerless to adjust it even when Congress (with the President's signature or over his veto) concludes that allowing state participation is in the national interest. The Bush Administration conceded that Congress can resolve concerns involving statutory preemption and the dormant Foreign Commerce Clause, but it questioned whether "federal legislation could remove any Federal preemptive force that flows from the Constitution's grant to the President of certain foreign affairs powers under Article II."⁶⁰

The Bush Administration similarly challenged Congress to explain why states should be allowed to participate in the making of foreign policy when they lack relevant expertise. It warned of the dangers of "effectively converting State actions – which States are already taking – into federally protected privileges, thereby undercutting the Supremacy Clause and the President's powers thereunder." It raised the camel's nose argument: "Such authorization would set a dangerous precedent, making it easier to pass similar legislation in other cases."⁶¹

The administration persisted with its constitutional objections to the extent that President Bush ultimately signed SADA subject to a signing statement, which maintained that SADA "purports" to authorize state divestment but will be "construe[d] and enforce[d]" by the executive branch to preserve the federal government's "exclusive authority to conduct foreign relations."⁶²

The legislative history of SADA thus shows support for a dialogically premised bill by the House and a third of the Senate, strenuous opposition by the Bush Administration, a convergence of views by business and activist groups toward an approach focused on reputational and financial risk, and

⁵⁹ See Benczkowski letter, *supra* note 53, at 67.

⁶⁰ *Ibid.* at 67, 69 (emphasis added, punctuation omitted).

⁶¹ *Ibid.* at 63–64 (letter from Jeffrey T. Bergner, Assistant Secretary for Legislative Affairs, U.S. Department of State, to Senator Harry Reid, giving the views of the State Department on SADA, October 22, 2007).

⁶² "Statement by President George W. Bush upon Signing S. 2271," 43 *Weekly Comp. Pres. Doc.* 1646 (December 31, 2007).

ultimate passage of a different bill lacking any express commitment to the dialogical view. There appears to be no information in the public record explaining the new language put forth in the Banking Committee bill and the committee report. In the circumstances, it seems not unreasonable to surmise that the Banking Committee decided to advance a bill capable of minimizing conflict with the Bush Administration and securing Republican backing to enact a divestment-authorizing statute, without regard to its theoretical basis.

B. *The Politics of Divestment from Iran*

As a senator, Barack Obama was the primary sponsor of a Senate bill designed to authorize states to divest from companies investing in the Iranian energy sector. The Obama bill would have obliged the Treasury Department to publish a list of companies investing more than \$20 million in the Iranian energy sector,⁶³ because that in turn was the threshold at which the Iran Sanctions Act (ISA) requires the President to impose federal sanctions unless he certifies that a waiver is "important to the national interest."⁶⁴ The Obama bill thus reflected both congressional interest in invigorating presidential use of ISA and an effort to align federal and state policies by tying the states' authority to divest to federal sanctions.

The Obama bill was premised on a congressional "finding" that "[p]olicy makers and fund managers may find moral, prudential, or reputational reasons to divest" from Iran.⁶⁵ The words "moral . . . reasons" suggest a more open embrace of state involvement with matters international than does SADA's reference to "financial or reputational risk." They acknowledge and legitimize state divestment not merely to protect states' own narrow business interests, but to condemn unacceptable foreign conduct and thereby participate in transnational discourse about ending that conduct.

Representative Barney Frank, the Chairman of the House Financial Services Committee, introduced a parallel to the Obama bill. The House of Representatives passed the Frank bill in July 2007, by a vote of 408 to 6. The Frank bill went beyond the Obama bill in two important respects. First, while keeping the recognition that states may divest for "moral" reasons, the House-passed bill added that "[i]t is the policy of the United States to support the decision of state governments, local governments, and educational institutions to divest from . . . persons that have investments of more

⁶³ Iran Sanctions Enabling Act, S. 1430 (110th Cong., 1st sess., introduced May 17, 2007).

⁶⁴ Iran Sanctions Act, 50 U.S.C. § 1701 note, §§ 4(d)(1), 5(a), 9(c).

