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INVESTMENTS TIED TO GENOCIDE: SUDAN DIVESTMENT AND BEYOND

HEARING

BEFORE THE

SUBCOMMITTEE ON
INTERNATIONAL MONETARY
POLICY AND TRADE

OF THE

COMMITTEE ON FINANCIAL SERVICES
U.S. HOUSE OF REPRESENTATIVES

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INVESTMENTS TIED TO GENOCIDE: SUDAN DIVESTMENT AND BEYOND

Tuesday, November 30, 2010I03

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERNATIONAL
MONETARY POLICY AND TRADE,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2128, Rayburn House Office Building, Hon. Gregory W. Meeks [chairman of the subcommittee] presiding.

Members present: Representatives Meeks, Driehaus, Maffei; Miller of California and Paulsen.

Also present: Representatives Capuano, McGovern, and Lee of California.

Chairman MEEKS. This hearing of the Subcommittee on International Monetary Policy and Trade will come to order.

We will have opening statements. And, without objection, all members' opening statements will be made a part of the record.

We are waiting for the arrival—I want to note that he is going to appear shortly—of the ranking member, Mr. Miller, but we will begin so that we can hear the testimony of our witnesses and get opening statements in prior to us having a vote.

But before I begin, let me first—I would like to thank the ranking member, Mr. Miller, for working with me to organize this critical hearing on the humanitarian crisis in Darfur and for exploring how we can better empower our capital markets to contribute to making a positive change in this crisis.

And I also want to take note of Mr. Capuano, who is here with us today. He is one of the most committed Members of Congress on this issue especially. And I want to thank you for your dedication and for your commitment in this area.

Here is Mr. Miller.

So we are happy to have you with us today. And later on, we will be asking for unanimous consent to allow Mr. Capuano to have an opening statement.

I was just saying, Mr. Miller, I wanted to thank you for all of your help, for your commitment, and always your partnership in organizing and bringing this together, and also for your commitment in this very important issue and area. I thank you.

And I also want to thank all of the witnesses, even prior to your testimony, for being here today and agreeing to testifying before Congress.

The Sudan has been in conflict, as many of you know, for many of the past 54 years since it achieved its independence. And civil wars have caused millions to die from violence and hunger, displaced millions more, and often destabilize the whole region, with neighbors that include Chad, Libya, Egypt, Eritrea, Ethiopia, Kenya, Uganda, the Central African Republic, and the Democratic Republic of Congo, all of which have been caught up in Sudan's civil wars and famines.

This is also a priority for reasons of our own national security. Whether because it is the largest country in Africa and a major producer of oil and other natural resources, a source of conflict with millions of weapons in circulation, a government accused of war crimes and genocide, or because of its porous borders, Sudan is not a country that any American can ignore, and one that the United States Government monitors very closely.

In 2007, Congress passed the Sudan Accountability and Divestment Act, or SADA. SADA helped empower a growing movement by authorizing States and investment managers to formally establish a policy to divest from or prohibit investment in companies that are seen as supporting the Government of Khartoum. In particular, SADA gave investment managers safe harbor from prosecution if they decided to divest from countries that conflict with such a policy. Surveys show that nearly all Americans support such initiatives and do not want their investments supporting genocide in any way.

As Mr. Melito will testify, a recent GAO study found that SADA and other such initiatives at the State level have led to an outflow of American capital from the targeted companies and Sudan in general. What is more, targeted companies have indeed been prevented from government contracting opportunities.

As we engage in the discussion today, it will matter also to explore what happens when American investors and companies exit such regions and whether less scrupulous players enter and merely make matters worse. While we want to keep up the pressure on American capital to not contribute to supporting governments that would allow atrocities such as the situation in Darfur, there is also no doubt that American companies generally operate with a higher ethical standard and understanding of civic engagement than do many other companies from around the world.

As we discuss and debate the merits of speaking with our wallet and empowering investors to direct their savings away investments that conflict with their values, we must also be mindful to consider what happens in the absence of American capital and companies, what we do to mitigate unintended consequences, and how we can also empower these same companies and investors to re-engage when the situation on the ground improves, looking at it from a wholistic point of view.

And I know that we are going to have some interesting testimony and some enlightening questions to come in this matter. So, again, let me thank the witnesses for being here to testify. I look forward to hearing your testimony and having the opportunity to ask you some questions in a very short while.

And I now will turn it over, I yield to my friend, the ranking member, Mr. Miller, for an opening statement.

Mr. MILLER OF CALIFORNIA. Thank you, Chairman Meeks, for holding this hearing today.

It is interesting to focus on what impact the effectiveness of the Sudan Accountability and Divestment Act of 2007 had on the divestment of assets from Sudan and how that affected the country and government regime.

I thank the witnesses for being here today. It is very nice of you to all show up. I really look forward to the testimony. We have a very brief period of time for you to speak, but I know you have a lot to say, and I hope you will make that concise so we can get as much as we can on the record.

Appropriately, this body is concerned with the actions and policies pursued by the Government of Sudan. The people of Sudan have long suffered through civil war and economic hardship while policies of the government have led to widespread human rights abuses and genocide in the Darfur region.

For this reason, in 2007 this House unanimously passed the Sudan Accountability and Divestment Act—and it is nice to say "unanimous;" when we do something like that on a bipartisan approach, it is very nice to see, because that means what we were dealing with was very important and we were trying to have a significant impact—allowing State and local governments to divest their assets from companies with business operations in Sudan.

While the law is only a few years old, I am interested in hearing the panelists' thoughts on the effectiveness of divestment and whether the policy has any hope of effecting a sustainable change in the region.

Again, Mr. Chairman, thank you for holding this hearing. We have widespread support for this, for what we have done in the past, and I am looking forward to hearing the testimony.

I yield back the balance of my time.

Chairman MEEKS. I now ask unanimous consent to allow Mr. Capuano to have an opening statement.

Mr. MILLER OF CALIFORNIA. We need to debate who is speaking, but I guess we will allow him to go ahead and talk.

Mr. CAPUANO. Thank you, Mr. Chairman.

I just want to be very brief myself. I want to thank the chairman and ranking member for having this meeting, and to make it clear to anybody who might be listening what this is about.

This is not about Sudan, per se. To me, it is not. It is not about civil wars. This is about genocide, clear and simple. There is a difference between a civil war and a genocide. A civil war is when two equal parties have disagreements and bad things happen. A genocide is when an innocent, unarmed population is massacred, particularly, in this case, by its own government. So that is what this is about, to me.

And this particular hearing is to determine how well, if at all, our law has worked, where the holes might be, what we might be able to do to close them up, to see if the action we took is sufficient and if it is having any impact. And I think that is the way it should be.

And I also want to underscore exactly what Mr. Miller said. I have not met anybody in this Congress or anywhere who is in favor of genocide. Every good human being—not Democrat, not Repub-

lican, not even American—every good human being should stand as tall as they can against genocide anywhere in the world, whether it be people next door to us or people we will probably never meet. And that is what this is about. It is about being a human being and being responsible to our fellow human beings.

And, again, I want to thank the chairman and the ranking member.

I particularly want to thank the chairman for the kindest words that have ever been spoken by a Yankees fan to a Red Sox fan. And I just want to return the favor. You have done a great job, Mr. Meeks, and I appreciate very, very much your leadership on this issue and so many other things.

Thank you.

Chairman MEEKS. Now I yield to Mr. Paulsen for an opening statement.

Mr. PAULSEN. Thank you, Mr. Chairman.

I also want to thank the chairman and the ranking member for holding the hearing today and for your leadership on this issue, as well.

Some of my constituents, especially a group of students from Edina High School who have been part of a group called STAND, have been very vocal and concerned about issues surrounding Sudan and genocide in particular. And these students have been active in informing the community on the crisis in Sudan. And I also became a member of, actually, the Sudan Caucus at their urging.

As we approach the 3-year anniversary now of the Sudan divestment legislation being signed into law, I believe it is important for us to examine the impact that the legislation has had on the situation in Sudan. And while the upcoming referendum on southern Sudanese independence will be extremely telling, Sudan is far from where we would like it to be. And I would hope that this hearing can provide some insight on how we can have a more effective policy toward Sudan.

I am also interested in hearing, in particular, the effects the legislation have had over the last 3 years. I was a strong proponent of the Iran divestment legislation that, of course, passed Congress, and I am interested to see how the lessons from Sudan can also be applied to Iran.

I want to thank the witnesses for being here today, and I look forward to your testimony.

Thank you, Mr. Chairman. I yield back.

Chairman MEEKS. I now ask unanimous consent to allow Mr. McGovern to speak for purposes of an opening statement.

Mr. MCGOVERN. I appreciate it. Thank you, Mr. Chairman.

And I want to thank those who are here to testify.

This is an important hearing. So many States, like my home State of Massachusetts, and public and private institutions are reviewing their investment funds and portfolios and looking for ways to ensure that they do not directly or inadvertently invest in companies whose activities and capital help enrich genocidal regimes.

A little over 2 years ago, in September 2008, the then-Congressional Human Rights Caucus, in coordination with the House Sudan Caucus, held a hearing to explore genocide-free investing:

who was successful at managing such investment portfolios; what were the reasons that other investment companies gave for not carrying out this type of scrutiny of their own portfolios; what type of guidance for investment managers might be helpful; and whether obstacles existed in laws or regulations that inhibited firms from making sure that their investment portfolios were genocide-free. Today's hearing more formally builds on that earlier hearing, and I look forward to hearing from the witnesses.

And let me finally say—and I want to associate myself with the remarks of my colleague from Massachusetts, Mr. Capuano. We are talking about genocide here. And what frustrates me is sometimes when you hear people say, that is something for governments to deal with. Yes, it is something for governments to deal with, but it is something for financial institutions and businesses to deal with, as well. Those who knowingly continue to invest in ways that help enrich genocidal regimes are, in essence, complicit. There is no excuse. And if you want to stop genocide, then you have to stop the investments in these genocidal regimes.

I tried to go to Darfur. The Sudanese Government wouldn't give me a visa to go, wouldn't allow me in the country. So I went and I visited the camps, refugee camps, in Chad, along the Sudanese border. It breaks your heart. And the stories that I heard, I can't even describe how horrific they were.

And I sit here frustrated that the world community has not done enough to stop the killing that goes on in places like Sudan, and we need to figure out a way to do it. And we are all in this, not just governments but the private sector, as well. And so I appreciate your being here and look forward to your testimony. Thank you.

Thank you, Mr. Chairman.

Chairman MEEKS. Thank you.

And, with that, I am going to forgo formal introductions, because I want to make sure that we have as much time as we possibly can with the testimony and questions prior to any votes being called.

So I will start with Mr. Thomas Melito, who is a Director of International Affairs and Trade at the United States Government Accountability Office.

Welcome, Mr. Melito.

