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SUDAN ACCOUNTABILITY AND DIVESTMENT ACT OF 2007

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Mr. DODD, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

R E P O R T

[To accompany S. 2271]

The Committee on Banking, Housing, and Urban Affairs, having had under consideration an original bill (S. 2271) to authorize State and local governments to divest assets in companies that conduct business operations in Sudan, to prohibit United States Government contracts with such companies, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

I. INTRODUCTION

On October 17, 2007, the Senate Committee on Banking, Housing and Urban Affairs considered a Committee Print, entitled the "Sudan Accountability and Divestment Act of 2007," a bill to authorize State and local governments to divest assets in companies with certain business operations in Sudan, to prohibit United States Government contracts with such countries, and for other purposes. The Committee voted unanimously to report the bill to the Senate.

II. PURPOSE

The Sudan Accountability and Divestment Act (hereafter 'the Act') provides a legal framework by which States, local governments and certain other investors can divest Sudan-related assets from their portfolios. Specifically, it allows States and local governments and private asset fund managers, if they so choose, to adopt measures to facilitate divestment from companies involved in four key business sectors in Sudan. Such measures may be adopted to reduce the financial or reputational risk associated with invest-

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ments in a country subject to international sanctions. The Act also directs the federal government to require that all U.S. government contractors certify that they are not involved in business in four key sectors of Sudan's economy.

III. BACKGROUND AND NEED FOR LEGISLATION

The ongoing crisis of genocide in Darfur

The conflict in Darfur has led to a humanitarian disaster, with an estimated 2 million people displaced; more than 234,000 people forced into neighboring Chad; and an estimated 450,000 people killed.[1] In July 2004, the U.S. House of Representatives and the Senate unanimously passed resolutions (H. Con. Res 467 and S. Con. Res. 133, respectively) declaring the crisis in Darfur to be genocide, based on the five criteria for genocide enumerated in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide. On September 9, 2004, then-Secretary of State Colin Powell acknowledged that the violence occurring in Darfur constituted genocide.

On May 29, 2007, the U.S. imposed new economic sanctions on two Sudanese government officials, and 31 Sudanese companies. According to Administration officials, these Sudanese officials acted as liaisons between the Sudanese government and the government-supported Janjaweed militia, which have attacked and brutalized innocent civilians in the region. Of the 31 companies sanctioned, 30 are either owned or controlled by the Government of Sudan, and the other violated the arms embargo in Darfur. These companies are banned from doing business within the U.S. financial system and with U.S. companies, and U.S. citizens are restricted from doing business with them.

On July 31, 2007, acting under Chapter VII of the Charter of the United Nations, the United Nations Security Council adopted Resolution 1769. The resolution calls for the deployment of a hybrid United Nations-African Union force in Darfur. The resolution also calls for immediate support for the existing African Union Mission in Sudan (AMIS) and a commitment to end the suffering in Darfur, while expressing concern about ongoing attacks on civilians in Darfur and the security of humanitarian aid workers in the region.

While efforts have been made to identify and deploy up to 26,000 peacekeeping troops to Darfur by early 2008, it remains unclear when or whether such a force will reach full strength, whether such a force-level will be adequate to stabilize the region and halt mass killings, or even whether the government and other factions in Sudan will cooperate to allow for the force's successful operation.

State and local divestment efforts

Notwithstanding the wide range of diplomatic and economic sanctions that have been pursued by the Federal Government, many states and localities have enacted measures restricting their agencies' economic transactions with firms that do business with, or in, Sudan. Twenty States have already initiated some form of divestment; and campaigns are under way in an additional twenty States to adopt similar measures. Also joining this movement are

[1] CRS Report.

many colleges and universities, large cities, non-profit organizations, and numerous pension and mutual funds.

