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# Forcing Sovereign Conformity: The Comprehensive Anti-Apartheid Act of 1986

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# FORCING SOVEREIGN CONFORMITY: THE COMPREHENSIVE ANTI-APARTHEID ACT OF 1986

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## I. INTRODUCTION

**T**he apartheid system of South Africa and its flagrant rejection of any respect for the racial equality of its population have been issues of worldwide concern for many years. As a result of this concern, the United Nations has repeatedly issued statements condemning South Africa and her apartheid policies and calling upon the rest of the world to take peaceful action to force a change in those policies.<sup>1</sup>

In 1986, the United States Congress finally took action in response to these calls by passing the Comprehensive Anti-Apartheid Act.<sup>2</sup> The purpose of this Act is to set forth a comprehensive framework "to guide the efforts of the United States in helping to bring an end to apartheid in South Africa and lead to the establishment of a nonracial, democratic form of government."<sup>3</sup> Further, the Act sets out United States policy toward the situation in southern Africa<sup>4</sup> and "provides the President with additional authority to work with other industrial democracies to help end apartheid and establish democracy in South Africa."<sup>5</sup> The Act provides for the accomplishment of these goals and policies through the conjunctive use of two types of measures: first, measures to assist victims of apartheid;<sup>6</sup> and second, measures by the United States to undermine

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<sup>1</sup> See, e.g., S.C. Res. 418, 32 U.N. SCOR Supp. (Oct.-Dec. 1977) at 5, U.N. Doc. S/INF/32 (1977); G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974); G.A. Res. 1761, 17 U.N. GAOR Supp. (No. 17) at 9, U.N. Doc. A/5276 (1962); S.C. Res. 134, 15 U.N. SCOR Supp. (Apr.-June 1960) at 1, U.N. Doc. S/4300 (1960).

<sup>2</sup> Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986)(codified at 22 U.S.C. §§ 2151, 2346(d), 5001-5116 (Supp. IV. 1986)).

<sup>3</sup> *Id.* § 4, 100 Stat. 1086, 1089 (1986).

<sup>4</sup> *Id.* §§ 101-10, 100 Stat. 1086, 1089-93 (1986).

<sup>5</sup> *Id.* § 4, 100 Stat. 1086, 1089 (1986).

<sup>6</sup> These would include positive actions on the part of the United States to provide assistance to the victims of apartheid. For example, the Act calls for scholarships for the

apartheid.<sup>7</sup> Although this second form of action can best be described as economic sanctions, this description is misleading, in that:

For some sanction supporters, such as Rep. Howard Wolpe, D-Mich., the moral and symbolic need to distance the United States from apartheid outweighs economic rationales. "The point is that the conflict in South Africa is not over economic issues," Wolpe said. "It is over the nature of a political system that totally dehumanizes the vast majority of the population."<sup>8</sup>

It is precisely this justification for the use of sanctions that makes its legality in the international sphere questionable. This is not to say that apartheid should not be challenged; it is merely to say that international law does not provide for such unilateral intervention into a country's domestic policies in order to subject that country to the moral viewpoint of the sanctionist. One focus of this Note, therefore, is to analyze the international repercussions of the Anti-Apartheid Act within the context of United States foreign policy, the sovereignty rights of South Africa, the jurisdiction of United States courts to pass on violations of the Act, and United Nations provisions governing interference with the economy of a foreign government.

However, before any discussion of the international legality of this Act can take place, its domestic legality must be determined. Therefore, before looking to international justifications for the Act, this Note will analyze it within the context of United States constitutional law. This analysis will focus on several issues: the basis of authority by which Congress can pass such an Act; the effect of the Act on the states' power to determine where they will invest their funds; the conformity of the Act with the established doctrines of separation of powers and delegation of authority; and finally, the effect of the Act on the equal protection rights of those American citizens doing business in and with South Africa.

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victims, establishment of a human rights fund to aid political prisoners and detainees in South Africa, expansion of participation in the South African economy, protection of victims of apartheid employed by the United States, imposition of a Code of Conduct which American companies doing business in South Africa are required to follow, and the participation of South Africa in agricultural export credit and promotion programs. See *Id.* §§ 201-12, 100 Stat. 1086, 1094-99 (1986).

<sup>7</sup> These would include prohibitions on: importation to the United States of krugerrands, military articles, products from parastatal organizations, uranium, coal, agricultural products, food, iron, steel and sugar imports; exports to South Africa of computer equipment, munitions, crude oil and petroleum products; loans to the Government of South Africa; air transportation with, and promotion of U.S. tourism in, South Africa; nuclear trade with South Africa; new investment in South Africa; United States Government assistance to, investment in, or subsidy for trade with South Africa; and cooperation with the armed forces of South Africa. See *Id.* §§ 301-23, 100 Stat. 1086, 1099-1106 (1986).

<sup>8</sup> Green, *Sanctions: From the Symbolic to the Economic*, 43 CONG. Q. 445 (1985).

## II. BACKGROUND

Economic sanctions have been defined as measures used by international bodies to uphold standards of behavior expected by custom or required by law.<sup>9</sup> "Sanctions are familiar conformity-defending instruments in national societies; . . . in legal systems they are penalties which designated authorities apply to law-breakers."<sup>10</sup> The Comprehensive Anti-Apartheid Act fits under this definition in that the United States may be deemed an international body for purposes of its foreign relations and policies. Further, the Act is being used to uphold a standard of behavior, *i.e.* racial equality, in a worldwide context and to penalize South Africa for her nonconformity to that standard. The question that arises, however, is whether the United States may be deemed a "designated authority" for purposes of this definition. As will be shown later, several United Nations documents call for member nations to act unilaterally in order to achieve some specific goal.<sup>11</sup> Therefore, it is safe to assume that the United States may be deemed a designated authority.

Having concluded that the United States is in a position to apply sanctions, the next step is to ascertain the purpose of such application. The commonly stated purpose of sanctions is to create a gap between the expectations of economic well-being and actual economic reality in the target country, causing "relative deprivation."<sup>12</sup> For the most part, the Anti-Apartheid Act meets this purpose and, beyond that, seeks to achieve the stated objectives of using economic sanctions against another country. These objectives are: 1) to deter or dissuade states from pursuing policies which do not conform to accepted norms of international conduct; 2) to encourage compliance with these accepted norms, which are considered to be in the general interest; 3) to apply penalties which relate specifically to acts which the international body condemns; and 4) to avoid unnecessary hardship in the imposition of sanctions.<sup>13</sup>

<sup>9</sup> M. DOXEY, *ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT* 3 (1980).

<sup>10</sup> *Id.*

<sup>11</sup> *See, e.g.*, G.A. Res. 35/206, 35 U.N. GAOR Supp. (No. 48) at 29, U.N. Doc. A/35/L.13 (1980); G.A. Res. 1761, 17 U.N. GAOR Supp. (No. 17) at 9, U.N. Doc. A/5276 (1962).

<sup>12</sup> *See* R. OLSON, *ECONOMIC SANCTIONS IN INTERNATIONAL DISPUTES* 3 (1974). This purpose, then, serves to force the government of the target country to conform to the wishes of the sanctionist by presenting it with the choice of complying with the sanctionist's demands or running an increased risk of being toppled and replaced by a new government.

<sup>13</sup> *Id.* at 9. It is apparent from the operation of this Act that the first three objectives are clearly met, *i.e.* the stated purpose is to lead to the establishment of a nonracial, democratic form of government in South Africa; and compliance by South Africa is in the general interest since it would avoid conduct condemned by the international body and promote peace in the region. However, it is doubtful whether the last objective is met. As Chief Gatsha Buthelezi, one of black South Africa's most admired leaders, has stated: "It is morally imperative that American firms remain active here and support us in our struggle. A call for actual disinvestment is a call for an aggravation of exactly the conditions we are

The bulk of apartheid legislation, which the Act seeks to deter South Africa's Government from enforcing, has been in existence since the Nationalist Government attained power in 1948.<sup>14</sup> South Africa has repeatedly defended these laws on nonracial grounds. For example, during debates at the 1974 session of the United Nations Security Council, R. F. Botha, South Africa's ambassador to the United Nations, stated that:

Our policy is not based on any concepts of superiority or inferiority, but on the historical fact that different peoples differ in their loyalties, cultures, outlooks, and modes of life and they wish to retain them. We do have discriminatory practices and laws. Those laws and practices are a part of the historical evolution of our country. But I want to state here today very clearly and categorically: my government does not condone discrimination purely on the grounds of race or color.<sup>15</sup>

However, contrary to this justification for the apartheid system, a short overview of several apartheid laws will indicate rather clearly that race is the primary, if not the sole, justification for the system as it is today. For instance, the Race Classification Act categorizes South Africans into racial groups based solely on physical characteristics.<sup>16</sup> In other words, a person who appears to be black will be categorized as black regardless of his actual nationality or race. Those persons deemed to be black are then further categorized by the Black Urban Areas Act. This Act provides that a black person who resides in an urban area for fifteen consecutive years becomes a permanent resident of that city.<sup>17</sup> The Black Labor Act, however, requires all blacks living outside the homelands to which they are designated to return to them every eleven months for registration, making it virtually impossible to become a permanent resident of an urban area.<sup>18</sup>

The Group Areas Act divides residential areas on the basis of race. It requires all blacks who are not subject to full time personal supervision by a white person to have permits to work as anything more than laborers in a white area. This Act also provides that black persons can possess

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struggling against." Chettle, *The Law and Policy of Divestment of South African Stock*, 15 LAW & POL'Y INT'L BUS. 445, 469 (1983). Chief Buthelezi's statement makes it clear that, rather than meeting this last objective, the Act works directly against it by creating exactly the hardship it portends to oppose.