⁶⁵ S. 1430, *supra* note 63, § 2(10).

than \$20,000,000 in Iran's energy sector." The House did not limit this "support" with any language about the states' motives for divestment. Indeed, the operative language went still further, authorizing divestment from any company "having an investment in, or carrying on a trade or business . . . in or with, Iran."⁶⁶ The House committee report explained that this bill "allows State and local governments to develop their own criteria with regard to the companies from which they will divest . . . irrespective of the list provided by the Federal government."⁶⁷

Like the Durbin bill on Sudan, the Obama bill faced procedural obstacles in the Senate, which led to a new bill sponsored by Chairman Dodd. In July 2008, the Banking Committee approved the Comprehensive Iran Sanctions, Accountability, and Divestment Act, or CISADA, by a vote of 19 to 2. CISADA echoed SADA in more than just name. Evidently drawing on the lessons of SADA's success over Bush Administration objections, the Banking Committee crafted CISADA's divestment provisions from the SADA mold. CISADA thus followed the SADA formulation connecting the "sense of Congress that the United States Government should support" state divestment to cases of "financial or reputational risk." As with SADA, the operative language was not tied to risk, but neither did it make the apparently open-ended commitment of the House-passed bill. Instead it tied the authority to ISA's \$20 million threshold – except that CISADA applied this threshold to banks providing financing at that level, as well as investors themselves, reflecting a preference to expand ISA long favored by its proponents.⁶⁸

The Banking Committee report on CISADA repeated the SADA report's language about "balance" between the states' interests as investors and the "singular" federal control over foreign relations, stressing the theme of divestment as a tool of risk management.⁶⁹ It added an unmistakable response to President Bush's SADA signing statement: "[T]he Committee has concluded that, with respect to each of these challenges [statutory preemption, dormant foreign commerce, and dormant foreign affairs], Congress and the President have the constitutional power to authorize States to enact divestment measures, and Federal consent removes any doubt as to the constitutionality of those measures."⁷⁰

⁶⁶ Iran Sanctions Enabling Act, H.R. 2437, §§ 2(10), 4 (110th Cong. 1st sess., as passed July 31, 2007).

⁶⁷ H.R. Rep. No. 110-277 (2007), at 7.

⁶⁸ Comprehensive Iran Sanctions, Accountability, and Divestment Act, S. 3445, § 202 (110th Cong. 2nd sess., introduced August 1, 2008).

⁶⁹ S. Rep. No. 110-443 (2008), at 2, 4, 5, 8.

⁷⁰ *Ibid.* at 5.

The House then passed CISADA, but the Senate did not act on it – a result perhaps not too surprising during the first general election campaign in U.S. history to pit two sitting senators against each other.

Through 2008, then, congressional consideration of divestment from Iran seemed to confirm the evidence of SADA. Once again, the House and a substantial number of senators (thirty-seven cosponsored the Obama bill) supported a dialogically grounded approach to divestment, but the Senate Banking Committee advanced a less openly dialogic bill apparently in an effort to maximize prospects for passage despite the objections of the Bush Administration. Both times, the House accepted the risk-based approach that emerged from the Senate Banking Committee.

In January 2009, Barack Obama took office as President of the United States. In his efforts to address Iran's nuclear program, President Obama pursued diplomacy with Iran – apparently with the twin objectives of trying in good faith to resolve the matter diplomatically while also laying the groundwork to persuade the UN Security Council about the necessity for multilateral sanctions against Iran should diplomacy fail. President Obama continued this “dual-track approach” even after Iran violently oppressed protestors and new disclosures emerged about Iran's nuclear program. The President's speech accepting the Nobel Peace Prize in December 2009 nicely illustrates his effort to find balance between multilateral sanctions and diplomatic outreach, as he appears to speak all at once to Iran, the international community, and domestic critics:

Those regimes that break the rules [of international law] must be held accountable. Sanctions must exact a real price. Intransigence must be met with increased pressure – and such pressure exists only when the world stands together as one. One urgent example is the effort to prevent the spread of nuclear weapons. . . . [I]t is also incumbent upon all of us to insist that nations like Iran and North Korea do not game the system. Those who claim to respect international law cannot avert their eyes when those laws are flouted. Those who care for their own security cannot ignore the danger of an arms race in the Middle East or East Asia. Those who seek peace cannot stand idly by as nations arm themselves for nuclear war. . . .