Legal and constitutional challenges

The state of Illinois passed a divestment law in June of 2005. Highlights of the law are as follows:

> Provides that the State Treasurer may not deposit any funds or otherwise transact any business with any financial institution unless an expressly authorized officer of that financial institution certifies that the financial institution has not, during any time following the effective date, loaned to or invested in certain entities involved with the Republic of Sudan.
>
> Provides that a fiduciary with respect to a retirement system or pension fund established under that Code shall not, directly or through a fund manager, transact any business with any company unless an expressly authorized officer of that company certifies that the company has not engaged in certain activities concerning the Republic of Sudan.[2]

In February 2007, a federal district court held Illinois's Sudan sanctions law to be unconstitutional and permanently enjoined its enforcement (National Foreign Trade Council v. Giannoulias); the defendants have since appealed. In its decision, the court highlighted 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. The court held that the Illinois statute's "lack of flexibility, extended geographic reach, and impact on foreign entities interferes with the national government's conduct of foreign affairs," and was in large part preempted by federal law. In unanimously approving the legislation, the Committee sought 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.

The Committee recognizes that this legislation involves balancing two important interests. The first is the singular authority of the Federal Government to conduct Foreign Policy. The second is the ability of State and local governments to invest or divest their funds as they see fit. 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 to profitability, economic well-being, and reputations, arising from association with investments in a country subject to international sanctions. The Act explicitly states the sense of Congress that the United States should support the decisions of State and local governments to divest from firms conducting business operations in certain sectors of

[2] Bill Status of SB0023 94th Illinois General Assembly.

Sudan's economy and the legislation is not pre-empted by any Federal law or regulation.

IV. DESCRIPTION OF THE BILL

The Act is meant to codify the appropriate rights of investors as well as State and local governments to hold or relinquish assets in accordance with their responsibilities to guard against both economic and reputational risks, as long as in so doing, fund managers continue to otherwise adhere to their fiduciary responsibilities and State and local governments adhere to the limited federal authorization provided in this bill. With such a limited federal authorization, the Act addresses policy concerns raised by the Executive Branch over previous legislative proposals regarding Sudan divestment, and it addresses the Constitutional concerns outlined above.

Four targeted sectors

Divestment authorized under this bill is targeted against four specific economic sectors, widely recognized as key sources of revenue for the Government of Sudan. These sectors are: oil, power production, mineral extraction, and military equipment. The first three sectors, by the Government of Sudan's own admission, serve as that country's main destinations of foreign direct investment (FDI), reaching $2.4 billion in 2005, according to the International Monetary Fund. As a result of such investment, revenues to the Government of Sudan have increased steadily over the past several years. The benefits of such increased investment do not appear to have benefited the general populace, which the World Bank reports maintains an income of $650 per capita. Meanwhile, a former finance minister of Sudan was recently reported to have said that more than 70 percent of the Khartoum government's share of oil profits is spent on military equipment, particularly for the local production of ammunition and weapons, in case defense imports to Sudan ever diminish or are effectively cut off by international sanction.

The Committee's reported bill has five main provisions:

(1) *State divestment.* Permitting states and localities that choose to do so to adopt measures to divest from companies involved in four key business sectors in Sudan;

(2) *Private divestment.* Allowing mutual fund and private pension fund managers to sell securities of companies involved in four business sectors in Sudan, while maintaining that managers must otherwise abide by their normal fiduciary responsibilities and comply with relevant laws and regulations in performing this task;

(3) *Federal procurement.* Requiring federal government contractors to certify that they are not conducting business operations in any of the four key sectors in Sudan identified in the measure. The President may waive the federal procurement certification if he determines and certifies to Congress that it is in the national interest to do so;

(4) *Sanctions report.* Requiring a report on the efficacy of current Sudan-related sanctions; and

(5) *Termination.* Setting forth conditions for this bill to sunset, including that Sudan is abiding by UN Security Council Resolution 1769, and has ceased attacks on civilians, demilitarized the

Janjaweed militia, allowed unfettered humanitarian relief delivery, and granted refugees right of return.