<sup>14</sup> Gould, *Black Unions in South Africa: Labor Law Reform and Apartheid*, 17 STAN. J. INT'L L. 99, 104 (1981).

<sup>15</sup> J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 54 (1978).

<sup>16</sup> Chettle, *supra* note 13, at 448.

<sup>17</sup> Gould, *supra* note 14, at 105.

<sup>18</sup> *Id.*

land only under a ninety-nine year leasehold arrangement and that homeland citizens cannot inherit property, thereby precluding any black from owning property.<sup>19</sup>

The Factory and Black Building Workers Act empowers the government to promulgate regulations for the separation of facilities for blacks and whites and permits discrimination and differentiation by the President regarding sanitation, accommodations, facilities and conveniences,<sup>20</sup> a task already accomplished in public areas by the Separate Amenities Act.<sup>21</sup>

The Internal Security Act empowers the Minister of Justice to impose disabilities on any person deemed to be engaged in activities which endanger or are calculated to endanger state security or public order.<sup>22</sup> These disabilities prohibit the person from any involvement with trade unions or any sort of gathering, defined as two or more persons together, thereby practically immunizing that person from any social contact with other blacks.<sup>23</sup>

The Terrorism Act makes an individual *prima facie* guilty of terrorism if he commits, attempts or incites an act which could be used by any person intending to endanger the maintenance of law and order.<sup>24</sup> This Act could be used against any labor union or practically any other anti-apartheid faction because of the vague language involved.

The impact of these laws clearly contradicts Mr. Botha's statements and evidences the intent of the South African Government to maintain a system of classification based solely on race.

Until passage of the Comprehensive Anti-Apartheid Act of 1986, the United States policy with respect to the situation in South Africa had been one of constructive engagement.<sup>25</sup> However, due to the worsening situation in South Africa, the effectiveness of this policy has deteriorated. In 1984, violence broke out in several black townships in response to

<sup>19</sup> *Id.* at 109.

<sup>20</sup> *Id.* at 110.

<sup>21</sup> Chettle, *supra* note 13, at 448.

<sup>22</sup> Gould, *supra* note 14, at 113.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 115.

<sup>25</sup> This policy of constructive engagement, though never clearly defined, has been described as follows:

The Administration has been—and remains—prepared to work with the Congress to devise measures that manifest the American people's united opposition to apartheid—without injuring its victims. We remain ready to work with the Congress in framing measures that . . . keep the United States at arm's distance from the South African regime, while keeping America's beneficent influence at work bringing about constructive change within that troubled society and nation.

President's Veto Message of H.R. 4868—Comprehensive Anti-Apartheid Act of 1986, 22 WEEKLY COMP. PRES. DOC. 1281, 1282-83 (Sept. 26, 1986). This veto was subsequently overridden by Congress, and the Bill passed into law.

increasing rents, inferior educational facilities for blacks, and the constitutional reform which denied the black majority the right to participate in their government.<sup>26</sup> The Government of South Africa responded to these uprisings with deadly force. From September, 1984 until the passage of this Act, some 2000 people died as a result of the violence, and approximately 8000 people were detained during the state of emergency imposed by the government in the eight month period from July 1985 through March 1986.<sup>27</sup>

Contributing to the violence were clashes between groups of radical young blacks, some as young as eleven years old, known as the comrades, and vigilante groups of older blacks, allegedly supported by the government.<sup>28</sup> In addition to these altercations, there have also been violent battles between various black groups over ideological, political, and tribal differences.<sup>29</sup> On June 12, 1986, the South African government declared another state of emergency, in which security forces began rounding up thousands of anti-apartheid activists, including church and social leaders. Under this state of emergency, security forces were stationed in the townships to "maintain calm" and were authorized to use force to accomplish this goal. Unprecedented censorship of the press and media has also been instituted.<sup>30</sup>

The above-described incidents finally led Congress to take harsher action against the South African Government in the form of economic sanctions. Congress passed the Comprehensive Anti-Apartheid Act of 1986 for the primary purpose of setting forth a framework by which the United States could help bring an end to apartheid in South Africa and encourage the establishment of a nonracial democratic form of government. The Act also set forth the policy of the United States toward the Government of South Africa.<sup>31</sup> In addition to this policy, the Act estab-

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<sup>26</sup> S. REP. NO. 370, 99th Cong., 1st Sess. 2, 3 (1986).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* These ideological differences are between groups such as the United Democratic Front, Azanian People's Organization, Inkatha, and various minor black groupings.

<sup>30</sup> *Id.* Despite the avowed governmental purpose of stationing security forces in the townships to maintain calm, statistics show that the average number of deaths has tripled in 1986. These statistics prompted Bishop Desmond Tutu to comment that "[w]e have the insensitivity of the authorities displaying their military might when they know the presence of the troops in the townships is highly provocative." *Id.* It may well be that this provocative attitude of the South African Government is what prompted Congress to abandon the policy of constructive engagement and seek harsher measures for eradication of the problems in South Africa.

<sup>31</sup> This policy is geared toward bringing about reforms in the system of government to be accomplished by encouraging the government of South Africa to—

- 1) repeal the present state of emergency and respect the principle of equal justice under law for citizens of all races;
- 2) release . . . black trade union leaders and all political prisoners;

lished measures to be taken by the United States to assist victims of apartheid. These measures consist of scholarships for the victims of apartheid;<sup>32</sup> the establishment of a human rights fund to be used for the "direct legal and other assistance to political detainees and prisoners and their families";<sup>33</sup> expanded participation of blacks in the South African economy;<sup>34</sup> the regulation of labor practices used by the United States Government in South Africa;<sup>35</sup> the purchase or lease by the United States of residential properties within the Republic of South Africa to be made available to victims of apartheid who are employed by the United States Government;<sup>36</sup> a prohibition on assistance to any group which grants membership to individuals who violate the human rights of others;<sup>37</sup> a prohibition on assistance to any person or group engaging in "neck-lacing," the practice of execution by fire;<sup>38</sup> and, a Code of Conduct under which all United States nationals employing more than 25 persons in South Africa are to operate.<sup>39</sup>

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3) permit the free exercise by South Africans of all races of the right to form political parties, express political opinions, and otherwise participate in the political process;

4) establish a timetable for the elimination of apartheid laws;

5) negotiate with representatives of all racial groups in South Africa the future political system of South Africa; and

6) end military and paramilitary activities aimed at neighboring states.

Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 101, 100 Stat. 1086, 1089 (1986). These goals are to be encouraged through economic, political, and diplomatic measures, and U.S. action will be adjusted to reflect the progress (or lack thereof) of the South African Government in meeting them.

<sup>32</sup> *Id.* § 201, 100 Stat. 1086, 1094 (1986).

<sup>33</sup> *Id.* § 202, 100 Stat. 1086, 1095 (1986).

<sup>34</sup> *Id.* § 203, 100 Stat. 1086, 1095 (1986). This section declares the prohibition of South African blacks from holding managerial, ownership and professional positions, and the policy of confining them to the status of employees, to be an affront to the values of a free society. This section further applauds and encourages adherence by United States nationals to the Code of Conduct to assure assistance to black South Africans in gaining their rightful position in the South African economy.

<sup>35</sup> *Id.* § 205, 100 Stat. 1086, 1096 (1986).

<sup>36</sup> *Id.* § 206, 100 Stat. 1086, 1097 (1986).

<sup>37</sup> *Id.* § 209, 100 Stat. 1086, 1098 (1986).

<sup>38</sup> *Id.* § 211, 100 Stat. 1086, 1098 (1986).