STATEMENT OF THOMAS MELITO, DIRECTOR, INTERNATIONAL AFFAIRS AND TRADE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. MELITO. Thank you, Mr. Chairman. I am pleased to be here to discuss our work regarding the Sudan Accountability and Divestment Act.

My testimony is based on our report which was released in September. I will focus on three topics: first, actions that U.S. States and investment companies have taken regarding their Sudan-related assets; second, the factors that these entities considered in determining whether to divest; and, third, compliance with the Act's contract prohibition provision.

Regarding the first topic, we found that State fund managers have divested or frozen about $3.5 billion in assets primarily related to Sudan. Thirty-five U.S. States have enacted legislation or

adopted policies affecting their Sudan-related investments. State fund managers we surveyed cited compliance with these laws and policies as their primary reason for divestment.

U.S.-based investment companies have also sold Sudan-related shares. Our analysis shows that the value of U.S. holdings in six key foreign companies fell by nearly 60 percent, or about $8.5 billion, from March 2007 to December 2009. We have found that this decline in Sudan-related holdings cannot be accounted for solely by changes in share price, indicating that these investors, on net, sold shares. Investment companies generally stated that they adjusted their Sudan-related shares for normal business reasons, such as maximizing shareholder value.

Regarding the second topic, we found that U.S. investors generally considered three issues when determining whether to divest from companies tied to Sudan: first, fiduciary responsibility; second, the difficulty in identifying operating companies with ties to Sudan; and, third, the possible effects of divestment on operating companies and the Sudanese people.

In terms of fiduciary responsibility, both State fund managers and private investment companies told us that any decision to divest needs to take into consideration their duty to act solely and prudently in the best interest of the client. However, investment companies that consider themselves socially responsible maintain that divesting from Sudan is consistent with fiduciary responsibility as long as the alternative equities chosen can compete financially.

Regarding the identification of operating companies with ties to Sudan, the Act requires that, before divesting, responsible entities must use credible information to identify which companies have prohibited business operations. State fund managers we surveyed rely heavily on private-sector lists of operating companies with business ties in Sudan. However, our analysis of three available lists indicates that they differ significantly from one another, finding that of the over 250 companies identified on one or more of these lists, only 15 appeared on all three.

Representatives from the organizations that created these lists told us that obtaining information on operating companies with business ties to Sudan is difficult. They also said they would consider an SEC disclosure filing by operating companies to be a particularly reliable source of information. However, Federal securities laws do not require companies specifically to disclose operations in countries designated as state sponsors of terrorism.

The SEC has suggested to companies that any operations they have in state sponsors of terrorism might be considered material and that investors would consider this information important in making investment decisions. However, in their correspondence with the SEC, companies have raised concerns about these instructions.

Regarding the possible effects of divestment, some companies that have ceased operating in Sudan warned of a negative effect on both companies and people. Because of these concerns, some investors and advocacy groups have shifted their focus towards engagement, viewing divestment as a last resort. U.S. States have also endorsed engagement as a viable alternative to divestment, with 19

of the 25 States whose laws or policies require divestment also encouraging or requiring engagement.

Regarding the third topic, we found that the U.S. Government has complied with the Federal contract prohibition provisions of SADA. We did identify one company that received a Federal contract and which also had prohibited business operations in Sudan. However, the contract was administered under simplified acquisition procedures that do not require SADA certification.

In addition, we found that the U.S. Government had awarded more than 700 contracts to affiliates and subsidiaries of companies identified as having prohibited business ties to Sudan. However, SADA does not restrict Federal contracting with these affiliates and subsidiaries if they certify that they do not have prohibited business operations in Sudan.

In our report, we recommended that the SEC consider issuing a rule requiring companies that trade on U.S. exchanges to disclose their business operations related to Sudan as well as possibly other U.S.-designated state sponsors of terrorism.

Mr. Chairman, this concludes my statement.

[The prepared statement of Director Melito can be found on page 69 of the appendix.]

Chairman MEEKS. Thank you very much.

Now, I will go to Mr. Eric Cohen, who is the chairperson of Investors Against Genocide.

Mr. Cohen, thank you for your work.

STATEMENT OF ERIC COHEN, CHAIRPERSON, INVESTORS AGAINST GENOCIDE

Mr. COHEN. Thank you, Chairman Meeks, Ranking Member Miller, and members of the subcommittee. Thank you for the opportunity to discuss the need to empower individual investors to choose investments aligned with their desire to avoid connections to genocide.

For the last 4 years, Investors Against Genocide has been asking financial institutions to better serve shareholders by making an effort to avoid investments in companies that are known to substantially contribute to genocide or crimes against humanity. We term this approach to investment "genocide-free investing."

Our experience highlights two problems. First, although U.S. sanctions against Sudan prevent U.S. companies from operating in Sudan's oil industry, American financial institutions have been major investors in foreign oil companies that help the Government of Sudan fund its campaign of genocide and crimes against humanity in Darfur. For example, in the last few years, well-known financial institutions such as Fidelity, Franklin Templeton, and JP Morgan have each had investments in PetroChina alone worth over $1 billion.

Second, research shows that the vast majority of Americans are opposed to having their hard-earned savings tied to genocide. Nonetheless, because most individuals entrust their savings to mutual funds, millions of Americans are investing unknowingly, inadvertently, and against their will in companies funding genocide.

Addressing this problem will have enduring value not only for the continuing crisis in Sudan but also for humanitarian crises in

the future. Our recommendations are focused on financial institutions becoming more transparent and providing customers with the material information needed to make informed choices.

Our recommendations are based on the following observations.

First, according to market research, 88 percent of Americans don't want to be connected through their savings to egregious human rights abuses. Copies of these studies are included in my written testimony. This preference for genocide-free investing has been further demonstrated in the marketplace by strong support for shareholder proposals addressing genocide-free investing and by the action of States, colleges, and Congress to support divestment from Sudan.

Second, current reporting requirements for funds provide no insight into the funds' human rights policy, depriving investors of material facts needed to identify funds with connections to the worst human rights abuses and preventing investors from making informed choices among investment options. Funds' investment policies on human rights, if they exist, are rarely disclosed or only vaguely referenced. Few investors take on the onerous task of researching fund holdings and determining which companies have ties to genocide so that they can avoid these companies. Instead, most investors simply trust their investment company to make sound choices on their behalf.

Third, financial institutions, in general, resist shareholder requests to restrict their investments, even in the case of genocide—the ultimate crime against humanity.

Fourth, through these investments in foreign companies, financial firms conflict with and weaken the effect of U.S. sanctions that block U.S. companies from doing business while U.S. mutual funds make investments that support their unrestricted foreign competitors. For example, ExxonMobil is precluded from supporting the Government of Sudan by helping in its oil industry, but U.S. mutual funds invest billions of dollars in PetroChina, ExxonMobil's foreign competitor.

Investors Against Genocide has developed specific legislative recommendations, detailed in the written testimony, that would provide useful guidance for financial institutions regarding human rights abuses without limiting their ability to make the investments they choose. Most importantly, the recommendations would make it easier for individual investors to be able to choose to avoid connections to the worst human rights abuses.

Regulations should establish a standard framework for genocide-free investing and require funds to use simple language to disclose whether they have implemented or chosen not to implement the framework.

Regulations should establish transparency and disclosure rules so that small investors and the investment marketplace can more readily understand the policies of funds and investment companies with regard to investments in companies tied to serious human rights abuses.

Regulations should ensure that there is no conflict between fiduciary responsibility and avoiding investments in companies tied to genocide or crimes against humanity. SADA provided a model for the case of Sudan that should be generalized to apply to future hu-

manitarian crises without requiring an act of Congress for each crisis.

It has been over 12 years since the U.S.-imposed sanctions on Sudan and noted serious human rights abuses, and 6 years since Congress declared Darfur a genocide, and yet most financial institutions are still investing in the worst companies funding the genocide. And through the fund offerings of these investment firms, millions of Americans are caught in the web of these problem investments.

Long-term inaction by financial institutions highlights the need for Congress to help empower Americans to make investment choices that are in line with their personal values. If it is important enough for the U.S. Government to impose sanctions related to human rights that prevent American companies from doing business in a country, then the funds in which America saves should have an extra level of due diligence and disclosure regarding their related investments.

Small improvements in disclosure and transparency rules related to human rights abuses can have a big effect. By acting, Congress will help investors be able to choose to avoid connections now and in the future to the worst human rights abuses: genocide and crimes against humanity.

Thank you.

[The prepared statement of Mr. Cohen can be found on page 30 of the appendix.]

Chairman MEEKS. Thank you for your testimony.

We will move on to Mr. Adam Kanzer, who is the managing director and general counsel of Domini Social Investment, LLC.

STATEMENT OF ADAM M. KANZER, ESQ., MANAGING DIRECTOR AND GENERAL COUNSEL, DOMINI SOCIAL INVESTMENTS LLC

Mr. KANZER. Thank you very much. It is an honor to address this committee and to share Domini's perspective on investor and regulatory responses to the genocide in Darfur.

Domini Social Investments is an investment advisor based in New York. We manage funds for individual and institutional mutual fund investors who incorporate social and environmental standards into their investment decisions.

We believe investors have an affirmative obligation to respect human rights and to seek to do no harm. Domini seeks to meet this obligation by implementing a comprehensive set of social and environmental standards to guide our investment decisions.

Addressing genocide is first and foremost a moral imperative, but it is also an appropriate concern for fiduciaries who see their role as exclusively focused on financial concerns. Companies that operate in conflict zones such as Sudan take on a variety of operational, reputational, and legal risks, including risk to their license to operate. There are also systemic socioeconomic risks presented.

Investment policies to address genocide are both warranted and achievable and can influence corporate behavior. Investors have other tools as well, and direct engagement with portfolio holdings is a critically important and effective strategy for addressing corporate human rights performance.

In discussions about the Sudan Accountability and Divestment Act, emphasis has been placed on the word "divestment." I would encourage you, however, to focus on the word "accountability." Investors cannot hold companies accountable without data. I would therefore like to focus today on the need for mandatory corporate human rights disclosure.

We strongly endorse the GAO's recommendation that the SEC require companies to disclose their business operations related to Sudan, and encourage Congress to take the recommendation a few steps further.

Domini utilizes a targeted model of divestment and engagement. A company's connection to Sudan is merely the first step in our analysis and is insufficient to gauge how a company is meeting its human rights obligations. We need information to distinguish between companies that are helping to finance human rights abuses and those that are contributing to solutions. Appropriate disclosure should also highlight key areas for corporate executives to manage and measure.

To foster business respect for human rights, Professor John Ruggie, the U.N. Secretary-General's Special Representative for Business and Human Rights, states that governments should encourage and, where appropriate, require business enterprises to provide adequate communication on their human rights performance. This is an element of the state's duty to protect against human rights abuses, one of the three pillars of the "protect, respect, and remedy" framework adopted by the U.N. Human Rights Council in 2008.