V. SECTION-BY-SECTION ANALYSIS OF BILL

Section 1.—This section establishes the short title of the bill as the "Sudan Accountability and Divestment Act of 2007".

Section 2.—This section defines terms used in the bill including: business operations, executive agency, Government of Sudan, marginalized populations of Sudan, military equipment, mineral extraction, oil-related activities, person, power-production activities, and State.

Clarifications regarding terms

For purposes of implementing measures adopted in accordance with Sections 3, 4, and 6 of this bill, the Committee makes the following observations regarding specific industry activities. In targeting persons involved in oil-related or mineral extraction-related activities in Sudan, States may target companies that sell supplies and provide services specifically for oil operations in Sudan. An example of such a case might be a company that sells pumps exclusively for installation along a pipeline in Sudan. However, coverage would not include a subcontractor that sells supplies to an array of companies for use in various operations, which are neither specifically integral, nor specifically designated for oil operations in Sudan. The Committee further notes that some consortia of oil and mineral extraction investors retain rights in Sudan but remain "inactive" in exploration or drilling there. Because investors in such consortia are generally not generating revenue for the Khartoum government, and may be effectively displacing others who might otherwise seek to actively engage in oil-related operations, the Committee does not intend for such investors to be targeted for divestment, as long as they remain "inactive."

Regarding the definition of "military equipment," the Committee notes that some 'dual-use' items may be exported to Sudan to serve civilian functions, such as military-grade trucks to ship regular goods and services, and radar equipment to support weather forecasting and other communications. It is not the intent of the Committee to authorize divestment from companies involved in such business if it can be credibly proven that these items will not be used for any military purpose.

The Committee's definition of a person is highly inclusive—not only including corporations and State-owned entities, but their successors, subunits or subsidiaries. Implicit in this definition is the requirement that parent companies to subsidiaries, or subsidiaries that share the same parent company, may be targeted for divestment as long as there is credible evidence linking their affiliates to business operations in key sectors of Sudan.

Section 3.—Authorizes States and localities to divest from companies involved in key Sudan business sectors and sets standards for them to do so.

While not mandating divestment, this section authorizes State and local governments, if they so choose, to divest public assets from certain companies doing business in Sudan. In its formulation of this section, the Committee recognized that divestment actions are being taken by investors for prudential and economic reasons,

including to address concerns over reputational and financial risks associated with investment in Sudan and to sever indirect business ties to a government that is subject to international sanctions.

Risk

Given the Constitutional concerns about States' enacting legislation which touches on international relations, subsection (a) expresses the sense of Congress concerning State or local divestment conducted for purposes of mitigating a 'financial or reputational risk.'

Standards

In order to ensure reasonable consistency and uniformity, the Committee sets forth specific standards by which States and localities may divest, and requires that a State or local government provide notice to the Department of Justice when it enacts a Sudan-related divestment law under the authority provided in this section. The standards for divestment to be observed include targeting companies that conduct business operations in Sudan's power production, mineral extraction, oil, and military equipment sectors. Furthermore, to avoid hampering positive development in Sudan, this section explicitly excludes companies whose business in Sudan only involves: investments in the regional government of Southern Sudan; legal transactions under a license from the Office of Foreign Assets Control (OFAC) or other U.S. authorization; delivery of goods and services for marginalized populations or internationally recognized humanitarian organizations, and other similar investments. In addition, companies that have voluntarily suspended operations are to be excluded from targeted divestment. The Committee recognizes that it may take up to a year, or possibly longer, for a company to fully suspend its operations once it has initiated such a process. Therefore, those agencies implementing measures adopted pursuant to this section should review all credible information provided to demonstrate voluntary suspension. In order to facilitate this process, the Committee has required that companies be informed in writing by the State or local government before divestment. Companies then have at least 90 days to comment on that decision.