<sup>39</sup> *Id.* §§ 207-08, 100 Stat. 1086, 1097 (1986). The Code of Conduct requires United States nationals doing business in South Africa to:

1) desegregate the races in each employment facility;

2) provide equal employment opportunity for all employees without regard to race or ethnic origin;

3) assure that the pay system is applied to all employees without regard to race or ethnic origin;

4) establish a minimum wage and salary structure based on the appropriate local minimum economic level which takes into account the needs of employees and their families;

5) increase by appropriate means the number of persons in managerial, supervisory,



As stated earlier,<sup>40</sup> prohibitions on various trade activities between the United States and South Africa would be the primary means of accomplishing these goals and objectives. The Act, itself, provides an enforcement mechanism to insure compliance with these prohibitions.<sup>41</sup> Despite the admirable goals and apparent self-sufficiency of the Act, an analysis of its legality under both the United States Constitution and international law must be undertaken before any predictions of its effectiveness can be made.

### III. CONSTITUTIONALITY

The Constitution provides that the "Congress shall have Power to . . . regulate Commerce with foreign Nations . . ." <sup>42</sup> In *United States v. Curtiss-Wright Export Corp.*,<sup>43</sup> the Court recognized a fundamental difference between the powers of the federal government with respect to foreign affairs and those with respect to domestic affairs. In support of its theory the Court stated:

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those enumerated in

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administrative, clerical and technical jobs who are disadvantaged by the apartheid system, for the purpose of significantly increasing their representation in such jobs;

6) take reasonable steps to improve the quality of employees' lives outside the work environment with respect to housing, transportation, schooling, recreation and health; and

7) implement fair labor practices by recognizing the right of all employees, regardless of racial or other distinctions, to self-organization and to form, join or assist labor organizations freely and without penalty or reprisal, and recognize the right to refrain from any such activity.

Further, these United States nationals should take reasonable steps to extend the scope of influence on activities outside the workplace, including:

1) supporting the unrestricted rights of black businesses to locate in urban areas;

2) influencing other companies in South Africa to follow the standards of equal rights principles;

3) supporting the freedom of mobility of black workers to seek employment opportunities wherever they exist, and making provisions for adequate housing for families of employees within the proximity of the workers' employment; and

4) supporting the rescission of all apartheid laws. *Id.*

<sup>40</sup> See, e.g., *supra* note 7.

<sup>41</sup> Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 603-05, 100 Stat. 1086, 1114-15 (1986). Under these sections, the President is authorized to establish mechanisms to monitor compliance with this Act. To ensure compliance, he is authorized to require any person to keep full records of information relative to any act or transaction described in the Act and conduct investigations of any possible violations of the Act. These sections further provide for fines of \$10,000-1,000,000 and prison terms of up to five years for any violations of the Act.

<sup>42</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>43</sup> 299 U.S. 304 (1936).

the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. Since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. As a result of separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.<sup>44</sup>

This distinction in the nature and source of Congress' power over foreign commerce set the groundwork for the basic rule that the federal government has sole and exclusive power over foreign relations. This groundwork has been severely tested in cases which have passed on the correlative issue of division of power between the federal government and the states with respect to foreign affairs.<sup>45</sup>

In *Hines v. Davidowitz*,<sup>46</sup> for example, the Supreme Court addressed the legitimacy of a state statute requiring aliens to register annually.<sup>47</sup> In affirming the decision of the district court, the United States Supreme Court stated:

The Federal Government, representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."<sup>48</sup>

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<sup>44</sup> *Id.* at 315-16.

<sup>45</sup> The following discussion is not intended to be all-inclusive. Rather, these cases were chosen to show some of the various justifications which the Court has stated for vesting the foreign relations power solely in the federal government.

<sup>46</sup> 312 U.S. 52 (1941).

<sup>47</sup> *Id.* A Pennsylvania statute requiring aliens to register was passed prior to a similar federal statute and imposed more stringent requirements on the aliens than did the federal statute. An alien covered by the law brought an action in federal court alleging that the separate requirements for aliens and residents constituted an equal protection violation. The district court enjoined enforcement of the state statute.

<sup>48</sup> *Hines*, 312 U.S. at 63 (quoting *The Chinese Exclusion Cases*, 130 U.S. 581, 606 (1889)).

This statement clearly supports the rationale used by the Court in *Curtiss-Wright* recognizing the distinction between the nature of the federal power over external as opposed to internal affairs. Further support for this position is found in the more recent case of *Japan Lines Ltd. v. County of Los Angeles*.<sup>49</sup> Although that case involved the taxing power rather than the commerce power, the analysis applied by the Supreme Court is equally applicable in both areas.<sup>50</sup> The Supreme Court's major concern in passing on the applicability of a state tax to an instrument of foreign commerce was the potential impairment of "federal uniformity in an area where federal uniformity is essential."<sup>51</sup> The Court determined that "[f]oreign commerce is preeminently a matter of national concern. In international relations and with respect to foreign intercourse and trade, the people of the United States act through a single government with unified and adequate national power."<sup>52</sup>

In coming to this conclusion, the Court relied partially on the one-voice standard first enunciated in *Michelin Tire Corp. v. Wages*.<sup>53</sup> In analyzing the applicability of a state *ad valorem* property tax against tires and tubes imported into the United States, the *Michelin Tire* Court concluded that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs which might affect foreign relations could not be implemented by the states consistently with that exclusive power."<sup>54</sup>

Finally, in *South-Central Timber Development Co., Inc. v. Wunnicke*<sup>55</sup> the Court stated the well-recognized need for a "consistent and coherent foreign policy which is the exclusive responsibility of the federal government."<sup>56</sup>

Taken together, all of these cases stand for the proposition that, because of the need for a consistent and coherent statement of policy, the

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<sup>49</sup> 441 U.S. 434 (1979).

<sup>50</sup> The case arose when the State of California imposed an *ad valorem* tax on plaintiffs' containers, which happened to be located in the state on the "tax day". Plaintiff paid the tax when imposed, then challenged its applicability to them in state court, arguing that the containers were instruments of foreign commerce that were subject to tax in their home ports in Japan. The trial court agreed and found for plaintiffs. However, the California Court of Appeals reversed and was affirmed by the state Supreme Court. The United States Supreme Court granted certiorari.

<sup>51</sup> 441 U.S. at 448.

<sup>52</sup> *Id.* (quoting *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933)).

<sup>53</sup> 423 U.S. 276 (1975).

<sup>54</sup> *Id.* at 285. Although this case concerned an *ad valorem* property tax, as did *Japan Lines*, plaintiffs based their cause of action on U.S. CONST. art. I, sec. 10, cl. 2, the export-import clause. In enunciating the one-voice standard, the Court recognized that the purpose of the clause was to assure that the federal government speak with one voice when regulating commercial relations with foreign governments.

<sup>55</sup> 467 U.S. 82 (1984).

<sup>56</sup> *Id.* at 92 n.7.

federal government must be and is the sole authority with respect to foreign relations and policy, whether in the area of commerce or some other area. The next issue that arises, however, is whether congressional regulation of foreign investments, as authorized by the foreign commerce clause, conflicts with the states' authority to invest their funds in any venture they choose.<sup>57</sup> The short answer to this question is that this area of investment involves foreign commerce more so than any sort of investment power. Therefore, it falls mainly within an area of power delegated exclusively to Congress rather than an area reserved to the states.<sup>58</sup> A more in-depth analysis of the issue lends further support to this conclusion since, by making investments in any market, the state takes on the position of a market-participant, thereby subjecting itself to the same regulation as any private citizen who would make similar investments.

In *Hughes v. Alexandria Scrap Corp.*<sup>59</sup> the Supreme Court first addressed the issue of state participation in a specific market as a burden on interstate commerce.<sup>60</sup> *Hughes* involved a Maryland law which was challenged by a Virginia scrap processor on commerce clause and equal protection grounds because it required out-of-state scrap processors to meet more stringent requirements than in-state processors before they could collect a bounty offered by the state. In passing on this issue, the Court held that Maryland did not burden interstate commerce by regulatory activity; rather, it entered the market as a participant by offering bounties on the hulks, having the effect of encouraging, not forcing, the in-state processing of hulks. In reaching this conclusion, the Court looked to the intent of the framers and stated that "[w]e do not believe the commerce clause was intended to require independent justification for such action."<sup>61</sup>

The Court addressed the same issue four years later in *Reeves, Inc. v. Stake*.<sup>62</sup> *Reeves* involved a challenge to the policy of a state-run cement

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<sup>57</sup> The Comprehensive Anti-Apartheid Act prohibits investment in South Africa in general. This issue arises, however, because, by establishing a general prohibition on investment in, or trade with, South Africa, Congress is regulating in an area of power generally reserved to the states: the power to invest state funds.

<sup>58</sup> U.S. CONST. amend. X.

<sup>59</sup> 426 U.S. 794 (1976).

<sup>60</sup> *Id.* The *Hughes* case involved a Maryland law which tried to clean up the environment by removal of scrap automobiles. To encourage this, the state passed (and subsequently amended) a law which, in its final form, allowed for the payment of a bounty to those processors who destroyed scrap autos upon proof of ownership. Out-of-state processors were required to produce a title document, while in-state processors were awarded a bounty upon production of an indemnity agreement from the supplier.