Let me also say this: the promotion of human rights cannot be about exhortation alone. At times, it must be coupled with painstaking diplomacy. I know that engagement with repressive regimes lacks the satisfying purity of indignation. But I also know that sanctions without outreach – and condemnation without discussion – can carry forward a crippling status quo. No repressive regime can move down a new path unless it has the choice of an open door. . . . There is no simple formula here. But we must try as best we can to balance isolation and engagement, pressure and incentives, so that human rights and dignity are advanced over time.

It did not take long for President Obama to be confronted with the views of Senator Obama on U.S. sanctions against Iran. Even with President Obama's fellow Democrats in control of both Houses, congressional patience for diplomacy with Iran is thin – and Iran strained it during 2009. In April, two bills intended to disrupt sales of refined petroleum to Iran expressly quoted then-Senator Obama's earlier support for such sanctions.⁷¹ In July, the Senate urged the President to impose new U.S. sanctions unless Iran started negotiations by late September and ended its nuclear program within sixty days thereafter.⁷² In October, the Senate Banking Committee held a hearing on Iran sanctions, during which it became evident both that the Obama Administration did not favor new sanctions legislation at that time and that the Banking Committee intended to push forward regardless.⁷³ Weeks later, the Banking Committee marked up a new Iran sanctions bill – here called “CISADA 2” – which passed the Committee quickly and unanimously.⁷⁴ In December, the House passed its refined petroleum sanctions bill, 412 to 12. In January 2010, the Senate passed CISADA 2 under its “unanimous consent” procedure – deferring the Obama Administration's concerns about the “timing and content” of the bill to be addressed, if at all, in a House–Senate conference committee.⁷⁵

To be sure, the main thrust of congressional interest is directed at federal sanctions against Iran rather than SADA-like approval of state divestment. Still, bills authorizing divestment from Iran have moved through Congress as well. In March, Chairman Frank introduced an Iran divestment bill reminiscent of the Frank and Obama bills of 2007.⁷⁶ In May, Senator Sam Brownback (who had been the principal cosponsor of the Obama bill in 2007) introduced a parallel bill in the Senate.⁷⁷ The House passed the Frank bill in October,

⁷¹ See Iran Refined Petroleum Sanctions Act, S. 908, § 2(a)(4-6) (111th Cong. 1st sess., introduced April 28, 2009); Iran Refined Petroleum Sanctions Act, H.R. 2194 (111th Cong. 1st sess., introduced April 30, 2009).

⁷² National Defense Authorization Act for Fiscal Year 2010, S. 1390, § 1232(b)(2) (111th Cong. 1st sess.).

⁷³ See, e.g., Bogardus, “Dem Senators Frustrated with State Dept. on Iran,” *The Hill* (October 7, 2009) 16; “Steinberg Says Administration Still Undecided on Iran Sanctions,” *Inside U.S. Trade* (October 9, 2009), 2009 WLNR 19948777. The administration's position is best reflected in the exchange with Senator Corker, and the Senate's appetite for quick action is evidenced in comments by Senators Bayh, Brownback, Bunning, Dodd, Schumer, and Menendez. Transcript, *Federal News Service* (October 6, 2009), at 2, 4, 6, 25–28, 35–36, 38–39.

⁷⁴ Comprehensive Iran Sanctions, Accountability, and Divestment Act, S. 2799 (111th Cong. 2nd sess., introduced November 19, 2009); S. Rep. No. 111-99, at 1.

⁷⁵ See Letter from James Steinberg, Deputy Secretary of State, to John Kerry, Chairman of the Senate Foreign Relations Committee, December 11, 2009 (on file with author), expressing the State Department's concerns about CISADA 2; 156 Cong. Rec. (28 Jan. 2010), at S324, S326 (remarks of Senator Dodd, noting the administration's “lingering concerns”).

⁷⁶ Iran Sanctions Enabling Act, H.R. 1327 (111th Cong. 1st sess., introduced March 5, 2009).

⁷⁷ Iran Sanctions Enabling Act, S. 1065 (111th Cong. 1st sess., introduced May 18, 2009).