In its testimony before the Committee, the Department of the Treasury seemed to sanction lists developed by non-governmental organizations (NGOs) produced for purposes of divestment from Sudan, suggesting that the federal government would not be able to add much value given current efforts already under way by NGOs. The Committee therefore discerns that in accordance with sections 3 and 4 of this Act, States, local governments, and fund managers may rely on resources provided by internationally recognized NGOs, and other appropriate sources, to target companies for divestment.

Finally, the Committee notes that because Section 4(b) of the Employee Retirement Income Security Act (ERISA) specifically excludes governmental plans, including State and local government pension plans, this provision should not be construed as conflicting with the directives of ERISA.

Section 4.—This section allows private asset managers, if they so choose, to divest from the securities of companies conducting busi-

ness operations in the power production, mineral extraction, oil, and military equipment sectors of Sudan, and provides a "safe harbor" for those divestment decisions made in accordance with the legislation. A major concern inhibiting divestment has been the possibility of a breach of fiduciary responsibility by asset managers who decide to divest. The Committee thus finds that fund managers may have financial or reputational concerns as reasons to divest from companies that accept the business risk of operating in countries subject to international economic sanctions. Fund managers will still be required to observe all other normal fiduciary responsibilities. The Securities and Exchange Commission is required to promulgate rules that require fund managers to disclose their divestment decisions made pursuant to Section 4 of this legislation in regular periodic reports filed with the Commission.

Section 5.—This section expresses the sense of Congress affirming pension managers' rights to divest from companies conducting business operations in key sectors of the Sudan economy in accordance with an interpretative bulletin issued by the Department of Labor in 1994, and printed in the Code of Federal Regulations in section 2509.94–1 of title 29. Under the regulations, making such "economically targeted investment" (ETI) decisions are allowed under sections 403 and 404 of the Employee Retirement Income Security Act of 1974 (ERISA), as long as the fiduciary making such a decision has diversified his portfolio adequately and made these decisions in the interest of the plan's participants and beneficiaries.

Section 6.—This section requires that companies seeking contracts with the United States Government first certify that they are not conducting business operations in key sectors of Sudan. Government agencies are provided a range of remedies if prospective contractors submit a false certification, including terminating the contract, suspending a contractor's eligibility for future contractors, and debarring a company from government contracts for up to three years. The President may waive these requirements on a case by case basis, if he determines and certifies in writing to Congress that it is in the national interest to do so.

Perjury

In addition, the Committee notes that in the course of legal proceedings, if a prospective contractor submits false statements pursuant to this section, the company may be subject to penalties of perjury in accordance with 18 U.S.C. 3571, which amount to the greater of $250,000 for an individual, $500,000 for an organization, or twice the amount of the proposed contract.

Section 7.—This section expresses a sense of Congress that the governments of other countries should adopt measures similar to those contained in the bill.

Section 8.—This section expresses the sense of Congress that the President should continue to work with the international community both to facilitate the urgent deployment of a peacekeeping force to Sudan and to call for a vote on a United Nations Security Council resolution imposing multilateral sanctions on Sudan in response to the ongoing genocide in Darfur.

Section 9.—This section explicitly addresses Constitutional and legal concerns by expressing the sense of Congress that the bill

does not conflict with current U.S. international obligations, or the Supremacy Clause of the Constitution.

Section 10.—This section requires that the Secretaries of State and the Treasury report on the efficacy of current sanctions on Sudan.

Section 11.—This section repeals a previously enacted reporting requirement upon the Secretary of the Treasury.

Section 12.—This section describes the circumstances under which the provisions of this bill will terminate, including Sudan's compliance with UN Security Council Resolution 1769, ceasing of attacks on civilians, demilitarizing of the Janjaweed militia, allowing unfettered humanitarian relief delivery, and its granting of the right of return to refugees. This provision is an important incentive for the Sudan government to meet its international obligations, stop the genocide in Darfur, and provide for conditions for the people of Sudan to recover from decades of violence. It is also important in that by sunsetting divestment authorizations for State and local governments and other investors, it helps ensure that their decisions will not conflict with future policies and objectives set by the federal government.