<sup>61</sup> 426 U.S. at 809. "Such action" was defined as state participation in the market in the same manner in which a private citizen would act.

<sup>62</sup> 447 U.S. 429 (1980) (state interference with commerce permissible when state acting as market participant).

plant restricting sales to in-state purchasers, thus causing economic injury to an out-of-state outfit.<sup>63</sup> In upholding a Court of Appeals decision in favor of the state, the Court held that the "Commerce Clause responds principally to state taxes and regulatory measures impeding free trade in the national marketplace and there is no indication of a constitutional plan to limit the ability of states themselves to operate freely in the free market."<sup>64</sup>

In support of this holding, the Court compared state proprietary activities with the activities of private market participants and stated that "state proprietary activities may be and often are burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, states should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause."<sup>65</sup> Consequently, by negative implication, this language would seem to indicate that states acting in their proprietary capacity would be subject to all federal regulations which would apply to private market participants. Therefore, the Comprehensive Anti-Apartheid Act involves no infringement of state sovereignty rights since, by investing its funds, the state is acting as a market participant and is subject to the same regulation as any private citizen.

Furthermore, the states are precluded from making a Tenth Amendment/federalism argument by the theory of preemption as it arises in cases involving both domestic and foreign commerce. For example, the relation of this theory to domestic commerce is demonstrated by a passage taken from *Hughes v. Alexandria Scrap Corp.*<sup>66</sup> In analyzing the role of the state as a market participant, the Court stated that "[n]othing in the purposes animating the Commerce Clause forbids a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."<sup>67</sup> This passage indicates that where Congress chooses to act in a certain field, the rights of the state, even when acting as a market participant, may validly be limited.

The same type of preemption exists in the field of foreign commerce.

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<sup>63</sup> *Id.* *Reeves* involved a cement plant run by the State of South Dakota which, during a cement shortage, announced a plan to confine its sales to in-state purchasers. This policy forced Reeves, an out-of-state buyer, to drastically cut production. Reeves then brought suit in federal district court, challenging the policy. The court granted relief on the ground that the policy violated the Commerce Clause but the Court of Appeals reversed on the ground that the state was acting in a proprietary capacity.

<sup>64</sup> 447 U.S. at 436-37.

<sup>65</sup> *Id.* at 439.

<sup>66</sup> 426 U.S. 794 (1976) (theory of preemption applied to state action taken in capacity of market participant).

<sup>67</sup> *Id.* at 810 (emphasis added).

For example, in *Container Corp. of America v. Franchise Tax Board*,<sup>68</sup> the Supreme Court was faced with a case in which a state tax, imposed on the basis of three variables, was challenged by a taxpayer on the ground that the allocation formula led to double-taxation based mainly on differences in labor costs between the United States and foreign countries in which the plaintiff operated several branches. In upholding the allocation formula, the Court distinguished between a state tax which merely had a slight effect on foreign commerce and one which implicated foreign affairs. Based upon this distinction, the Court went on to state that "if a state tax merely has foreign resonances, but does not implicate foreign affairs, we cannot infer, *absent some explicit directive from Congress*, that treatment of foreign income at the federal level mandates identical treatment by the states."<sup>69</sup> Despite the fact that this statement is couched in terms of state taxes and foreign income, the underlying theory of it may be applied to any state action which involves foreign affairs in this manner.

In this same case, the Court went on to provide the test for exactly when the preemption doctrine would apply. The Court concluded that "a state tax at variance with federal policy will violate the 'one-voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive. The second of these considerations is, of course, essentially a species of preemption analysis."<sup>70</sup> This statement, considered in conjunction with the analysis set forth in the *Japan Lines* case,<sup>71</sup> leads to the conclusion that the Comprehensive Anti-Apartheid Act is a valid exercise of congressional power in that Congress is "explicitly directing the states to conform to a single approach,"<sup>72</sup> *i.e.* sanctions. Furthermore, state investment in a foreign nation, or in companies doing business in a foreign nation, may be read as "implicating foreign policy issues which must be left to the Federal Government."<sup>73</sup>

It is clear from the foregoing that the foreign commerce power is a legitimate basis for the passage of the Comprehensive Anti-Apartheid Act because it is an exclusive power delegated to the federal government; it does not impose undue restriction on the states' power to regulate their own investments since the investment power makes the state a market participant and subjects it to federal regulations over the market; and, finally, it satisfies the one-voice standard by creating a single statement of policy which the United States will follow where South Africa is

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<sup>68</sup> 463 U.S. 159 (1983).

<sup>69</sup> *Id.* at 194 (emphasis added).

<sup>70</sup> *Id.* (emphasis supplied).

<sup>71</sup> See *supra* note 50 and accompanying text.

<sup>72</sup> 463 U.S. at 194.

<sup>73</sup> *Id.*

concerned. Since it has been established that the Act was passed legitimately, the next issue which must be addressed is whether it violates the established doctrine of separation of powers, in that regulation of foreign relations is an area predominantly governed by the Executive Branch.

When the Constitution was originally drafted, the framers were faced with the serious concern of preventing tyranny. The separation of powers doctrine is the basic tool used to prevent such tyranny in that it serves to preclude an absolute conglomeration of power in one body.<sup>74</sup> Therefore, when the Constitution was drafted, certain powers were delegated to each branch of government. However, some of the powers conferred on the separate branches were also interconnected to provide for a system of checks and balances.<sup>75</sup>

According to this structure, both the executive and the legislative branches were afforded some authority over foreign relations. In *United States v. Curtiss-Wright Export Corp.*,<sup>76</sup> the Supreme Court noted the joint authority over foreign relations that is shared by these two branches.

It is quite apparent that if, in the maintenance of our international relations, embarrassment . . . is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.<sup>77</sup>

This statement evidences the underlying idea that any congressional legislation which is to be effectuated in the international realm must afford the President a great degree of freedom by which to implement

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<sup>74</sup> THE FEDERALIST No. 47 (J. Madison).

<sup>75</sup> THE FEDERALIST No. 51 (J. Madison).

<sup>76</sup> 299 U.S. 304 (1936).

<sup>77</sup> *Id.* at 320. The Court went on to note the "unwisdom" of requiring Congress to lay down narrowly defined standards by which the President is to be governed. The Court stated that:

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has, or may thereafter receive, or upon the effect which his action may have upon our foreign relations.

*Id.* This passage serves to show that the President's exclusive knowledge of certain matters within the foreign sphere makes him more competent than Congress to deal in such a foreign sphere. However, this also indicates that, to some extent, congressional legislation is necessary before the President may act in a given area.

such legislation. The Comprehensive Anti-Apartheid Act operates in accordance with this idea. For example, several sections of the Act allow the President or other high level United States officials to meet with various African leaders.<sup>78</sup> Two possible interpretations for these sections exist. First, the language may be taken as suggestions to the Executive Branch on how to go about pursuing the policies stated in the Act, particularly with respect to the "frontline states."<sup>79</sup> On the other hand, the language may be taken as restrictions on the President's power in the field of foreign affairs in that it dictates the method he is to follow in implementing United States policy.<sup>80</sup> Arguably, it is the first interpretation of these sections of the Act which Congress intended to apply. This assertion is supported by two reasons: first, each of the sections is prefaced with language such as "it is the sense of the Congress . . .",<sup>81</sup> and second, prior case law would support such an interpretation.

In *Real v. Simon*,<sup>82</sup> the court stated that:

[A]ppellants do not cite, nor have we been able to locate, any portion of the legislative history of the 1961 Act<sup>83</sup> that would indicate either an explicit or implicit intention on the part of Congress to limit Executive attempts to respond to the Cuban crisis. Absent clear and unequivocal evidence of such intent, we

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<sup>78</sup> See, e.g., Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 105, 100 Stat. 1086, 1091 (1986) ("It is the sense of Congress that the President should discuss with the governments of the African 'frontline' states the effects on them of disruptions in transportation or other economic links through South Africa and of means of reducing those effects."); *Id.* § 106(a)(2), 100 Stat. 1086, 1092 (1986) ("It is the sense of Congress that the President . . . or other . . . United States officials should meet with the leaders of opposition organizations of South Africa . . . . Furthermore, the President, in concert with the major allies of the United States . . . should seek to bring together opposition political leaders with leaders of the government of South Africa."); *Id.* § 109, 100 Stat. 1086, 1093 (1986) ("It is the sense of the Senate that the United States Ambassador should promptly make a formal request to the South African Government for the United States Ambassador to meet with Nelson Mandela.").

<sup>79</sup> Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 105, 100 Stat. 1086, 1091-92 (1986).