414 to 6. The Brownback bill, as with the Durbin and Obama bills before it, was replaced by the divestment provisions of a new Banking Committee bill, CISADA 2. With the Senate's recent passage of CISADA 2, both Houses have voted to authorize state divestment from Iran – subject, of course, to final reconciliation of the bills and presentment to President Obama.⁷⁸

The Frank and Brownback bills include the language legitimizing a “moral” basis for state divestment.⁷⁹ The Banking Committee seemed poised to omit these words in favor of the less dialogic, risk-based path of SADA and the original CISADA bill. The Committee Report on CISADA 2 employs familiar language about “balance” between the “singular authority” of the federal government over foreign affairs and “risks to profitability, economic well-being, and reputations” arising from the states’ management of their investment portfolios.⁸⁰ The report even appears to suggest that CISADA 2 limits states to divesting only for reasons of risk management.⁸¹

In fact, however, CISADA 2 does not limit the authority to divest in this way. Indeed, it includes the Frank and Brownback language acknowledging “moral” reasons for state divestment.⁸² It passed the Senate by unanimous consent. The Senate thus took a step away from its previous reliance on risk management as an explanation for authorizing states to divest. This step better aligns the bill’s stated premises with its operative language, allowing a peek behind the veil drawn by the Banking Committee as part of the effort to secure passage of SADA.⁸³

⁷⁸ As this chapter goes to press, President Obama signed CISADA 2 into law as Public Law 111-195, with the divestment provisions discussed here intact.

⁷⁹ H.R. 1327, *supra* note 76, § 2(2); S. 1065, *supra* note 77, § 2(2).

⁸⁰ See S. Rep. No. 111-99, at 7; see also *id.* at 2 (“to reduce the financial or reputational risk”); 6 (“prudential or reputational reasons to divest from companies that accept the business risk” of dealings with Iran); 11 (“prudential and economic reasons,” including “reputational and financial risks”).

⁸¹ *Id.* at 7: “The Committee believes it has struck an appropriate balance by targeting State action in such a way that permits State divestment measures based on risks. . . .”

⁸² S. 2799, *supra* note 74, § 202: “It is the sense of Congress that the United States Government should support the decision of any State or local government that for moral, prudential, or reputational reasons divests from, or prohibits the investment of assets of the State or local government in, a person that engages in investment activities in the energy sector of Iran, as long as that country is subject to economic sanctions imposed by the United States.”

⁸³ I am presuming, of course, that the Senate’s addition of the word “moral” was purposeful. Cf. Frankfurter, “Some Reflections on the Reading of Statutes,” 47 *Colum. L. Rev.* (1947), at 527, 545–546: “The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible or undisciplined use of language. In the keeping of legislatures perhaps more than any other group is the well-being of their fellow-men. Their responsibility is discharged ultimately by words.”

Why did the Senate take this step toward a more openly dialogic rationale for divestment? The public record is silent. CISADA 2 moved quickly through committee and the full Senate, with a minimum of public debate. Issues about divestment necessarily predominated in the consideration of SADA, but divestment attracted relatively little attention in discussions about the larger CISADA 2 bill. Neither the State Department nor the NFTC mentioned divestment in their statements opposing CISADA 2.⁸⁴

One might ask whether the move toward dialogism reflects President Obama's own personal policy preferences. Besides the evidence of his legislative record and his statements and actions during the 2008 campaign, we have this passage from his memoir *Dreams from My Father*:

I got involved in the [anti-apartheid] divestment campaign [at Occidental College]. . . . I found myself drawn into a larger role – contacting representatives of the African National Congress to speak on campus, drafting letters to the faculty, printing up flyers, arguing strategy. . . . When we started planning the rally for the trustees' meeting, and somebody suggested that I open the thing, I quickly agreed. . . .

"There's a struggle going on," I said. . . . "It's happening an ocean away. But it's a struggle that touches each and every one of us. . . . A struggle that demands we choose sides. . . . It's a choice between dignity and servitude. Between fairness and injustice. Between commitment and indifference. A choice between right and wrong."

Let us assume that this passion endures, that it extends beyond apartheid to current-day Iran, that President Obama is willing to allow states to act on that passion even if such actions complicate his own high-stakes diplomatic outreach to Iran, and that he is also willing to tolerate the risk that similar complications may arise in our relations with other countries should new divestment campaigns emerge.⁸⁵ Even so, this is not enough. After all, a SADA-like bill would achieve express authority for state divestment from Iran. President Obama's commitment would have to extend beyond divestment itself to the nonoperative language in his Iran bill or Senator Durbin's Sudan

⁸⁴ See Steinberg letter, *supra* note 75; Cummings, "Business Community Voices Strong Opposition to Iran Sanctions Bills" (January 26, 2010), available at <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&id=236&articleid=2974&category=All> (last accessed February 15, 2010).