In the United States, however, corporations are not required to disclose their human rights policies, procedures, or performance unless corporate counsel determines that such issues present material risk to the company.

The materiality standard has failed to provide investors with necessary information about corporate human rights performance in any area of the world, including Sudan, for several reasons. First, although materiality is an objective standard, in practice materiality is in the eye of the beholder: the corporation.

Second, the materiality standard is generally interpreted as financial risks to the issuer, not to stakeholders affected by corporate activity. So-called externalities, including human rights abuses, are generally not reported.

And, third, materiality is a broad, ambiguous concept. Companies are often uncertain whether an emerging risk should be disclosed and, if it is material, how it should be disclosed. In Domini's experience, it is rare to find any human rights data in securities filings. Management's incentives, particularly during a global divestment campaign, are to disclose as little as possible. As noted by the GAO, companies have generally resisted the SEC's instructions to disclose and, at times, have refused to disclose information about their ties to Sudan. There appears to be no meaningful sanction for these companies.

The status quo falls short of Professor Ruggie's recommendation that the state encourage or require corporate reporting and provide clarity about these obligations. A mandatory set of tailored indicators—including human rights policies, due diligence procedures,

risks identified, and performance reports—would provide investors with reliable, consistent, comparable, and relevant information to make prudent investment decisions and monitor corporate human rights performance and would further our government's policy goals in Sudan and its duty to protect against human rights abuses.

In addition, if investors are to help avert the next Darfur, we need disclosure requirements that apply to corporations wherever they operate around the world.

Thank you again for this opportunity. You will find additional recommendations and details in my written testimony. I look forward to your questions.

[The prepared statement of Mr. Kanzer can be found on page 57 of the appendix.]

Chairman MEEKS. Thank you very, very much.

And last, but far from least, we have Mr. Richard S. Williamson, who is the former special envoy to Sudan.

STATEMENT OF RICHARD S. WILLIAMSON, FORMER SPECIAL ENVOY TO SUDAN

Mr. WILLIAMSON. Thank you, Chairman Meeks, Congressman Miller, and other members of the subcommittee.

During 30 years in various diplomatic posts, I have been a skeptic of economic sanctions and divestiture campaigns. They are blunt instruments, difficult to quantify. They have collateral damage to innocents. And regimes most often hunker down and endure, giving people a sense of having taken action but not getting the desired results.

Having said that, I strongly support the continued application and strengthening of the Sudan Accountability and Divestment Act. I am not an expert on the intricacies or application of SADA, but I would like to make a few comments about the situation in Sudan which frames this debate.

We are approaching the north-south referendum on January 9th. This follows the longest civil war in Africa, in which over 2 million died and 4 million people were displaced. The CPA, the Comprehensive Peace Agreement, largely negotiated by the United States 6 years ago, put an end to the worst fighting. And there is hopes that the referendum, which will give the south a chance to determine whether to have independence or remain part of Sudan, will be successful.

Having said that, there are many significant areas that have not been adequately addressed, particularly the contested border areas, Abyei, oil revenue, citizenship, freedom of movement, and treaties. Neighbors and China have begun to tilt their behavior, hedge their bets, with the possibility of independence. There are no observers who disagree that the will of the people will be independent.

However, the post-referendum commission, which is dealing with these difficult issues, reflects a pattern used by the Government of Sudan over the last decades of developing an elaborate machinery, followed by extensive discussions, deliberations, delay, eventually for denial. The point is, more will need to be done after the referendum during the 6-month period to independence. And this is

not the time to look at just incentives, but coercive pressure is necessary, tied to concrete steps.

With respect to Darfur, as you well know, and the target of this particular law, we have had one of the worst genocides in the last 30 years. While it is less vigorous today, it continues with low-intensity conflict. And the degree to which there is less violence is not because of a change of heart but because there are fewer targets of opportunity, with over 300,000 people dead and more than 2 million displaced—displaced and nowhere to go, no hope, their lives ruined, their families killed.

Meanwhile, aerial bombings by the Government of Sudan continue. The Qatar negotiations have not been productive. The International Criminal Court has issued arrest warrants for President al-Bashir regarding his actions on Darfur for war crimes, crimes against humanity, and genocide.

Finally, if the north-south does proceed, you should be aware that it may make more difficult progress in Darfur, the Nuba Mountains, and the Blue Nile, as Khartoum is worried that it may lead to further dismemberment.

Bottom line, I think that SADA provides a useful purpose, that coercive steps are required to get action. And having negotiated with all the prominent personalities in Khartoum, in Juba, in Darfur, I believe the only way to make progress is to go beyond what the current envoy has referred to as "gold stars and cookies," i.e., incentives for the north, and to use pressure and tie it to concrete, verifiable steps for progress. That is the only way this genocide in slow motion will end.

Thank you.

[The prepared statement of Mr. Williamson can be found on page 86 of the appendix.]

Chairman MEEKS. Thank you very much for your testimony.

And I do see, for the first time in a long time, and as indicated by just about anybody here, we all are united in that we want the genocide to stop. We have to make sure that we are doing everything that we can to have that done. And one method is the divestment.

What I want to make sure, and I think the reason for you being here is, what else do we need to do?

For example, Mr. Melito, in your testimony you talked about how exchanges between the SEC and companies and even investors at times as to whether or not their activities in the Sudan can be considered material—yet, a lot of those issues just remain unresolved. And the SEC has not given, I think, the real guidance or made the guidance clear here.

I was wondering, are there other comparable examples to using a starting point where the SEC did decide to give a clear guidance as to what might constitute material information or something else that we can then try to push to the SEC so that we don't have these unresolved issues?

Mr. MELITO. Mr. Chairman, I don't believe there is an example. Part of our discussions with SEC is that they have generally left the materiality decision to the operating company to decide, within the broad parameters which were partly established by the Su-

preme Court, which is, if the information is important to investors, it should be disclosed.

That said, in our dialogues with them and in response to our report, they seem quite open to our recommendation. The way it would work, though, is the SEC staff would present it to the Commissioners. Then it is up to the Commissioners to either approve it or not. If it does get approved by the Commission, then it would become a rule, which would have to go through the regulatory process.

Sudan has been designated by the U.S. State Department to be a state sponsor of terrorism. The SEC can then say, in that case and potentially for the other three state sponsors, you, as an operating company, should disclose your activities.

It doesn't mean that everyone would divest, because, as other witnesses have mentioned, it is possible that you are involved purely in humanitarian activities or you are conducting activities that SADA approves of. But putting the information out to the public would then greatly increase the credibility of available information.

Chairman MEEKS. Let me ask another question then, because I am trying to—I would like to make sure that we accomplish our goals. And in your opening statement, you indicated that your data showed that the United States did, in fact, withdraw capital from the Sudan.

I am concerned about other folks coming in or, you know—so we withdraw, but other folks are still coming in, and we are not stopping this genocide because there is no real effect that we are having here, and there may be—we have to do something.

I am wondering whether or not you have any additional data that will show who is stepping in when we are leaving. And maybe there should be—because I am going to look at it from the point that some pressure point may be put on some other individuals also. Because I like more pressure on multilateral sanctions also, as opposed to just the sanctions that we may have from the United States.

Mr. MELITO. Our analysis of both the private sector and the States were on holdings in publicly traded companies. So they sold their shares, and it is unclear who bought them, but it is obvious that the holdings of State governments and private sector investment companies have gone down.

The issue of operating companies is very tricky, though. There are a number of operating companies; some are Western, some are Asian. There are no U.S. companies operating in the 4 sectors because that would be against our sanctions law.

Some of the companies we spoke with try to engage the Government of Sudan to change its behavior; they try to provide humanitarian or social programs. At least one of the companies we spoke with said, as they left Sudan that the company that bought them said they would not continue those activities. So there are some real concerns.

Though divestment is a blunt instrument, but it is having an effect in terms of changing investor behavior. So there are a number of tradeoffs that need to be considered.

Chairman MEEKS. Mr. Cohen, I would like for you to respond to this. It is similar. We need to stop it. And I don't know if we have

sufficient data about who is moving in. You indicated in your testimony how some American companies are investing and others who are still doing business. Do you have any or have you done any research or anything in that regard? Any suggestions?

Mr. COHEN. I agree with Mr. Melito that it would be helpful to have a really good, deep list of who is operating in Sudan.

But one thing we know is who the worst players are, because universally everyone recognizes that the worst players are the oil companies helping the regime. So in our work at Investors Against Genocide, we focused on those oil companies, because they most substantially contribute to the problem. So if you just think about leverage, who is the worst problem, and then it doesn't take you long to focus on the CNPC group, of which PetroChina is a part, because it is the largest partner with the Government of Sudan.

So if you just look at PetroChina and its holdings, what we see is, as recently as October 11th of this year, Franklin Templeton owned over a billion shares of PetroChina. This is worth about $1.3 billion, in that one company alone. So there could be really big voices that could be used if the Franklin Templetons of the world didn't think that it was okay to invest their shareholders' money in the very worst companies.

I use them as an example, but I don't want to use them alone because it is not like they are the only one. It is many financial institutions who are the biggest holders. It was never the colleges and universities, and it was never the States. The biggest holders of the worst companies were financial institutions.

Chairman MEEKS. What about divestment also from other OECD countries?

Mr. COHEN. If you look at U.S. sanctions and included just the biggest, most prominent ones—let's take Burma, Sudan, and Iran, all of which are sanctioned against U.S. companies doing business in the oil industry—there is a heavy correlation of the companies in Sudan being in the other countries, as well.

So pressure on the CNPC group, on Sinopec, on PETRONAS, on ONGC would be helpful not just in Sudan but helpful across the board in the places where the worst human rights abuses are happening and where the United States has already identified sanctions are worth having because of those terrible human rights abuses.

Chairman MEEKS. Thank you.

I am going to turn it over to Mr. Miller. Just saying this from my point of view, because that is tremendously important. I believe Mr. Williamson talked about South Africa. South Africa because successful when everybody—we happened to be one of the last joining in, but when we joined in and everybody else joined in, then we were able to make a difference. And to the degree that we can put the pressure on everybody so that we can stop this creep, if you will, that I think goes on—as we leave out, somebody else comes in, and it keeps this regime in Khartoum up and continues the genocide. We have to focus how we can put the same kind of multilateral pressure on the financial institutions and the other countries so that we can join in, because this is an atrocity to all of us.

Mr. Miller?

Mr. MILLER OF CALIFORNIA. Yes. If you look at the way GSEs bundle their mortgage-backed securities, if they have a nonperforming loan within the bundle, they can remove that and replace it with a performing loan. So the investors are held harmless.

But if you look at the way the private sector did it, which got us in many of the problems we face today, they weren't bundled that way. And the problem you have is the servicer, if they try to replace one of the nonperforming loans, they can be sued by the investors for all the losses associated with the mortgage-backed security.