<sup>80</sup> It is the second interpretation which President Reagan chose to follow. In his message accompanying the veto of the Act, 22 WEEKLY COMP. PRES. DOC. 1281, 1282 (Sept. 26, 1986), he stated: "[T]he legislation . . . ties the hands of the President of the United States in dealing with a gathering crisis in a critical subcontinent . . . . I am also vetoing the bill because it contains provisions that infringe on the President's constitutional prerogative to articulate the foreign policy of the United States."

<sup>81</sup> See *supra* note 78.

<sup>82</sup> 510 F.2d 557 (5th Cir. 1975).

<sup>83</sup> Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (1961)(codified at 22 U.S.C. §§ 2161-2406 (1982)).



are unwilling to announce a limitation on the President's powers to conduct the foreign affairs of this country.<sup>84</sup>

A thorough review of the legislative history of the Comprehensive Anti-Apartheid Act also discloses no intention on the part of Congress to limit Executive attempts to respond to the South African crisis. Rather, the history indicates an intent to provide the President with broad discretion in dealing with the situation.<sup>85</sup>

Viewing these references to presidential authority under the Act in the light which legislative history casts upon them, it is clear that the Act meets the specifications stated in *Curtiss-Wright*:<sup>86</sup> namely, it gives the President considerable "discretion and freedom from statutory restriction"<sup>87</sup> and bears in mind that the form of presidential action depends upon the effect which his action may have upon United States foreign relations.<sup>88</sup> Therefore, there is no separation of powers bar against the Act since Congress granted the President broad authority over the field of foreign relations involving South Africa, and further, Congress merely suggested the means by which he is to implement the policies stated in the Act itself.

Based on the conclusion that Congress has granted the President a broad range of discretion, the next issue that logically arises is whether the broad powers granted to the President by the Act represent an unconstitutional delegation of legislative authority. This issue arises in particular with respect to those sections of the Act which authorize the President to expand or modify the provisions of the Act.<sup>89</sup> In *United States*

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<sup>84</sup> 510 F.2d at 560. The case arose on a challenge to a freeze of Cuban nationals' assets which were held in the United States. Plaintiff, a naturalized citizen whose husband died in Cuba, challenged the law after a treasury regulation permitted her to take only half of the assets held in a United States account (her portion under Cuban community property law). The district court upheld the freeze against a claim that it was an unconstitutional deprivation of property, but the Fifth Circuit reversed.

<sup>85</sup> For example, the legislative history indicates that:

The Act would provide for the imposition of additional measures in one year if the President determines that substantial progress has not been made in dismantling apartheid . . . . The Act would give the President authority to negotiate international agreements imposing measures on South Africa with other industrial democracies. The President would also be given the power to modify U.S. measures to reflect international agreements.

S. REP. NO. 370, 99th Cong. 1st Sess. 2, 2 (1986).

<sup>86</sup> See *supra* text accompanying note 77.

<sup>87</sup> 299 U.S. 304, 320 (1936).

<sup>88</sup> *Id.* See also Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 105, 100 Stat. 1086, 1091 (1986).

<sup>89</sup> See, e.g., Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 208, 100 Stat. 1086, 1098 (1986):

c) The President may issue additional guidelines and criteria to assist persons who are or may be subject to Section 207 in complying with the principles set forth

*v. Fernandez-Pertierra*<sup>90</sup> the court was faced with the issue of an unconstitutional delegation of legislative power to the Executive Branch. The court determined that "[r]ecent Supreme Court cases confirming other aspects of the exercise of executive power in foreign affairs lend support to this court's decision to uphold the challenged statute . . . . These cases continue the long judicial tradition of sustaining the exclusive power of the President in the sphere of international relations."<sup>91</sup>

Furthermore, "as the Supreme Court has explicitly recognized, a delegation of unusually extensive power to the President is not uncommon in the external realm."<sup>92</sup> In *South Puerto Rico*,<sup>93</sup> the challenged statute afforded the President extensive authority to impose surcharges on sugar imported into the United States from the Dominican Republic. The applicable language of the statute allowed the President to impose "such terms and conditions as he deems appropriate under prevailing

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in subsection (a) of this section. The President may, upon request, give an advisory opinion to any person who is or may be subject to this Section as to whether that person is subject to this section or would be considered to be in compliance with the principles set forth in subsection (a).

d) The President may require all nationals of the United States referred to in Section 207 to register with the United States Government.

See also *Id.* § 401, 100 Stat. 1086, 1107 (1986): "If the President successfully concludes an international agreement, . . . he may, after such agreement enters into force with respect to the United States, adjust, modify, or otherwise amend the measures imposed under any provisions of Sections 301 through 310 to conform with such agreement." Although this section also requires the approval of Congress by joint resolution, the information on which such a resolution is to be based indicates an intent on Congress' part to give substantial deference to the President's findings, thus making him the final authority with respect to such action.

<sup>90</sup> 523 F. Supp. 1135 (S.D. Fla. 1981). This case arose when a defendant, indicted for her participation in the Mariel Boatlift of Cuban refugees, challenged her indictment on the ground that the applicable federal regulation was unconstitutional on its face as an unconstitutional delegation of authority to the President.

<sup>91</sup> *Id.* at 1141. See also *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding President's power to nullify prejudgment attachments against the government of Iran and directing those persons holding blocked Iranian funds and securities to transfer them to the Federal Reserve Bank for ultimate transfer to Iran); *Haig v. Agee*, 453 U.S. 280 (1981) (confirming executive authority to revoke a passport on the ground that the holder's activities in foreign countries are likely to cause serious damage to the national security or foreign policy of the United States).

<sup>92</sup> *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F.2d 622 (Ct. Cl. 1964) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 324 (1936)), *cert. denied*, 379 U.S. 964 (1965). In support of this proposition, the court stated that:

Practically every volume of the United States statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.

<sup>93</sup> 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965).

circumstances."<sup>94</sup> Application of the above-stated Supreme Court position to such a broad delegation of power suggests that the delegation of authority in the Comprehensive Anti-Apartheid Act, a delegation of considerably smaller proportion, would also be upheld as a valid exercise of congressional authority. Therefore, the delegation involved in the Act is not so overbroad as to be rendered unconstitutional.

The final constitutional issue that must be addressed is whether this Act violates the equal protection rights of those firms doing business in South Africa. The equal protection problem arises because, unlike United States-based multinationals doing business in other countries, those doing business in South Africa must conform to a legislatively-mandated Code of Conduct.<sup>95</sup> Section 207(a) of the Act requires that "[a]ny national of the United States that employs more than 25 persons in *South Africa* shall take the necessary steps to insure that the Code of Conduct is implemented."<sup>96</sup> Moreover, the Act not only regulates corporate operations of United States nationals doing business in South Africa, it selectively regulates with whom United States nationals may have economic ties by prohibiting various types of trade and other activities with South Africa.<sup>97</sup> A similar approach was pursued under the prior policy of constructive engagement. This approach, however, called for the *voluntary* divestment of all stock in companies doing business in South Africa.

One authority on the divestment situation regarding South Africa argues that a state, by divesting itself of holdings in companies on the basis of their dealings with South Africa, denies those companies the right to do business with a state institution in violation of the equal protection clause.<sup>98</sup> A tenuous expansion of this argument would indicate that a federal prohibition on trade with, or investment in, a particular country would likewise be held to be a violation of the equal protection clause. However, a relatively recent Supreme Court case supports precisely the contrary view. In *New Orleans v. Dukes*<sup>99</sup> the Supreme Court stated that it will not grant any significant review of general economic legislation, but will uphold such legislation if it satisfies the rational basis test. The Court will seek to determine only if the classification adopted in the legislation conceivably could bear a rational relation to a legitimate governmental purpose.<sup>100</sup> The problem in applying the ratio-

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<sup>94</sup> *Id.*

<sup>95</sup> Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, §§ 207-08, 100 Stat. 1086, 1097 (1986). See also *supra* note 39.

<sup>96</sup> *Id.* (emphasis added).

<sup>97</sup> *Id.* at §§ 301-23, 100 Stat. 1086, 1099-1106 (1986).

<sup>98</sup> Chettle, *supra* note 13, at 526 n.391.

<sup>99</sup> 427 U.S. 297 (1976).

<sup>100</sup> *Id.* at 303.

nale of this case to the Act is that a question arises as to whether the purpose involved herein is a legitimate governmental purpose. However, the solution is clear. The classification adopted by the Government based on the extent of a corporation's South African ties or its adherence to the Code of Conduct clearly has a rational relationship to the legitimate governmental purpose of effectuating its concept of socially-responsible investment.<sup>101</sup> Therefore, if the governmental purpose of ending apartheid through the vehicle of corporate economic regulation can be equated with the purpose of promoting socially responsible corporate investment, then this latter purpose would add legitimacy to the former, at least for purposes of the rational relation test of *Dukes*.