⁸⁵ In mentioning the risks of state divestment for the president's foreign policy, one should not lose sight of the possibility that state divestment might in fact strengthen the president's position by, for example, signaling to foreign actors the depth of public support for that position. See Bechky, *supra* note 17, at 869–870; H.R. Hrg. 111-13 (2009), at 80 (quoting Chairman Frank).

bill – to the very idea that states may divest for “moral . . . reasons” or as “an expression of opposition” to Iranian policy.

In fact, there is reason to believe that the Obama Administration might be more open than was the Bush Administration to sharing with the states a degree of power on matters touching upon foreign relations – as, indeed, the Reagan and Clinton Administrations were.⁸⁶ Claims of broad executive power were a hallmark of the Bush Presidency. In its first year, the Obama Administration wrestled with how far to roll back these claims – showing, at times, a greater willingness to accept constraints on executive action and to share power with other actors, while still securing the institutional interests of the United States and the Executive Branch.⁸⁷ With regard to CISADA 2, the Executive Branch’s institutional priorities lie in preserving its dominant position in foreign policy generally and minimizing the bill’s impact, in its substance or timing, on the president’s diplomatic initiatives. President Obama’s past personal support for an earlier bill containing certain language would seem an unlikely basis for the Executive Branch to instigate legislative amendments inviting freer challenges on a central matter of foreign policy than Congress itself previously had been willing to endorse. That prospect seems remote, even if we imagine that an Obama Administration addressing the issue on a blank slate might have opposed the Durbin bill less vigorously than the Bush Administration actually did (or not at all) and so might have negotiated different language for SADA and the committee report:

Instead, CISADA 2’s step toward dialogism may reflect the efforts of supporters of the Brownback bill. Senator Brownback himself cast his support for state divestment in, inter alia, moral terms: “[D]ivestment serves as a way

⁸⁶ See “Constitutionality of South African Divestment Statutes,” *supra* note 33 (Reagan Administration; finding constitutional states’ divestment and procurement laws); Brief for the United States as Amicus Curiae Supporting Respondents, *Natsios v. National Foreign Trade Council*, U.S. S.Ct. No. 99–474, 2000 WL 14805 (Clinton Administration; opposing Massachusetts’ procurement restrictions, but recognizing the legitimacy of various state measures, possibly including divestment). By contrast, the Bush Administration’s amicus brief in *Garamendi* stressed the exclusive prerogatives of the president without acknowledging the legitimacy of any state measures touching foreign relations. See Brief for the United States as Amicus Curiae Supporting Petitioners, *American Insurance Association v. Garamendi*, U.S. S.Ct. No. 02–722.

⁸⁷ In one notable early example, the Obama Administration shifted the legal basis for holding the Guantánamo detainees from a claim of inherent presidential power to a construction of the statute authorizing use of military force in Afghanistan. This approach maintained a legal basis for continuing to hold the detainees while the administration works toward closing Guantánamo, while also sharing power over detainee policy with a Congress capable of amending the statute. See Brief for the United States, *In re Guantánamo Bay Detainee Litigation*, D.D.C. Misc. No. 08–442 (March 13, 2009), at 1 (“the Government is refining its position with respect to its authority to detain those persons who are now being held at Guantanamo Bay”).

of fulfilling our minimum moral obligation towards the victims of oppression from brutal regimes, like that in Tehran.”⁸⁸ Senator Robert Casey, the principal cosponsor of the Brownback bill, nicely captured its dialogic spirit:

I call on my colleagues to listen to legislatures in so many states across the country who have passed divestment measures. The American people do not want anything to do with investing in this regime. Let’s send a strong message to this regime and the international community that a nuclear-armed Iran is unacceptable.⁸⁹

This is not to say that the election of President Obama is irrelevant to the addition of the “moral” language to CISADA 2. Supporters of the Brownback and Frank bills often quoted then-Senator Obama or otherwise claimed that the Obama bill evidenced the President’s personal support.⁹⁰ Aligning CISADA 2 with the Obama bill may well have been part of the political strategy to secure passage of the bill.