Do you believe that the investment advisor who would divest in Sudan-related holdings is open to a charge of violating fiduciary responsibility if the reinvestment doesn't yield a rate that competes? Or do you believe that SADA's safe-harbor provision really adds needed protections to that?

Anybody who wants to address that.

Mr. KANZER. One answer, I think, is: It depends. As a mutual fund manager, our fiduciary duty is to comply with our prospectus. Our prospectus says that we apply human rights standards and environmental standards to our holdings. Our investors come to us for that; they expect us to do that. If we fail to do that, we could be subject to a lawsuit for violation of fiduciary duty because we would have a duty to uphold our prospectus.

Mr. MILLER OF CALIFORNIA. But the question was—

Mr. KANZER. Yes?

Mr. MILLER OF CALIFORNIA. I understand, but if you have an investor who invests, and their perspective might be something they are looking for other than human rights but they are looking for an investment they thought was reasonable, and you divested of that when they put their money with you, and the investment you put it into did not compete as it applies to yield, does SADA's safe harbor—I am wondering if we need to address it or if it is not adequate. That is my concern.

Mr. KANZER. Possibly, yes. Possibly. And I think it is a real problem.

Mr. MILLER OF CALIFORNIA. Because that was discussed during the presentations, and that raised a big flag to me of who is going to be liable if we placed a situation in the private sector where investment advisors are open to litigation because of what we have asked them to do and the consequence of good faith on their part has put them in court.

Mr. KANZER. Generally, a trustee is accorded pretty wide discretion in making those kinds of decisions, the business judgment rule. So it would be, I think, difficult to bring a successful lawsuit because you made a couple of decisions that were wrong and impaired the performance of the fund. Look how many funds underperform their benchmarks and don't get sued. I don't think it is a high risk.

But there is a theoretical risk, and I think—

Mr. MILLER OF CALIFORNIA. Mr. Melito's comments are why I brought it up. I think in your statement you said that. And when you said that, that was a concern for me.

Mr. MELITO. It is a theoretical risk, as Mr. Kanzer is saying.

We interviewed a number of investment companies, and all of them said that their decisions were based on market reasons. And they held to that very, very closely.

That said, at the time we issued our report, two companies had applied for safe harbor. Now three companies have in fact applied for safe harbor. So I think there is ambiguity here. But I do think it would be difficult to discern why an investment company sold its shares if it didn't say it was to divest.

Mr. MILLER OF CALIFORNIA. But Mr. Kanzer would have stated that publicly was the reason for the sell. And that is the concern I am having. I am just wondering if we have a loophole out there that needs to be dealt with or addressed or not. And I am not trying to debate you. I am trying to see if we can open this can up and there is something there that we don't want to have in it.

Yes, sir?

Mr. COHEN. Yes, on this point, when we have dealt with financial institutions about this problem, some, like TIAA–CREF, publicly spoke out against the genocide, said they would do more, and divested, and they took advantage of the safe-harbor provision of SADA.

Mr. MILLER OF CALIFORNIA. So it was adequate for them.

Mr. COHEN. Yes. So they used it because it helped them.

When American funds decided to sell 100 percent of their PetroChina, $200 million worth, they did what you heard Mr. Melito describe, which is, "We don't discuss why we do things."

Mr. MILLER OF CALIFORNIA. Okay.

Mr. COHEN. The less said, the better, because they don't want to increase the risks Mr. Kanzer is talking about, about getting sued for whatever reasons.

When we talked to Fidelity, Fidelity at shareholder meetings would say, "We are just following our prospectus," and they want to say as little as possible.

The thing they can do, though, is, if Congress acts and provides an ongoing safe-harbor provision, then that can provide protection for fiduciaries who choose to use it such as TIAA–CREF did.

Mr. MILLER OF CALIFORNIA. Okay.

Mr. COHEN. The second thing that any financial institution could do with a prospectus is to disclose that they cared enough that they would try to avoid investments in companies. And the Fidelity general counsel agreed with us that that was all they would have to do to eliminate any of these theoretical risks.

The problem the lawyers in these financial institutions have is they want to minimize risk so they will do the most conservative thing so they will talk the least about it, they will do the least they can in this direction, even if they—

Mr. MILLER OF CALIFORNIA. So they are being proactive in their approach. They are not being extremely candid on what they are really doing—

Mr. COHEN. Yes. So if we give them reasons and give them tools, then we will have a chance that they will use them.

Mr. MILLER OF CALIFORNIA. Okay. Looking at the continuing unrest in the Sudan, does it contribute to destabilizing nearby African countries, or is there the opposite occurring in some cases?

Mr. WILLIAMSON. I am sorry. Could you repeat that?

Mr. MILLER OF CALIFORNIA. The destabilization that has occurred in Sudan, has that had a negative or positive impact on surrounding countries?

Mr. WILLIAMSON. Oh, no question, it has had a significant bleeding effect, especially in Chad, which has to deal with a rebel group which is given safe harbor in Darfur by the Government of Sudan to make attacks on N'Djamena, the capital of Chad, because they fear that Chad gives safe harbor to the Justice and Equality Movement. So there is a destabilization there.

There is also a bleed of refugees into Egypt. There is some bleed into Ethiopia. There is unquestionably a link between the LRA in southern Sudan, again enhanced by the Government of Khartoum, to cause destabilization down there.

So, of the nine neighbors, all of whom have an interest in Sudan, all of whom play a role, not always constructive, and the potential from Somalia all the way to the Congo of a bleed of destability is real. And the consequences would be catastrophic, both on the war on terror and for the people who live there.

Mr. MILLER OF CALIFORNIA. Has anybody seen any changing of behavior in the Khartoum regime based on what we have done so far?

Mr. WILLIAMSON. Congressman, if I could just comment. And it certainly came out in my discussions and negotiations with the senior level of the Government of Khartoum, or the Government of Sudan, but also in discussions with other regimes.

I think it is safe to say that those who have done the least to earn legitimacy, either because of their action or lack of expression of the will of the people, hold a claim of legitimacy most dearly. And among other consequences, beyond what Chairman Meeks had raised earlier, the financial one, it goes to the issue of legitimacy. That is a heavy burden.

And the divestment act contributes to that questioning and reinforces that the behavior in which they are engaged is unacceptable to the international community and to the United States of America.

Mr. MILLER OF CALIFORNIA. Thank you very much for your candid response and for your testimony. I appreciate it.

Chairman MEEKS. Mr. Maffei?

Mr. MAFFEI. Thank you, Mr. Chairman.

Mr. Williamson, I want to follow up by bringing the upcoming referendum into the discussion. The Sudanese people, or the southern Sudanese people, are going to be able to vote, at least allegedly are going to be able to vote, on whether they want to stay part of the Khartoum Government or break away. And that vote is supposed to be, I believe, in late January?

Mr. WILLIAMSON. January 9th.

Mr. MAFFEI. January 9th, earlier in January.

First, can you give me some sort of sense of your estimate about whether that will actually occur on time, whether it will be a fair process? I have constituents who are Sudanese refugees who are going to be able to vote in that election. They have to come down to Washington to vote, but are going to be able to vote in that referendum.

Can you give us some context about that?

Mr. WILLIAMSON. Sure.

Congressman, as you know, the referendum was part of the Comprehensive Peace Agreement. It gave 6 years for the Government of Sudan to make unity attractive. Those 6 years were not utilized to make unity attractive. The marginalization continued—economically, politically, and otherwise. There is no observer who does not believe that the will of the people will be for independence on the plebiscite.

The mechanics of the plebiscite are difficult; it goes on for 7 days. Many of the mechanics have not been put in place because of dragging by the north. And in a country the size of Texas, with over 50 inches of rain a year, they only have about 40 miles of asphalt road—mostly dirt. So the logistical is consequential, the logistical handicaps. USAID and others are intervening to try to help as best they can.

Second, there is a cluster of important issues, such as citizenship, freedom of movement, treaties, etc., that need to be dealt with. And a very able diplomat, Ambassador Princeton Lyman, is there now, heading those negotiations. Some progress is being made.

There are more difficult, divisive, and consequential issues dealing with contested border areas, the area of Abyei, oil revenue sharing. There, the progress has been nonexistent. There have been two different mechanisms for the contested border area. Both sides agreed to having it arbitrated initially by a border commission, second by the International Board of Arbitration. Both times, the north reneged on its word.

There is going to be a 6-month period after the vote to try to resolve those issues. The south says it should be a firm date; the north has said it should be a soft date. And the senior presidential advisor for security, former head of intelligence for the Government of Sudan, Salah Gosh, just last week said that this issue could be resolved by war.

Mr. MAFFEI. So you do think, though, that the referendum or the plebiscite will occur?

Mr. WILLIAMSON. It will occur. There will be some violence. Whether or not it is credible will be a tough call. If it is in the least bit credible, it will be a vote for independence. And then it is trying to make that a reality.

Mr. MAFFEI. And trying to avoid a civil war, hopefully, the Khartoum Government.

Then my question is, for Mr. Cohen and Mr. Kanzer or anyone else who wants to chime in: After that process, won't it be a lot easier to bring attention to the injustices in Sudan and, therefore, make this situation far more comparable to South Africa, when there was a massive movement to divest in South Africa?

Mr. WILLIAMSON. If I could just make one comment?

Mr. MAFFEI. Yes, of course. Of course. Sorry.

Mr. WILLIAMSON. I do think the risk is going to be even more intense on Darfur, Nuba Mountains, Blue Nile, other areas. And I think if the reaction is an increase in violence, which it could well be, there will be repercussions in the neighborhood and in the international community, which hopefully will further galvanize people on this issue.

Mr. MAFFEI. Yes, even for their own self-interest, people may want to divest.

Anyway, sorry, I am almost out of time, but I think I have a little time for Mr. Cohen and Mr. Kanzer to respond.

Mr. COHEN. Just to add to that, one of the things we know about the Government of Sudan is that it is constantly testing the limit of what it can get away with. And if sanctions are weak, if financial pressures are weak, they will sense it. They are looking to find what the limits are.

So the point that Mr. Williamson made about now is the time to make the pressures be as great as possible so that they believe the pressures will build, build, build, build, build, will have perhaps a chance of success; where, even if the south secedes peacefully, the challenges in the south don't end and the challenges for Darfur may be just beginning.

So the stronger our measures, the better. The sooner we can make them credible and clear, the more powerful.

Mr. MAFFEI. So your answer is, yes, it would help, but we can't wait for that because our best chance of avoiding civil war is to act effectively.

Mr. Kanzer, I believe other Members took a little bit longer, so, please, go ahead.

Mr. KANZER. Sure. If I could just add a couple of quick comments on that.

I think, first, you would have thought that calling this a genocide would have been sufficient to raise awareness. A civil war, a new civil war may be a new opportunity for us to raise—

Mr. MAFFEI. In one where a clear plebiscite, a clear referendum is ignored.