Furthermore, in *Narenji v. Civiletti*,<sup>102</sup> the court determined that classifications among aliens based on nationality are consistent with due process and equal protection if supported by a rational basis.<sup>103</sup> The court further stated that:

It is not the business of the courts to pass judgment on decisions of the President in the field of foreign policy . . . . Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive rather than the Judiciary. This very case illustrates the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication.<sup>104</sup>

Extending this language by analogy to the field of foreign commerce, it becomes evident that the same rationale applies to support the conclusion that the Act does not violate equal protection because it is a form of classification different in very minor respects from that upheld by the

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<sup>101</sup> For a similar conclusion with respect to a state's divestment of its holding in a corporation with South African ties, see Note, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543 (1985).

<sup>102</sup> 617 F.2d 745 (D.C.Cir. 1979), cert. denied, 446 U.S. 957 (1980).

<sup>103</sup> *Id.* The case arose as a challenge to a regulation passed by the Attorney General requiring all nonimmigrant alien postsecondary students who were natives or citizens of Iran to report to their local Immigration & Naturalization Service office and provide information as to the maintenance of their nonimmigrant status. Each student was required to show a passport, evidence of enrollment in school, and good standing in the United States. Failure to comply with these requirements subjected the student to deportation. The district court upheld the challenge by rendering the statute unconstitutional. The D.C. Circuit reversed.

<sup>104</sup> *Id.* at 748.

court in *Narenji*. The foregoing discussion makes clear that the Comprehensive Anti-Apartheid Act does not violate equal protection.

Therefore, there are no constitutional barriers to the application of this Act. The next step, then, is to determine whether the Act is legal under international law. This determination will be made by analyzing the Act within the context of United States foreign policy, the sovereignty rights of South Africa, the jurisdiction of United States courts to pass on violations of the Act and, finally, United Nations provisions governing interference with the economy of a foreign government.

#### IV. INTERNATIONAL LEGALITY

One reason for the passage of the Comprehensive Anti-Apartheid Act was that it provided Congress an opportunity to express more concretely the policy of the United States with respect to apartheid and the situation in South Africa. The current foreign policy position of the United States is to support and protect human rights. This policy is evidenced by its support for United Nations calls for all countries to act in opposition to oppression and apartheid. In *South Puerto Rico Sugar Co. Trading Corp. v. United States*,<sup>105</sup> the court upheld a delegation of power to the President to impose such conditions on sugar imports as he deemed appropriate.<sup>106</sup> In reaching that conclusion, the court relied on the then United States foreign policy with respect to the position of the Organization of American States. The court deferred to the position of the State Department that "under the act . . . the United States had no other choice but that by imposing the compensating fee the President had observed the spirit of the Sixth Meeting . . . of the OAS within his existing authority."<sup>107</sup> This reliance makes it likely that, were the validity of the Comprehensive Anti-Apartheid Act challenged, the court would defer to the United States policy with respect to the position of the United Nations and uphold the Act. The United Nations position is one calling on member nations to unilaterally or collectively act to oppose apartheid.<sup>108</sup> Therefore, it is clear that the courts, in recognition of, and deference to, the foreign policy of the United States would uphold the Comprehensive Anti-Apartheid Act as a valid exercise of legislative authority.

The next aspect of this Act which must be considered in order to determine its legality under international law is its effect on the sovereignty of South Africa. The Act affects that sovereignty in two ways.

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<sup>105</sup> 334 F.2d 622 (Ct. Cl. 1964), cert. denied, 379 U.S. 964 (1965). See also *supra* notes 92-94 and accompanying text.

<sup>106</sup> *Id.*

<sup>107</sup> 334 F.2d at 632.

<sup>108</sup> See G.A. Res. 35/206, 25 U.N. GAOR Supp. (no. 48) at 29, U.N. Doc. A/35/L.13 (1980); G.A. Res. 1761, 17 U.N. GAOR Supp. (No. 17) at 9, U.N. Doc. A/5276 (1962).

First, the Act directly affects it by prohibiting investment in and trade with South Africa until apartheid is dismantled, thus dictating through trade policy exactly what internal policies that country is to follow.<sup>109</sup> Second, it indirectly affects sovereignty by requiring United States nationals doing business in South Africa to conform to the legislative Code of Conduct, which differs in significant respects from South African law. Therefore, the Act seeks to change South Africa's internal policies by compelling United States nationals to disobey South African laws.

In its Declaration on Friendly Relations,<sup>110</sup> the United Nations has defined sovereignty as follows:

All States . . . have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements:

- a) States are juridically equal;
- b) Each State enjoys the rights inherent in full sovereignty;
- c) Each State has the duty to respect the personality of other States;
- d) The territorial integrity and political independence of the States are inviolable;
- e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
- f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.<sup>111</sup>

It is apparent from this definition that the Act violates the sovereignty of South Africa by obstructing South Africa's political independence and

<sup>109</sup> See, e.g., Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 311(a), 100 Stat. 1086, 1103 (1986) which provides that:

This title . . . shall terminate if the Government of South Africa—

- 1) releases all persons persecuted for their political beliefs or detained unduly without trial and Nelson Mandela from prison;
- 2) repeals the state of emergency in effect on the date of enactment of this Act and releases all detainees held under such state of emergency;
- 3) unbans democratic political parties and permits the free exercise by South Africans of all races of the right to form political parties, express political opinions, and otherwise participate in the political process;
- 4) repeals the Group Areas Act and the Population Registration Act and institutes no other measures with the same purposes; and
- 5) agrees to enter into good faith negotiations with truly representative members of the black majority without preconditions.

<sup>110</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8082 (1970).

<sup>111</sup> *Id.*

infringing on its right to choose and develop its political, social, economic and cultural systems freely. However, in defense of the United States position, the argument may be made that by failing to comply with its international obligations and to live in peace with other States,<sup>112</sup> South Africa has waived its claim to protection of its sovereignty. If that argument is accepted, the United States position under the Act is justified, and no violation of South African sovereignty exists.

The next issue that must be considered is whether United States courts will enforce their jurisdiction to pass on violations of the Act. This question basically devolves to a question of comity of nations and what effect this will have on decisions of United States courts.<sup>113</sup> The Act itself provides two mechanisms by which it is to be enforced. First, it provides a private right of action to any United States national who, by operation of the Act, is forced to curtail operations in South Africa against any party who takes commercial advantage of such curtailment.<sup>114</sup> Second, it provides for the imposition of criminal and civil penalties on any person, natural or otherwise, who violates the provisions of the Act.<sup>115</sup> However, before these penalties may be enforced, United States courts must have jurisdiction over the action.

In *United States v. First National City Bank*,<sup>116</sup> the court was faced with the problem of an American corporation doing business overseas being precluded by the laws of the foreign country from complying with the requirements of American law.<sup>117</sup> In determining that the corporation must comply with American law or be held in civil contempt, the court determined that it may require a defendant to perform an act despite repercussions abroad, provided that it has in personam jurisdiction over the matter.<sup>118</sup> The court supported this proposition by stating that:

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<sup>112</sup> Such failures include, for example, South Africa's armed intervention in Namibia and Angola.

<sup>113</sup> Comity of nations has been defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

<sup>114</sup> Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 403, 100 Stat. 1086, 1107-08 (1986).

<sup>115</sup> *Id.* § 603, 100 Stat. 1086, 1114-15 (1986).

<sup>116</sup> 396 F.2d 897 (2d Cir. 1968).

<sup>117</sup> *Id.* The case arose when Citibank was served with a subpoena *duces tecum* ordering it to produce certain documents located in New York City and Frankfurt, West Germany, regarding the transactions of a specific customer. Citibank refused to produce the documents from Frankfurt, asserting that its refusal was justified because production would subject it to civil liability and economic loss in West Germany. The trial court adjudged Citibank in civil contempt, and the Second Circuit affirmed.

<sup>118</sup> 396 F.2d at 900-01.

[U]nder the principles of international law, "a state having jurisdiction to prescribe or enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct."<sup>119</sup>

Additionally, the court recognized that federal courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of government in the area of foreign relations.<sup>120</sup> In attempting to reach a conclusion which would satisfactorily respect these two considerations, the court listed several factors which should be considered when deciding a case in which the defendant is subject to conflicting laws elsewhere.<sup>121</sup> The court should consider: vital national interests of each state;<sup>122</sup> the extent and nature of the hardship that inconsistent enforcement actions would impose on the defendant;<sup>123</sup> the extent to which the required conduct is to take place in the territory of the other state;<sup>124</sup> the nationality of the person;<sup>125</sup> and the extent to which enforcement by either state can reasonably be expected to achieve compliance with the rule prescribed by that state.<sup>126</sup> Based on the application of each of these considerations to the Comprehensive Anti-Apartheid Act, it is likely that, given a violation of the Act, courts of the United States would

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<sup>119</sup> 396 F.2d at 901 (quoting RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 39(1) (1965)).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 902.