3. A LOOK FORWARD: THE CONTINUING POLITICS OF DIVESTMENT

The political evidence through 2008 suggested that the U.S. House of Representatives was prepared to legitimize a degree of concurrent state responsibility on matters of foreign affairs, but the U.S. Senate as a whole was not yet prepared to do so and the House was willing to accept the less dialogic language capable of securing Senate passage. It should be recognized that this difference in approach flows less from a genuine commitment by either chamber to a particular theory of federalism than to the institutional differences between the chambers. The Senate finessed the question to facilitate enactment of

⁸⁸ Written Statement of Sam Brownback before the Senate Committee on Banking, Housing, and Urban Affairs, “Minimizing Potential Threats from Iran” (October 6, 2009), at 2, available at http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=23f97300-5b76-483b-9225-aa14a2a82e79 (last accessed February 16, 2010).

⁸⁹ Written Statement of Robert Casey before the Senate Committee on Banking, Housing, and Urban Affairs, “Minimizing Potential Threats from Iran” (October 6, 2009), at 6, available at http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=23f97300-5b76-483b-9225-aa14a2a82e79 (last accessed February 16, 2010).

⁹⁰ For example, Senator Brownback said, “And lest any of my colleagues worry about where our President stands on this, you can rest easy. In the last Congress, then-Senator Obama and I introduced almost this very same bill.” He then quoted then-Senator Obama and added, “I could not have said it better than the President.” Brownback Statement, *supra* note 88, at 3. Likewise, Senator Casey said, “When President Obama was in the Senate, he introduced an earlier version of this legislation. It was right in 2007, and it is right now.” Casey Statement, *supra* note 89, at 5. See also H.R. Hrg. 111-13 (2009), at 5–6, 20, 29–30, 77–78 (statements of Rep. Erik Paulsen and Professor Orde Kittrie).

SADA, and it had reasons of prudence and precedent to continue to do so. This finesse pointed to the possibility that Congress would retain a nominal commitment to dualism in foreign affairs, while allowing an important degree of dialogism to develop in fact.

A year later, however, the Senate took its own step toward a more open embrace of dialogism. It did so notwithstanding the institutional interests of both the Executive Branch and the business community. Admittedly, it may have done so based on particular political calculations in the unusual circumstance where President Obama himself had recently sponsored similar legislation as a senator. Whatever the reasons, however, if Congress finally enacts legislation authorizing states to divest from Iran and legitimizing moral concerns as the basis for so doing, that may supplant SADA's less openly dialogic approach as a precedent should Congress contemplate authorizing state divestment again in the future.

Regardless, questions of the politics of divestment will endure. The politics of divestment, when they can be separated from the politics of a particular foreign-policy controversy, are the politics of federalism – with an added touch of the politics of separation of powers. In other words, they are the politics of sharing power in a complex and ever-evolving polity. On such enduring questions of U.S. politics, all answers are transitory.

More generally, although this chapter has emphasized the role of divestment in fostering dialogue within the United States, it should be seen that a divestment strategy entailing shareholder engagement backed by the possibility of selling shares also opens channels for transnational dialogue. These channels supplement, not replace, traditional *international* dialogue. They build upon the established and uncontroversial channel of investor–company communication, as well as the trends toward both greater inclusion of social responsibility discourse in such communication and greater involvement by nonstate actors in shaping international norms.

This transnational dialogue will not be cost free, of course. As within the United States, transnational discussion of moral and political controversies should be expected to generate frictions and coordination challenges for national governments. By way of example, the Norwegian Government Pension Fund – Global has divested in recent years from a number of European, Israeli, and U.S. companies when it has concluded that the companies were likely to continue activities it deemed unacceptable, including selling certain weapons and causing environmental harm.⁹¹ In managing the inevitable

⁹¹ Information about the fund, its ethical guidelines, and the reasons it has divested from various companies is available at <http://www.regjeringen.no/en/dep/fin/Selected-topics/The-Government-Pension-Fund/Ethical-Guidelines-for-the-Government-Pension-Fund-Global-.html?id=446948> (last accessed February 16, 2010).

controversies, it should be borne in mind that it is undesirable and impracticable to force investors to make and hold investments against their will, that divestment will have little impact on share prices unless the objections motivating it are widely shared, and that the disagreement underlying the divestment would still exist even if it had to be expressed by different means. In other words, the real source of controversy is not divestment itself, but the underlying differences in interests, policies, laws, values, and perceptions that give rise to the divestment – and divestment, deployed wisely, may contribute positively to the transnational discourse that is so vital to addressing such differences.