Mr. KANZER. Right. True, but we have that in Burma, as well. And although we are part of a movement to divest from Burma, it hasn't changed the government yet.

So, one, I think that we have a problem here where there are a lot of traditional, mainstream investors that still simply view these issues, regardless of how egregious they are, as off the table for them as investors, which I do consider to be a breach of fiduciary duty, because these things do raise financial issues, they do raise long-term issues, and they do raise systemic risks. And we all know how well our financial system deals with financial risks.

So we need to revisit those issues, and we need to put more pressure on fiduciaries to think more broadly about their obligations to their beneficiaries and what it really, truly means to provide benefits to their beneficiaries.

The other quick thing I just want to note is that we haven't been sitting on the sidelines here. And the Conflict Risk Network, which is a network of investors and other stakeholders—a subscriber base of trillions of dollars—has been—and we have been part of this—has been engaging with telecommunication companies and oil and gas companies on the referenda, to say there has been evidence in the past—the Sudatel apparently shut down cell phone communication in timing with attacks in the south to ensure that people couldn't warn each other that the attacks were coming.

So we have reached out to the telecommunication companies that are operating in Sudan to ensure that they put appropriate meas-

ures in place to make sure that communication is maintained throughout the referendum and that they ensure it is a fair process.

Mr. MAFFEI. Excellent. Thank you very much.

I also just want to quickly note, Mr. Chairman, that Mr. Williamson mentioned Princeton Lyman. I am familiar with his work and we couldn't have a better person there to help observe this very challenging situation. But I want to thank all of the panelists.

Chairman MEEKS. Thank you. Now, we couldn't have a better person here than Mr. Michael Capuano.

Mr. CAPUANO. Thank you, Mr. Chairman. First of all, I want to thank the witnesses for coming today and helping us out.

Mr. Williamson, I presume you know the most about Sudan. Is there anything, any natural resources in Sudan that are unique to Sudan that can't be found anyplace else? I know that oil is the major item, but is there gold that can't be found, some kind of special diamonds or bauxite or anything that can't be found anyplace else?

Mr. WILLIAMSON. Unlike the Eastern Congo that, as you know, with cobalt and other things, has unique mineral assets, the discovered assets in Sudan don't reflect that. However, let me emphasize, when the NCP came to power through a coup in 1989 there were less than $500 million of exports. Today, there is $9.5 billion, principally from oil. Second, that there are great agriculture resources in the south and that is the opportunity for development.

Mr. CAPUANO. I understand. But there is nothing unique that can't be replicated someplace else?

Mr. WILLIAMSON. Not that I am aware of.

Mr. CAPUANO. Are there any manufacturing techniques that can't be replicated anyplace else?

Mr. WILLIAMSON. Not that I am aware of.

Mr. CAPUANO. So that basically any investor who is looking at an investment opportunity—not necessarily helping out Sudan and building Sudan—as an investment opportunity, there is no particular reason to invest in Sudan and not someplace else.

Mr. WILLIAMSON. I am not aware of unique attributes that would compel an investment, no.

Mr. CAPUANO. Fair enough. I was wondering if anybody on the panel—are there any other countries, at the moment, that we know of that have been designated officially by the United States Congress as engaged in committing genocide?

Mr. WILLIAMSON. No.

Mr. CAPUANO. So that we have a country that has no specifically unique attribute to attract investors, that maybe we could say, geez, you can't get it anyplace else. We have the only country in the whole world that the United States Congress has said, "You are committing genocide." Are there any studies anywhere? And maybe, Mr. Kanzer, you might be the best, or maybe Mr. Cohen. Are there any studies anywhere that indicate that investment in Sudan provides a particularly unique or large return on that investment?

Mr. KANZER. Not that I am aware of. I think the problem is that most of the companies that we are speaking about are not Suda-

nese companies. They are global companies that have operations in Sudan. So the problem for a fiduciary that manages a large mutual fund, for example, that wants to track, let's say, a PAC Asia benchmark that has PetroChina as one of its largest holdings and is going to be held to performance against that benchmark, it might be difficult for them to say, I can't hold PetroChina. It is not because of PetroChina's investment involvement in Sudan, it is because it is PetroChina and it is because it is one of the largest components of their benchmark.

Mr. CAPUANO. I understand. But I am trying to make sure that—it has been argued to me that anytime you add social agenda to investment opportunities, it is a slippery slope. Today, it is genocide. Tomorrow, it might be because I don't like left-handed people. And I understand that argument.

And my argument in return has always been, unless you can—I understand the slippery slope argument. I get that, that you can't just have an unlimited list of things we don't like. But I think in this particular case we have a unique situation: a country that is committing genocide, that doesn't offer anything in particular, to my knowledge, doesn't offer a specifically astronomically high return on investment. So there is no real reason for anybody to look me in the eye and say, I really have to invest in Sudan and only in Sudan in order to fulfill my fiduciary responsibility of providing the highest return to my investors. Is that a fair statement to make?

Mr. KANZER. I agree that is a fair statement, yes.

Mr. CAPUANO. And I understand the difficulties in tracking all this. Which brings me to the last point, and this is a point to Mr. Melito in particular. I want to be clear. The SEC, as you understand the law now, currently has the authority, if they choose to exercise it, to require disclosure from various companies about the investments they make in Sudan.

Mr. MELITO. As the law is written, they have the authority to enforce materiality, which is a rather imprecise designation or definition. We were privy to correspondence between the SEC and a few companies where the SEC said, given the divestment campaign and given your large holdings, you may want to include this information on Sudan. But in those cases the company said, we don't think so, because even though the holdings may have been large as a portion of Sudan, they said it was a small portion of their global holdings. That is why our recommendation is to clarify the materiality standard to say: In the cases where it is state-sponsored terrorism, where Sudan is one of them, it is material.

Mr. CAPUANO. And in your judgment, the SEC has the authority currently to make that clarification pursuant to regulation?

Mr. MELITO. The SEC has that authority, but they would have to go through the regulatory process, which includes going through the Commission.

Mr. CAPUANO. So everything is in place. This law, we know, has some loopholes. I understand there are some problems in definition. I understand there are problems defining exactly which company. But according to you, Mr. Melito, there are at least 15 companies that everybody agrees is on this list, and another several

dozen companies that most people will agree. And then you will get the debates. That I understand.

But at least, if nothing else—I don't even know what the 15 companies are, but these 15 companies that everybody agrees fits this materiality, the SEC could require them to disclose their investments.

Mr. MELITO. Yes.

Mr. KANZER. Can I add to that?

Mr. CAPUANO. Sure.

Mr. KANZER. Actually, I believe the SEC actually does have the authority to add a specific item of disclosure that could relate to Sudan or many other items, and they do this all the time. There are many items of disclosure, for example, in a corporate proxy statement related to executive compensation, board composition, etc., etc., that are not material. The SEC simply decided this is material that must be disclosed. If a company has environmental liabilities that exceed $100,000, you are required to disclose it. They decided that was material. Now companies ignore the rule, but it is a rule.

The SEC just decided that you must disclose whether you have a policy on board diversity. If you do, how is it implemented; not because it is material, because they thought it was important. So the SEC can do this, but they need to step outside of the materiality framework. Once you are within the materiality framework we will never, in my view, resolve this problem.

Mr. CAPUANO. I would certainly think that—I would love to see that disclosure statement from any company saying, "We invest in a genocidal country that is also officially sanctioned as a state sponsor of terrorism." And then I would love to see anyone invest in that company.

Mr. MELITO. In our dialogues with the SEC, they see this as possibly consistent with the materiality clause, given SADA, given State laws, given interests of certain investment companies. So part of the materiality clause is what is interesting to an investor. So it can work within or without the materiality clause.

Mr. CAPUANO. Fair enough. And for me, basically what I take out of this hearing, and some of the information that has been given by the GAO is, number one, the law that we have is okay, could use some improvements, but is okay.

Number two is we have some further work to do both on Sudan, and maybe particularly on some other regimes that might attract our attention.

But number three, in particular, the quickest thing that can be done, in my estimation based on this hearing today, is to get the SEC to actually take the next step and to demand disclosure from companies. And again, I am not ready to argue every single company. But there are 15 companies that everybody agrees should be on this list. Then at least start with them to simply allow disclosure, so that if the American public or the people that they invest through want to invest in companies that admittedly invest in a genocidal state sponsor of terrorism, let them explain that to their neighbors.

Mr. COHEN. That certainly would be very powerful and very helpful. I would just add one thing. It is now 7 years and more

since the genocide started. We are lucky this is a slow-motion genocide or we would have lost count of the number of people killed. Something is wrong with our system if we are here, 7 years after the beginning, arguing, trying to discuss, trying to find ways to incent the people who are ignoring the problem.

So one of the things I hope we can accomplish, beginning today, is the kind of rules that you were just describing could be put in place not only for Sudan, but looking forward, so that we never have to sit 7 years after the event and say, now what can we do so that we can have less investment in the very worst places?

Mr. CAPUANO. I agree. Thank you, gentlemen. I thank the Chair for your indulgence.

Chairman MEEKS. Thank you. And the Jets will beat New England. All right.

Now I will call on my friend and colleague, Barbara Lee. With unanimous consent, there is no objection.

Ms. LEE OF CALIFORNIA. Thank you very much, Mr. Chairman. I apologize for being late, so if I ask a couple of questions that are redundant, please forgive me. But as the author of the original legislation that passed the House, and working with Senator Dodd—this was back in 2007—I just want to say thank you for getting us this far. And I want to thank Mr. Melito and the GAO for your report that came out.

I guess we didn't really know exactly how the law would work, but we knew it would be significant not just for the real impact on the regime in Khartoum and its supporters, but also for engaging the American public in a sustained commitment and campaign to invest with a conscience and to encourage others to do the same.

Of course, I come from California and have been very involved in many divestment movements, and it was really a challenge here to get this bill passed for many reasons. And one of the issues I remember when we tried to get the—when we were writing the bill was that the SEC had no information. There was no database, no knowledge of what companies were actually doing business in the Sudan.

And so I wanted to just ask about, and following up with Mr. Capuano, how, and with the GAO's recommendation in terms of a rule, why can't we, why can't the SEC develop a rule that is meaningful so that we have that information, we have the knowledge of who is doing this? I think it could really provide meaningful information to investors. And I don't see why this can't be done.

I know I read just a minute ago the letter that Mr. Cross from the SEC wrote, talking about the overall mix of information about a company and how this could possibly overwhelm investors and possibly obscure other material information. And so I don't see how that is possible. These companies know what they are doing, and they should be able to easily disclose this if the SEC had a rule that would require them to do that.

Mr. MELITO. Congresswoman, the SEC, even though it is so strangely written, is agreeing with the recommendation. But they are agreeing with the great caveat that they don't want the rule to be broad. They want the rule to be narrow. So state sponsors of terrorism, potentially just Sudan, they agree with.