<sup>122</sup> With respect to the Comprehensive Anti-Apartheid Act, the vital national interest of South Africa is the maintenance of its laws, regardless of their validity to the rest of the world, while that of the United States is the promulgation of a uniform foreign policy, a "one-voice" standard, which indicates United States support for human rights worldwide.

<sup>123</sup> The nature of the hardship imposed by inconsistent enforcement is that the potential defendants would not know whether they would be punished for violations of the Act, thereby being unsure of whether they are justified in any way in breaking the laws of South Africa.

<sup>124</sup> The conduct involved in the Act may be deemed to take place primarily in the United States, because it involves importation and exportation of goods, an activity which, with respect to United States involvement, is performed predominantly in the United States.

<sup>125</sup> The nationality of any persons involved in prosecutions or civil actions under the Act would be American, since the Act only regulates the conduct of "United States nationals" with respect to trade activities involving South Africa conducted in the United States, and business activities conducted in South Africa involving adherence to the Code of Conduct.

<sup>126</sup> Enforcement by action of either country is as likely to cause compliance with its laws as is enforcement by the other country, as regards those companies doing business in South Africa and their adherence to the Code of Conduct. However, the Act predominantly focuses on United States nationals doing business in the United States and restricts their right to trade with South Africa. Therefore, in most cases, it is highly unlikely that any South African action would cause compliance with its laws by those specific persons regulated by the Act.



enforce their jurisdiction and hear any cause of action brought under it, whether it is a criminal action brought by the United States or a private right of action brought under Section 403.<sup>127</sup>

Having concluded that under international law United States courts would be able to enforce their jurisdiction over persons who violate the Act, the only remaining issue is whether the Act is valid under the various United Nations documents which govern international relations.

The United Nations Charter prohibits any member from the threat or use of force against the territorial integrity or political independence of any state.<sup>128</sup> The question that this provision presents in the context of the Act is whether economic sanctions fall under the United Nations definition of force. It has been stated by one authority that:

Gross interference with the normal intercourse which is conducted across frontiers—interference for the purpose of bringing pressure to bear upon a state or government—constitutes a . . . ground for claiming that there has been a breach of the law. Within these categories of prohibited conduct would come . . . acts of economic coercion.<sup>129</sup>

However, the dominant view in light of the legislative history of Article 2(4) is that the delegates present at the drafting of the Charter opposed any broad construction of the article, and a narrow interpretation, *i.e.* one excluding economic sanctions, prevails.<sup>130</sup> The strongest evidence of this interpretation is the fact that the San Francisco conference overwhelmingly rejected a Brazilian amendment which would have included economic coercion as prohibited conduct under Article 2(4).<sup>131</sup> Further support for this interpretation may be found in the fact that the United Nations definition of aggression does not include economic aggression, nor is there any precedent for such a finding.<sup>132</sup>

Furthermore, the United Nations Charter requires all members to pledge themselves to take joint and separate action to promote higher living standards and universal respect for human rights without distinction as to race.<sup>133</sup> On its face, this language authorizes any member nation to take whatever action it deems appropriate to promote the stated goals, and the Comprehensive Anti-Apartheid Act explicitly pursues

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<sup>127</sup> Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 403, 100 Stat. 1086, 1107-08 (1986).

<sup>128</sup> U.N. CHARTER art. 2, para. 4.

<sup>129</sup> Parry, *Defining Economic Coercion in International Law*, 12 TEX. INT'L L. J. 1, 3 (1977).

<sup>130</sup> Blum, *Economic Boycotts in International Law*, 12 TEX. INT'L L. J. 5, 10 (1977).

<sup>131</sup> *Id.*

<sup>132</sup> Johnson, *Sanctions and South Africa*, 19 HARV. INT'L L. J. 887, 908 (1978).

<sup>133</sup> U.N. CHARTER art. 55, 56.

these very goals. This is evident in the Code of Conduct<sup>134</sup> as well as in the termination provisions for the Act.<sup>135</sup>

The United Nations specifically authorized individual state action in opposing apartheid through two resolutions focusing specifically on the problem.<sup>136</sup> In General Assembly Resolution 1761,<sup>137</sup> the United Nations requested member states to take action against South Africa, *separately or collectively*, in protest of its apartheid policies. Further, in General Assembly Resolution 35/206, the United Nations again called on member nations to protest apartheid, this time appealing to them to take unilateral action. Both of these resolutions listed the sanction measures which the members were requested to impose against South Africa in accordance with the objectives of the resolutions. The latter resolution went further, however, in considering that all states should take action to prevent transnationals within their jurisdiction from collaborating with the racist regime in South Africa and by inviting all governments to prevent such action.<sup>138</sup> Not only does the current United States action with respect to South Africa conform to these resolutions by representing unilateral action to protest apartheid, it imposes some of the measures stated therein.<sup>139</sup>

The final document to be considered with respect to the Act is the United Nations Declaration on Friendly Relations.<sup>140</sup> This Declaration recognizes the duty of States to "refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State."<sup>141</sup> Along this same line, it states the principle that "no state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the

<sup>134</sup> Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 208, 100 Stat. 1086, 1097 (1986).

<sup>135</sup> *Id.* § 311, 100 Stat. 1086, 1103 (1986).

<sup>136</sup> See G.A. Res. 35/206, 25 U.N. GAOR Supp. (No. 48) at 29, U.N. Doc. A/35/L.13 (1980); G.A. Res. 1761, 167 U.N. GAOR Supp. (No. 17) at 9, U.N. Doc. A/5276 (1962).

<sup>137</sup> G.A. Res. 1761, 167 U.N. GAOR Supp. (No. 17) at 9, U.N. Doc. A/5276 (1962).

<sup>138</sup> See G.A. Res. 35/206, 25 U.N. GAOR Supp. (No. 48) at 29, U.N. Doc. A/35/L.13 (1980).

<sup>139</sup> For example, both resolutions call upon members to boycott all South African goods; refrain from exporting goods, including arms and ammunition, to South Africa; and refuse landing and passage facilities to all aircraft belonging to the Government of South Africa and companies registered under the laws of South Africa. Further, the more recent resolution calls upon members to impose these measures as well as to terminate all government promotion of, assistance to, trade with or investment in South Africa; to prohibit the sale of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the

<sup>140</sup> Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8082 (1970).

<sup>141</sup> *Id.*

exercise of its sovereign rights.”<sup>142</sup> When this language is applied to the Comprehensive Anti-Apartheid Act, it becomes apparent that the Act violates the provisions of this Declaration because it is an economic measure used to coerce South Africa to give up its sovereignty and act in accordance with the demands of the United States.

Another aspect of the Declaration, however, is its conviction that the principles of equal rights and self-determination constitute significant contributions to international law.<sup>143</sup> It goes on to note that effective application of this principle is of paramount importance to the promotion of friendly relations based on a respect for the principle of sovereign equality.<sup>144</sup> As stated earlier,<sup>145</sup> it is possible to argue that South Africa has waived its claim to protection of its sovereignty by infringing on the sovereignty of other nations. This language, therefore, appears to authorize unilateral action by the United States for the goal of achieving equal rights and self-determination for the people of South Africa. Finally, in its closing statement, the Declaration states that the principles of the Charter which are embodied in the document are basic principles of international law and appeals to all states to observe these principles.<sup>146</sup>

As the foregoing discussion indicates, the language of the Declaration appears to contradict itself on the issue of whether it actually authorizes actions such as those taken by the United States in the Act. However, this Declaration has been deemed to be the authoritative interpretation of the United Nations Charter and to declare such economic measures to be in violation of international law.<sup>147</sup> On the other hand, this Declaration does not have the force of law, despite the fact that it is indicative of world attitudes and general customary law.<sup>148</sup> Furthermore, some authorities take the view that, despite these provisions, economic coercion only becomes illegal when the motive for its imposition becomes improper.<sup>149</sup> With respect to South Africa's position, the United States motive is patently improper since it seeks to influence South Africa's internal affairs. On the other hand, this motive may be deemed proper from the point of view of the world community, especially when consideration is given to current world opposition to the apartheid policies of South Africa.

If one agrees with the proposition that the Declaration does not have

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See *supra* note 112 and accompanying text.

<sup>146</sup> See *supra* note 140.

<sup>147</sup> Lillich, *The State of Economic Coercion Under International Law: United Nations Norms*, 12 *Tex. Int'l L. J.* 17 (1977).

<sup>148</sup> *Id.* at 20-21.