VI. HEARINGS

On October 3, 2007, the Committee on Banking, Housing, and Urban Affairs held a public hearing entitled "Combating Genocide in Darfur: The Role of Divestment and Other Policy Tools." Witnesses, Panel One: Honorable Richard Durbin, United States Senator; Honorable Sam Brownback, United States Senator; Witnesses Panel Two: Honorable Jendayi Frazer, Assistant Secretary for African Affairs; Ms. Elizabeth Dibble, Principal Deputy Assistant Secretary for International Finance and Development, Department of State; Mr. Adam Szubin, Director, Office of Foreign Assets Control, Department of the Treasury; Witnesses, Panel Three: Honorable Frank Caprio, General Treasurer, State of Rhode Island; Mr. Bennett Freeman, Senior Vice President for Social Research and Policy, Calvert Investment; Mr. John Prendergast, Co-Chair, ENOUGH Project; Mr. William Reinsch, President, National Foreign Trade Council; Mr. Adam Sterling, Director, Sudan Divestment Task Force.

VII. COMMITTEE CONSIDERATION

The Committee on Banking, Housing, and Urban Affairs met in open session on October 17, 2007, and unanimously ordered the bill reported, as amended.

VIII. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Section 11(b) of the Standing Rules of the Senate, and Section 403 of the Congressional Budget Impoundment and Control Act, require that each committee report on a bill contain a statement estimating the cost of the proposed legislation. The Congressional Budget Office has provided the following cost estimate and estimate of costs of private-sector mandates.

Sudan Accountability and Divestment Act of 2007

This legislation would allow state and local governments to divest their holdings in certain companies doing business in Sudan. If any state or local government chose to divest, it would be required to notify both the Attorney General and the companies affected by the divestiture. It also would allow state and local governments to divest financial holdings or any government assets used to make loans and extensions of credit to companies doing business in Sudan. The bill also would prohibit federal agencies from entering into contracts for goods or services without a certification from the contractor that it does not conduct business operations in Sudan.

Based on information from the Securities and Exchange Commission, CBO estimates that implementing the new regulations necessary to carry out the bill's provisions would cost less than $500,000 per year. Based on information from the General Services Administration, we estimate that changes to the federal contracting process would cost about $1 million per year, including computer and administrative costs. Thus, enacting this legislation would cost about $5 million over the 2008–2012 period, subject to the availability of appropriated funds. Enacting the bill would not affect direct spending or revenues.

The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA). State or local governments that chose to divest their assets would have to notify the Attorney General and the companies affected by the divesture, but the costs of such notifications would result from their voluntary decision to divest and would not result from an intergovernmental mandate as defined in UMRA.

The CBO staff contacts for this estimate are Susan Willie (for federal costs) and Elizabeth Cove (for the state and local impact). This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

IX. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b), rule XXVI, of the Standing Rules of the Senate, the Committee makes the following statement concerning the regulatory impact of the bill.

The Act permits states, localities, and private asset managers to divest from companies involved in four key business sectors in Sudan. While these provisions remain discretionary, they may nevertheless entail the production of more documentation by involved corporate entities than would otherwise have been required. Fund managers who make such divestment decisions will be required to report such actions to the Securities and Exchange Commission. States and local governments will be required to file similar reports to the Department of Justice on their divestment decisions. Furthermore, companies are to be informed of divestment decisions pursuant to provisions in the Act, and will be given the opportunity to comment on those decisions, as well.

In addition, the Act requires federal government contractors to certify to appropriate agency heads that they are not conducting business operations in four key business sectors in Sudan. While the President may waive the federal procurement certification, he

would nevertheless be required to certify to Congress that doing so is in the national interest.

The Congressional Budget Office Cost Estimate prepared for this bill notes, "The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA). State or local governments that chose to divest their assets would have to notify the Attorney General and the companies affected by the divesture, but the costs of such notifications would result from their voluntary decision to divest and would not result from an intergovernmental mandate as defined in UMRA."

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