And in the dialogue with SEC staff yesterday, my staff said that they are preparing the package to present to the Commission. So it will go to the Commission. The next step then will be whether or not the Commission agrees with the recommendation.

Ms. LEE OF CALIFORNIA. Okay. Can you define what "broad" versus "narrow" would mean?

Mr. MELITO. In our opinion, the designation of a state sponsor of terrorism is an objective finding by our State Department. State has determined that four countries are state sponsors of terrorism, one of which is Sudan. So we believe that designation then should fall within the materiality clause. We limit our recommendation to Sudan since our report is about Sudan.

But we say you could possibly go beyond and to the other three—Syria, Cuba and Iran—as well and be consistent. So that is how we—there is a process that the State Department goes through. They make a designation, then, that should then be consistent with materiality.

Mr. KANZER. Can I just add a couple of comments to that? First, in terms of the investors being inundated with information, if you look through current securities filings, there is plenty of information in there that investors are not finding particularly useful, and it does take a lot of time to get through it. I would agree with that. We spend most of our time looking elsewhere. Most investors want as much quality information as they can get, and I don't think that there is a risk here, as long as the requirement is carefully drafted.

The other thing that I want to just stress here is that companies face human rights risks all over the world. They are profiting from slavery. They are profiting from child labor. They are profiting from forced labor. They are profiting from horrendous abuses all around the world. We really need to get information about how companies are managing these risks everywhere.

And we can engage with our holdings on sweat-shop issues, on slavery in Brazil, on child labor around the world. Obviously, genocide rises to a different level. But if we are going to avoid the next genocide, if we are going to avoid the next conflict zone, the next set of problems, we need to make sure that the companies we are investing in have the appropriate policies in place, that they understand and respect human rights, that they know what to do when they are confronted with these situations, because sometimes when you engage with a company that is doing business in Sudan, they don't know what you are talking about. And I think the people you talk to are being honest when they say that. They honestly don't know what you are talking about.

And that happens with virtually every human rights issue we raise, the first time we raise it. But after we continue to raise it, they get smarter about it. And I think it can be done. I think the SEC could require companies to disclose, do you have a human rights policy? Where can we find it? How do you implement it? Who is in charge?

And then with respect to specific countries where we know there are egregious human rights risks or where the U.S. Government has designated a state sponsor of terrorism, are you operating there, and what are you doing to mitigate those risks? I think that

is useful information. I don't think it is going to bury investors in useless information.

Ms. LEE OF CALIFORNIA. Mr. Cohen?

Mr. COHEN. Just one caveat to add about SEC disclosure. A lot of the time, when I read discussions about what the SEC is going to do, there is a discussion about what happens on U.S. stock exchanges. However, what we have seen in investigating financial institutions who are investing in the worst companies, helping the regime in Khartoum, is most of their holdings are in Hong Kong.

So, for instance, I know that Franklin Templeton is a 5 percent shareholder in PetroChina not because of any SEC filing, but because of one in Hong Kong. They own zero shares, zero shares of PetroChina in New York. So if a rule is written that sounds really good, but only dealt with New York holdings, it might accomplish nothing; not the intended consequence, because they just wouldn't report on PetroChina. After all, they don't own it in New York.

So for anything that goes forward, it would be really valuable to be keeping in mind the need to be addressing that the financial institutions that we use in America are investing globally, global markets, not just in domestic markets.

Ms. LEE OF CALIFORNIA. Let me mention one thing. I couldn't let this go. In terms of a standard being used, state sponsors of terrorism, how do we—if we use that standard, how do we address countries that are on that list for political reasons, such as Cuba?

Mr. MELITO. Our recommendation is about Sudan, so we say perhaps consider the other state sponsors. We know that there is a process to designate a country as a state sponsor of terrorism. So whether for political reasons, economic reasons or such, there is a process, and we considered that to be an important objective element in this particular materiality clause. If a country is on this list, if a company is working in one of these countries, it could potentially be consistent with U.S. interests. They could be conducting activities in a humanitarian way. So their disclosure wouldn't necessarily be brief. It could disclose the activities, and then it would be for the investors to decide whether or not these are activities that they want to support.

Ms. LEE OF CALIFORNIA. Mr. Cohen?

Mr. COHEN. I would register a concern about using the state sponsor of terror list. Just recently, we heard the news that the United States Government might trade listing Sudan as a state sponsor of terror for having free and fair and relatively safe recognized elections in south Sudan, not a determination that they weren't anymore, but a political judgment as a chip to trade away. So that list is very, very political, and I would worry about that.

In contrast, the sanctions list has a hand, not just from the Administration with Executive Orders, but also from Congress, so that there is some balance there. So that politics may still come into play, but there are more hands getting to have a say in what are the really terrible things that are happening in the world. So I would encourage a close look in that tie-in to sanctions.

Ms. LEE OF CALIFORNIA. Mr. Chairman, just one more question. When we were writing the legislation, we had some concerns about the impact on the south. Of course we were naturally targeting the Khartoum regime as it relates to Darfur. How has this impacted

the south, if it has, or not impacted the south? We were very careful to try to carve out that type of exemption.

Mr. WILLIAMSON. Unfortunately, the south still remains enormously underdeveloped. As I mentioned earlier, in an area the size of Texas, it has about 40 kilometers of asphalt roads, has a rainy season that gives it over 50 inches of rain a year. But to the best of my knowledge, the Divestment Act hasn't had a negative impact. And with respect to sanctions, there have been waivers given.

I would suggest the issue with respect to the lack of development in the south has to go with both the donor community and trying to hold together an area which was divided into various competing militias that have fragmented since the CPA was signed.

But bottom line, Madam Congresswoman, I do not think, at least in my experience, that the Divestment Act has been a significant burden for the development that is necessary, and hopefully the United States will redistribute its substantial development assistance in the south from just humanitarian to actual economic development, good governance, etc.

Ms. LEE OF CALIFORNIA. Thank you very much. Thank you, Mr. Chairman. And thank you all very much, because not only is this important, and I think all of us have been to Darfur and witnessed the tremendous tragedy that has and continues to take place there. But it is an effort to try to stop the genocide, but also trying to figure out ways to prevent future genocides. And so your role in that and this oversight hearing has been very important. And so I just want to thank you for following up and responding.

Chairman MEEKS. Thank you. And I also want to thank you. This has been a good hearing, and one of which I think that all of you who have testified, I could just look back and see the facial expressions and the acknowledgements of one another and listening to the points that each other was making, which leads to the focus of trying to make sure we stop the genocide. And going further than that, we make sure that we don't have an opportunity where so much time goes by, where so many people die, and we are still trying to figure out what needs to be done; that we need to stop this and put something in place so that should this ever arise again, we know how to stop it before thousands and thousands of lives are lost.

I heard that sentiment from all four of you and I thank you for that, because that is really what this is really about. It is about preserving human life and making sure that this never happens again. But if it does, it shouldn't take, 7, 8, 9, 10 years to figure out how do we stop it and put the pressures on the government to stop this from happening. Because those are lives that are gone. Those are people, those are generations of young kids who will never have a chance to enjoy this place that we call Earth.

So your testimony and your work and your commitment is something that is much, much appreciated. And again, I thank you very much for being here today.

Let me note that some members may have additional questions for the witnesses which they may wish to submit in writing. Without objection, the hearing record will remain open for 30 days for members to submit written questions to these witnesses and to place their responses in the record.

With that, this hearing is now adjourned.

[Whereupon, at 3:26 p.m., the hearing was adjourned.]

A P P E N D I X

November 30, 2010

Investors Against Genocide

Draw the line at investing in genocide

Testimony
November 30, 2010

Eric Cohen
Chairperson, Investors Against Genocide

Before the House Financial Services Committee
Subcommittee on International Monetary Policy and Trade

"Investments Tied to Genocide: Sudan Divestment and Beyond"

Chairman Meeks, Ranking Member Miller and members of the subcommittee, thank you for the opportunity to discuss the need for regulations to empower individual investors to choose investments aligned with their desire to avoid connections to genocide.

For the last four years, Investors Against Genocide has been advocating for shareholders and asking financial institutions to better serve shareholders by making an effort to avoid investments in companies that are known to substantially contribute to genocide or crimes against humanity; we term this approach to investment "genocide-free investing." Our experience highlights two problems.

First, although U.S. sanctions against Sudan prevent U.S. companies from operating in Sudan's oil industry, American financial institutions have been major investors in foreign oil companies that help the repressive government of Sudan fund its campaign of genocide and crimes against humanity in Darfur. For example, just the last few years, well-known financial institutions such as Fidelity, Franklin Templeton, and JP Morgan have each had investments in PetroChina alone worth over one billion dollars.

Second, research shows that the vast majority of Americans are opposed to having their hard-earned savings tied to genocide. Nonetheless, because most individuals entrust their savings to mutual funds, millions of Americans are investing, unknowingly, inadvertently, and against their will, in companies funding genocide.

We are asking Congress to address these problems, building on three years of experience with the Sudan Accountability and Divestment Act (SADA). Addressing these problems will have enduring value, not only for the continuing crisis in Sudan, but also for humanitarian crises in the future.

Our recommendations are based on the realization that financial institutions should be more transparent and provide customers with the material information needed to make informed choices. As President Obama recently said, "The strongest foundation for human progress lies in open economies, open societies, and open governments."

We suggest the following observations as a basis for addressing these problems:

First, according to market research 88% of Americans don't want to be connected through their savings to egregious human rights abuses. Copies of the studies are included in the written

testimony. This preference for genocide-free investing has been further demonstrated in the marketplace by strong support for shareholder proposals addressing genocide-free investing, and by the action of states, colleges, and Congress to support divestment from Sudan.

Second, current reporting requirements for funds provide no insight into the fund's human rights policy, depriving investors of material facts needed to identify funds with connections to the worst human rights abuses and preventing investors from making informed choices among investment options. Funds' investment policies on human rights, if they exist, are rarely disclosed or only vaguely referenced. Few investors take on the onerous task of researching fund holdings and determining which companies have ties to genocide or crimes against humanity, so that they can avoid those companies. Instead, most investors simply trust their investment company to make sound choices on their behalf.

Third, most financial institutions resist shareholder requests to restrict their investments, even in the case of genocide, the ultimate crime against humanity. Mutual fund companies like Fidelity, Vanguard, and Franklin Templeton are among the largest companies that have failed to take action to avoid investments with ties to genocide.

Fourth, through these investments in foreign companies, financial firms conflict with and weaken the effect of U.S. economic sanctions that block U.S. companies from doing business, while U.S. mutual funds make investments that support their unrestricted, foreign competitors. For example, ExxonMobil is precluded from supporting the government of Sudan by helping to develop its oil industry, but U.S. mutual funds invest billions of dollars in PetroChina, ExxonMobil's foreign competitor.