<sup>149</sup> Bowett, *Economic Coercion and Retaliation by States*, 13 *Va. J. Int'l L.* 1, 3-5 (1972).

the force of law and further views the motive of the United States from the standpoint of the rest of the world, it becomes apparent that the Act is legal under international law as set forth in the various United Nations documents. However, one need not resort to these assumptions. Since the Declaration states that the principles of equal rights and self-determination are paramount to the promotion of friendly relations,<sup>150</sup> it is clear that even if the Declaration were held to have the force of law, the Act would be legal in that it seeks to promote equal rights in South Africa and, having complied with this purpose of the Declaration, the analysis need not proceed to the question of whether it respects the sovereignty of South Africa.

## V. APPLICATION

Having determined that by making some relevant assumptions the Comprehensive Anti-Apartheid Act is a legal form of action by the United States, the only remaining question which must be addressed is whether it will accomplish its stated objectives. The first step in answering this question is to look at the amount of trade between the two countries, thereby determining the amount of economic interference this Act can be expected to cause.

According to one government authority, "the United States is South Africa's largest trading partner, buying about 15% of South Africa's exports and supplying 19% of its imports in 1983. And U.S. businesses are a major source of capital, accounting for about 15% of all foreign investment in South Africa."<sup>151</sup> However, there are few points to which the United States could provide pressure. While United States investment and trade are great, they are not indispensable to South Africa since it has been diversifying its trade to become less dependent on any one country for imports.<sup>152</sup> When the threat of sanctions arose, South Africa diversified its foreign sources of supply, limiting its imports from any one nation to 20%.<sup>153</sup> As a result, the greatest effect that severing of economic ties will have on South Africa is to force it to pay more and wait longer for some goods. Though it can still obtain the goods, the psy-

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<sup>150</sup> Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.S. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8082 (1970).

<sup>151</sup> Green, *Sanctions: From the Symbolic to the Economic*, 43 CONG. Q. 445, 445 (1985). "U.S. investment is especially strong in some strategic sectors. One-half of South Africa's oil industry, 70% of its computer industry, and one-third of its automobile industry are controlled by U.S. firms, according to the Investor Responsibility Research Center, which examines such issues for shareholders." *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 447.

chological and foreign policy costs are great because the sanctions serve to isolate South Africa from the United States, one of its few remaining allies.<sup>154</sup> This trade situation makes it clear that, on strictly economic grounds, the Act will not accomplish its stated objectives because the sanctions will only cause temporary relative deprivation.<sup>155</sup>

The second step in answering this question is to look at a prior attempt to impose sanctions on an African nation—the United Nations resolution imposing sanctions against Rhodesia.<sup>156</sup> This resolution required members of the United Nations to prohibit among other things:

- 1) import of all commodities and products originating in Rhodesia;
- 2) sale or supply by their nationals from their territories of any commodity or product to persons or bodies in Rhodesia, excepting only medical and educational materials and foodstuffs;
- 3) provision of funds for investment or of any other financial or economic resources to government commercial or industrial enterprises in Rhodesia and the remittance of any funds to Rhodesia except for pensions or payment for exempt items; and
- 4) airline companies constituted in their territories or under charter to their nationals from flying to or from Rhodesia.<sup>157</sup>

This resolution is similar to the Comprehensive Anti-Apartheid Act both in the sanctions it imposes and the justification for its imposition. In both cases, the sanctions were imposed on the African nation in an effort to bring an end to its nonconformist position with respect to the policies of the rest of the world. However, the first conclusion that appears from an analysis of the sanctions against Rhodesia is that, while they were the main instrument of pressure, they did not achieve their stated goal.<sup>158</sup> Furthermore, thorough analysis reveals that sanctions did not cause “sustained economic stagnation or recession.”<sup>159</sup> Although they had imposed direct strains in the form of unfavorable terms of trade and an inability to obtain foreign capital on a large scale, further modest growth in spite of the sanctions was still possible.<sup>160</sup>

The major reason that the sanctions against Rhodesia did not accomplish their goal was because “[p]olitically, the damaging effects of relegating the Rhodesian government and its supporters to a kind of international limbo were offset for a considerable time by the stiffened

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<sup>154</sup> *Id.* at 445.

<sup>155</sup> See *supra* note 13 and accompanying text.

<sup>156</sup> S.C. Res. 253, 23 U.N. SCOR Supp. (Apr.-June 1968), U.N. Doc. S/8601 (1968), reprinted in *The Situation in Southern Rhodesia*, 1968 U.N.Y.B. 125, 152, U.N. Doc. 8601.

<sup>157</sup> *Id.* This list is not all-inclusive. Rather, these selected provisions were chosen because of their similarity to the provisions of the Comprehensive Anti-Apartheid Act.

<sup>158</sup> M. DOXEY, *ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT* 73 (1980).

<sup>159</sup> H. STRACK, *SANCTIONS: THE CASE OF RHODESIA* 96 (1978).

<sup>160</sup> DOXEY, *supra* note 158, at 78.

resolve of white Rhodesians to resist international pressures and go it alone.”<sup>161</sup> This reason is directly applicable to any analysis of the potential effectiveness of the Comprehensive Anti-Apartheid Act since South Africa’s inaction with respect to the United States’ divestment campaign of the past twenty years appears to validate the notion that South Africans “will endure rather substantial economic damage before they would . . . countersanction the United States.”<sup>162</sup> Moreover, the fact that U.S. sanctions against South Africa will not cause serious economic damage makes it clear that white South Africans will easily resist the sanctions and continue to operate as they have up to this point.

A further reason for doubting the effectiveness of the current United States action is that the sanctions against Rhodesia constituted a multilateral action which cut off a considerable number of supply sources to that country, yet they failed to accomplish their stated purpose. The Comprehensive Anti-Apartheid Act, on the other hand, is a unilateral action, leaving other sources of supply available to South Africa without requiring compliance with the United States objectives and goals. Therefore, the inevitable conclusion is that the Comprehensive Anti-Apartheid Act of 1986 will not cause any major changes in the structure of the South African system, thereby failing to accomplish its essential goals.

Even aside from economic perspectives, however, it is clear that the Act will not achieve its stated purpose. The Code of Conduct enunciated in the Act is strikingly similar to the Sullivan Principles,<sup>163</sup> a voluntary code of conduct to which several large U.S. multinationals doing business in South Africa adhered but which did not accomplish their stated purpose of ending apartheid.

Mr. Sullivan . . . contends that corporate response to his “Sullivan Principles” has improved the conditions of black workers and their families and encouraged South African opposition to apartheid.

But that system of racial separation persists, and the South African Government has served notice that business opposition will not be allowed to undermine it.<sup>164</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> Green, *supra* note 151, at 446 (quoting MIT metals expert Daniel Fine).

<sup>163</sup> The Sullivan Principles were drafted by the Reverend Leon Sullivan, a Baptist minister and General Motors board member. These principles called upon American companies doing business in South Africa to undertake actions to desegregate the workplace, improve training and promotion prospects for black workers, improve their lives in matters such as health and schooling, support the establishment of black businesses, and end apartheid laws. *N.Y. Times*, June 1, 1987, at 23. Although not all American companies abided by these Principles, the number of signatories was large enough to have some effect on apartheid policies had the South African Government chosen to listen.

<sup>164</sup> *N.Y. Times*, June 1, 1987, at 23.

The general tone of the South African position clearly indicates that the use of sanctions will have no more effect on apartheid policies than did voluntary opposition under the Sullivan Principles since, in either case, the action represents "business opposition" which the Government refuses to recognize.

## VI. CONCLUSION

The Comprehensive Anti-Apartheid Act is a legitimate exercise of power by Congress under the United States Constitution, with the basis of congressional authority to legislate in this area coming from the Foreign Commerce Clause.<sup>165</sup> The Act does not infringe on the power of the President to conduct the foreign affairs of the nation, nor does it unconstitutionally delegate any unnecessary legislative power to him. Furthermore, the Act does not raise any equal protection problems, since the Supreme Court will only apply a rational basis test to economic legislation,<sup>166</sup> and this Act easily passes that test.

The Act is also legitimate under international law, subject of course, to several differing interpretations. The Declaration on Friendly Relations, the authoritative interpretation of the United Nations Charter, deems acts of this nature to be illegal. However, there is language in the Declaration which implicitly approves of such actions. Furthermore, some authorities who interpret these types of actions take the view that the action only becomes illegal when the motive behind it becomes improper. From a worldwide point of view, the United States motive in enforcing the Act is proper in that it seeks to aid in the resolution of one of the major problems facing the world today.

Despite its legality under both domestic and international law, it is clear that the Act will not accomplish its desired goals because: 1) the insubstantial amount of trade involved prevents the Act from dealing a severe blow to the South African economy; 2) a similar effort against an African nation has failed in the past; and 3) it has been predicted that South Africans will endure substantial hardship before taking any retaliatory action against the United States or bending to its demands.

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<sup>165</sup> U.S. CONST. art. I, sec. 8, cl. 3.

<sup>166</sup> See *supra* notes 99-100 and accompanying text.