Investors Against Genocide has developed specific legislative recommendations, detailed in the written testimony, that would provide useful guidance for financial institutions regarding human rights abuses, without limiting their ability to make the investments they choose. Most importantly, the recommendations would make it much easier for individual investors to be able to choose to avoid connections to the worst human rights abuses.

Regulations should:

- Establish a standard framework for "genocide-free investing" and require funds to use simple language to disclose whether they have implemented or chosen not to implement the framework.
- Establish transparency and disclosure rules so that small investors and the investment marketplace can more readily understand the policies of funds and investment companies with regard to investments in companies tied to serious human rights abuses.
- Ensure there is no conflict between fiduciary responsibility and avoiding investments in companies tied to genocide and crimes against humanity. SADA provided a model for the case of Sudan that should be generalized to apply to future humanitarian crises, without requiring an act of Congress for each crisis.

It has been over 12 years since the U.S. imposed sanctions on Sudan and noted serious human rights abuses, seven years since the Darfur genocide began, six years since Congress declared it a genocide, and five years since the movement for targeted divestment from Sudan began Yet most financial institutions are still investing in the worst companies funding the genocide, and, through the fund offerings of these investment firms, millions of Americans are caught in the web of these problem investments, almost always unknowingly and without the possibility of choosing.

Long-term inaction by financial institutions highlights the need for Congress to help empower Americans to make investment choices that are in line with their personal values. If it is important enough for the United States government to impose sanctions related to human rights abuses that prevent American companies from doing business in a country, then the funds in which America saves should have an extra level of due diligence and disclosure regarding their related investments. Small improvements in disclosure and transparency rules related to the worst human rights abuses can have a big effect.

By acting, Congress will help investors to be able to choose to avoid connections, now and in the future, to the worst human rights abuses — genocide and crimes against humanity.

Legislative recommendations for a Genocide-free Investment Act

1. Within two years, each fund's board must decide whether or not to be genocide-free. A fund will be considered genocide-free if it creates and applies a policy that:
   - Will restrict investments in countries targeted by U.S. sanctions if: 1) the sanctions prevent U.S. companies from doing business or making investments in those countries, AND 2) the sanctions are due at least in part to genocide, crimes against humanity, or serious human rights violations.
   - Will define "problem companies" to include at least those which: 1) operate within countries meeting the above criteria, AND 2) substantially contribute to genocide, crimes against humanity, or serious human rights violations in these countries. Subsidiaries, parent companies, and related entities of problem companies are included in this category.
   - Will clearly state a commitment to divesting from such problem companies and avoiding the future acquisition of shares in such problem companies.
   - May include provisions for "engagement" with problem companies, since engagement may be a key business tool for an investment company. The policy may allow for a time-limited public engagement period, not to exceed one year, to allow time for the problem to be resolved.
2. Transparency and disclosure requirements:
   - The prospectus and all periodic filings for each fund will answer the following "Yes / No" question: Does the fund have a human rights policy to guide its investments? Funds that answer "Yes" will then provide a paragraph clearly explaining the human rights policy and how it is being implemented.
   - The prospectus and all periodic filings for each fund will answer the following "Yes / No" question: Does this fund seek to avoid investments in companies that are known to substantially contribute to genocide, crimes against humanity, or serious human rights violations? Funds that answer "Yes" will then provide a paragraph clearly explaining their genocide-free investing policy and how it is being implemented.
   - Periodic filings for funds that have genocide-free investment policies will make public the names of problem companies they have identified. Such filings will also identify the names and timeframes of any companies for which engagement is underway.

- Investment companies will produce quarterly consolidated reports showing their beneficial interest in companies held by all their funds, partnerships, subsidiaries, and other related companies. The reports will include company names, shares, and dollar holdings. Note that investment companies currently produce a very similar report with the quarterly 13F filing to the SEC, but that report only reflects holdings on the U.S. stock exchanges. This existing requirement should be expanded to include the global markets on which funds and investment companies are buying stock.
- For each of the three years following enactment of this Act and from time to time thereafter, as deemed appropriate, the Consumer Financial Protection Bureau will publish a review of problem companies identified by funds. The report will contrast the funds' selections and highlight the degree to which there is a consensus among funds regarding the list of problem companies.

3. The provisions of the Sudan Accountability and Divestment Act (SADA) will be generalized to apply to future genocides and crimes against humanity without waiting for separate congressional action. These provisions include:
   - The right for state and local governments to avoid or divest from companies substantially contributing to genocide, crimes against humanity, or serious human rights violations
   - A safe harbor for changes of investment policies by asset managers to avoid or divest from companies substantially contributing to genocide, crimes against humanity, or serious human rights violations
   - The sense of Congress regarding certain ERISA plan investments, as in SADA.
4. These provisions will apply to the following types of funds: mutual funds, exchange traded funds, pension funds, unit investment trusts, hedge funds, and closed end funds.

Statement of support for increased transparency and disclosure for genocide-free investing

Statement of support

We support efforts to pass legislation that will increase transparency and disclosure by financial firms regarding investments in companies that substantially contribute to genocide or crimes against humanity. We hope legislation will empower the vast majority of Americans, who do not want their hard-earned savings connected to egregious human rights abuses, to make informed decisions and to avoid such connections should they choose to do so.

Signatories

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Armenian Assembly of America
Bryan Ardouny
Executive Director

Armenian National Committee of America
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East Timor and Indonesia Action Network
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Mia Farrow
Actor and Sudan Advocate

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Genocide No More--Save Darfur
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Questions and answers about the proposed transparency and disclosure rules

1. What problem would be addressed by new regulations?

   Despite the Sudan Accountability and Divestment Act (SADA) and U.S. sanctions against Sudan, American financial institutions are major investors in foreign oil companies that help the repressive government of Sudan fund its campaign of genocide and crimes against humanity in Darfur. New regulations would ensure that Americans aren't investing unknowingly, inadvertently, and against their will, in companies funding genocide.

2. Why use U.S. sanctions that are related to human rights abuses as the trigger for increased disclosure?

   The U.S. Congress and the President have a record of recognizing and escalating attention to human rights abuses by applying sanctions. If the U.S. government decides that it is important enough to impose sanctions, related to human rights abuses, that prevent American companies from doing business in a country, then American mutual funds should have an extra level of due diligence and disclosure regarding investments in foreign competitors seeking the same business. This approach is ongoing and requires no new Federal or State bureaucracy to administer.

3. What are examples of countries that have U.S. sanctions related to human rights abuses, that prevent U.S. companies from doing business in that country?

   Sudan, Myanmar (Burma) and Iran are the three most prominent examples of countries that would be targeted for closer scrutiny by the proposed regulation. For instance, U.S. sanctions recognizing human rights abuses in Sudan and in Burma have been in place since 1997.

4. What are some examples of problem companies tied to genocide?

   Very often, oil companies are the leading problem companies. In Sudan, the CNPC group (including PetroChina), the Sinopec group, Petronas and ONGC are internationally recognized as providing the government of Sudan with the funding needed to support the genocide in Darfur. The government of Sudan has used 70% of its oil revenue to provide arms and funding for the genocide. Some of these same problem companies are also active in Burma and Iran.

5. What is wrong with the existing disclosure rules?

   Individual investors who attempt to make genocide-free investments discover that it is a daunting task to determine which companies have ties to genocide. Reports of a fund's portfolio holdings are months out of date when published and individuals have no assurance that their mutual fund managers will not invest in the problem companies in the future. In the case of 401k investments, individuals are limited by the number of funds offered in their 401k plan and may have no good options. Lastly, investors who would like to choose low-priced index funds are severely limited, since the international and emerging markets indices often include even the worst offending companies.

6. What other problems prevent Americans from avoiding investments in companies tied to genocide and crimes against humanity?

   Few people have the time, skills, or inclination to do extensive research on their savings and investments. They trust the mutual fund companies to make their investment decisions on their behalf. A 2010 study by KRC Research found that only 29% of Americans were aware that their savings are invested in companies that help to fund genocide. When they become aware, this same research indicates that 88% (95% of those earning $50,000 or more) would like their mutual funds to be genocide-free. However, it is very difficult to for them to find genocide-free funds because most mainstream mutual funds have no policy preventing these investments.

7. How common is the problem of inadvertently having investments tied to genocide?

   Despite having taken strong positions on the Darfur genocide, in 2008 Barack Obama and John McCain both found they had PetroChina stock in their personal portfolios. This illustrates how difficult it is for even sophisticated investors to become genocide-free.

8. Why leave it up to the Board of Trustees of the fund to decide whether or not to invest in problem companies?

   State laws defining fiduciary responsibilities frequently require that the power to manage a fund's affairs resides exclusively with the Board of Trustees. If the Federal government or the shareholders attempted to dictate the specific investments for a fund, it would conflict with these state laws.

9. Since funds aren't in the business of human rights analysis, how can they get the expertise needed to make judgments about problem companies?

   Once targeted countries are identified according to the U.S. sanctions list, the funds still have the task of identifying companies that are "substantially contributing to genocide or crimes against humanity" in these countries. Likely, most investment companies would hire a firm with the requisite expertise to provide the research as a service for their funds. There are several firms that already provide these services such as KLD Research & Analytics, Inc. and the Conflict Risk Network (formerly the Sudan Divestment Task Force).

10. Isn't the market taking care of this problem already? TIAA-CREF and American Funds have already taken action to avoid investments with ties to genocide?

    Some large mutual funds companies have taken such action, but most mainstream mutual funds continue to resist calls by shareholders to divest from the worst problem companies. The positive actions by American Funds and TIAA-CREF stand in stark contrast to Vanguard, Fidelity, and Franklin Templeton for taking no action and continuing to hold large investments in companies, such as PetroChina, linked to an ongoing genocide. If Congress requires disclosure and transparency, then investment consumers will have much clearer choices and fund companies are more likely to be responsive to their shareholders wishes. Further, the crisis in Darfur is already seven years old, but companies are only now beginning to react. A framework for policy and regulations will encourage a quicker and more effective response for future crises.

11. Why is genocide-free investing important?

    There are three reasons to support genocide-free investing: 1) Americans do not want to be connected to the world's worst human rights abuses. When they learn the facts, people are typically horrified to discover that their savings are being invested to support such atrocities by the company they trusted to manage their money. 2) Divestment can have real impact on governments and make a difference for people in affected countries. For example in Darfur, since investment companies are the largest public investors in the worst offending oil companies helping to fund the genocide in Darfur, and since the government of Sudan relies on those companies for expertise, capital investment, and revenue from oil sales, American investors can have a powerful voice and be one part of an effective set of pressures. 3) In the face of genocide, each person must take the actions that they can to help. Although there may be few actions that individuals can take, one area which each person can control is how their money is invested, and how the organizations with which they affiliate invest their money.

12. Will beneficial activity such as humanitarian relief be negatively affected?

    The proposed language calls for addressing companies that "substantially contribute to genocide, crimes against humanity, or serious human rights violations". This language is in line with the idea of "targeted divestment." It is intended to exclude minor players and companies engaging in humanitarian activities. While there may be disagreement about some of the companies that are minor players in a country with serious human rights abuses, there is broad agreement about the worst offenders that support the regime but do not provide benefits to the population at large.

13. Why is it important to test for "problem companies" using the standard of "substantially contributing" to genocide, crimes against humanity or serious human rights violations?

    Using the standard of "substantially contributing" helps minimize unintended side-effects. This approach is in line with "targeted divestment" from Sudan, for example, by focusing the policy on the most significant problem companies supporting the regime that is responsible for the human rights abuses, and by trying not to affect companies that are doing good in the country by providing goods and services to citizens or humanitarian relief to the needy.

14. Beyond legislation, what is the role of the Federal government in genocide-free investing?

    The legislation provides a very narrow and low cost role for the government. Funds would operate within the framework of any legislation adopted by Congress. Beyond identifying countries subject to sanctions, a role already played by the President and Congress, the only responsibility for the government envisioned by the legislation is to produce periodic consolidations of the public filings made by the mutual funds under the regulations. This reporting will enable investors to compare and contrast the actions taken by the major mutual funds and will be a strong inducement for the funds to clearly implement their human rights policies.

15. What facts support the statement that American investors are overwhelmingly opposed to having their savings tied to genocide?

    Public awareness of the problem of investing in companies that substantially contribute to genocide is growing. Thirty states have divested from Sudan, as have over 60 colleges and universities. Congress unanimously passed the Sudan Accountability and Divestment Act in December 2007. Shareholder proposals for genocide-free investing have appeared on the proxy ballots of large mutual funds resulting in many millions of shareholders being exposed to the issue and voting in favor of their fund avoiding investments in companies that "substantially contribute to genocide or crimes against humanity." Further, the national and financial media have written extensively on the topic, thereby helping to build awareness of the problem.

16. How will the requirements be enforced?

    We believe that the mutual funds will comply with the legislation if enacted. In our experience, internal lawyers typically advise mutual fund managers support requests to divest out of concern for a theoretical violation of fiduciary responsibility and/or potential investor lawsuits. These regulations will change the dynamic so these same lawyers will be advising their clients to comply with the letter and spirit of the law in order to avoid risk. This change will provide the needed incentive for most firms to faithfully implement the requirements of the law.

Research and leading indicators of strong public support for genocide-free investing

Most Americans are unaware that the financial institutions they trust may invest their family savings and pensions in companies that help to fund genocide. Once they become aware, Americans are overwhelmingly opposed to being financially connected to genocide. Details from two public opinion surveys that document overwhelming support by the American public for genocide-free investing are included below.

- KRC Research results from the 2010 study
- KRC Research results from the 2007 study

Some highlights from the two public opinion surveys:

- 84% of respondents say they will withdraw their investments from American companies that do business with companies that directly or indirectly support genocide.
- 88% would like their mutual funds to be genocide-free.
- 95% of those earning $50,000 or more would like their mutual funds to be genocide-free.
- 82% say they would advise friends, family and co-workers against buying products or services, or investing in American companies that invest in a foreign company that directly or indirectly provides revenue to a government that perpetrates genocide.

Some leading indicators of broad-based support for genocide-free investing include:

- 30 states have divested from Sudan, as have over 60 colleges and universities, beginning in 2005.[1]
- Congress unanimously passed the Sudan Accountability and Divestment Act in December 2007.[2]
- During the presidential election, candidates from both parties[3] divested from mutual funds holding stock in problem companies supporting the Government of Sudan, including President Obama[4] and Senator McCain. [5]
- Shareholder proposals for genocide-free investing have appeared on the proxy ballots of large mutual funds, including Fidelity, Vanguard, and American Funds, beginning in 2007, resulting in many millions of shareholders being exposed to the issue and voting in favor of their fund avoiding investments in companies that "substantially contribute to genocide or crimes against humanity."[6]

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1 "Who has divested" webpage accessed August 4, 2010 - http://investorsagainstgenocide.net/page1004

2 http://www.govtrack.us/congress/bill.xpd?bill=s110-2271

3 "Giuliani, Edwards Discover Darfur-Related Holdings" on Fox News, May 18, 2007 - http://www.foxnews.com/story/0,2933,273787,00.html

4 "Obama Sells Investment With Link to Sudan" in the Wall Street Journal, May 17, 2007 - http://blogs.wsj.com/washwire/2007/05/16/obama-sells-investment-with-link-to-sudan/

5 "McCain Urges Sudan Divestment -- After Wife Dumps Her Holdings" on ABC News, May 15, 2008 - http://abcnews.go.com/Blotter/story?id=4861297

6 "Mutual funds with shareholder proposals for genocide-free investing" webpage accessed May 31, 2010 - http://investorsagainstgenocide.net/shareholderhelp

KRC Research results from the 2010 study

KRC RESEARCH

Following are the results of a nationally representative telephone survey of 1,016 adults, ages 18 and over, conducted April 1-5, 2010. The margin of error for the overall study is +/- 3.1% at the 95% confidence level and is higher for subgroups. The data was weighted by demographic variables to ensure the sample accurately reflects the U.S. adult population. Detailed results are appended at the end of this memo.

KEY FINDINGS

- ✓ Awareness that mutual funds invest in companies that fund genocide is limited. The vast majority of Americans are unaware that mutual funds invest in foreign firms that finance genocide overseas.
- ✓ That said, significant majorities find this practice unacceptable and express support for new regulations that would require greater transparency for mutual funds when investing in companies that finance genocide.
    - This trend is particularly strong among affluent Americans and those who own mutual funds.
- ✓ Americans by wide margins agree that their funds should be genocide free.
    - This trend is near universal among those earning $50,000 or more. In fact, this income group is significantly more likely than those earning less than $50,000 to agree that their funds should be genocide free (95% vs. 84%).
- ✓ The overwhelming majority of Americans also strongly believe that Board of Directors and shareholders have a role in limiting their mutual funds from financing companies that support genocide. Solid majorities say they agree that:
    - Mutual funds should be required to get permission from their shareholders before investing in companies that fund genocide; and,
    - Board of Directors of fund companies should be required to approve any investments in foreign companies that fund genocide.

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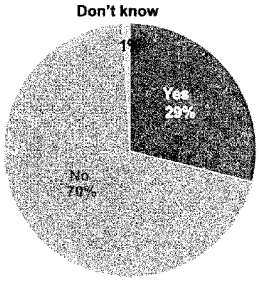
KRC Research results from the 2010 study

DETAILED FINDINGS

Awareness that mutual funds invest in foreign companies that fund genocide is remarkably low. The vast majority of Americans are unaware that their savings may be invested in foreign companies that finance genocides overseas.

- ✓ Seven in ten consumers do not know that some American mutual funds invest in foreign companies that fund genocide in places like Sudan.
- ✓ Those most likely to be unaware are:
  - Women compared to men (75% vs. 65%).
  - Those with less than a college education compared to those with a college degree (74% vs. 61%).
  - Those earning less than $50,000 compared to those earning more (77% vs. 67%).
  - Those who don't own mutual funds (74% vs. 66%).

Before today, were you aware that some American mutual funds invest their customers' savings in foreign companies that fund genocide, in places like Sudan where hundreds of thousands of people have died?



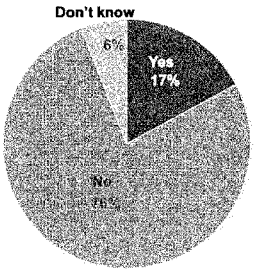
Lack of disclosure by mutual funds is unacceptable. The overwhelming majority of Americans reject the disclosure practices of fund companies around genocide.

- ✓ Three in four (76%) report that it is unacceptable that mutual funds are not required to disclose to the public or shareholders that they invest in foreign companies that fund genocide.

KRC Research results from the 2010 study

- ✓ This trend is consistent across all demographic groups and geographies.

And do you find it acceptable that mutual funds are NOT currently required to disclose to the public or shareholders that they invest in foreign companies that fund genocide?

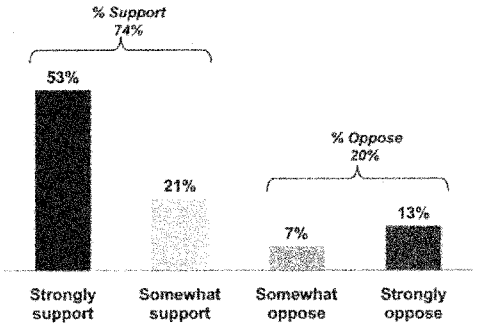


Americans would support greater transparency. Support is overwhelmingly strong for new regulations that would require mutual fund companies to be more transparent in their investments.

- ✓ When respondents were asked if they would support or oppose new regulations that would require greater disclosure by mutual funds of their investment in companies that support genocide, nearly three in four Americans (74%) say they would support such regulations with one in two (53%) expressing strong support.
- ✓ Support for new regulations that would require greater disclosure is universal among demographic subgroups. That said, support is more prevalent among:
  - o Those who own mutual funds (78% vs. 70%).
  - o Those earning $50,000 or more (83% vs. 70%).
  - o College graduates (79%) compared to those who have less than a college education (71%).
- ✓ Only one in five (20%) oppose new regulations that would require mutual funds to disclose that they invest in foreign companies that fund genocide.

KRC Research results from the 2010 study

And would you strongly support, somewhat support, somewhat oppose, or strongly oppose new regulations that would require mutual funds to disclose that they invest in foreign companies that fund genocide?



Genocide-free investment is the preference for the vast majority of Americans.

- ✓ The overwhelming majority of Americans would like their funds to be genocide-free. When respondents were read the following statement: "I would like my mutual funds to be genocide-free," nearly nine in ten (88%) say they agree with the statement and seven in ten (72%) completely agree.
    - Those who earn $50,000 or more are significantly more likely than those who earn less than $50,000 to agree with this statement (95% vs. 84%).

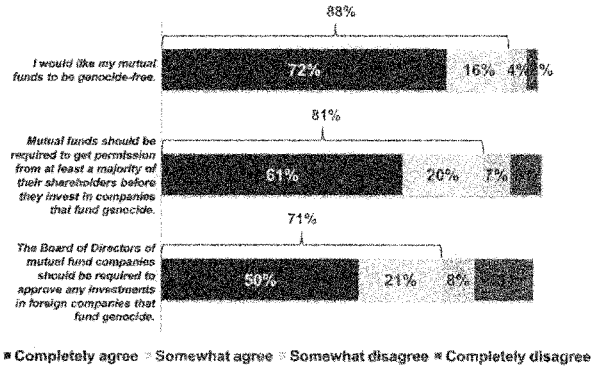
Significant majorities believe Board of Directors and shareholders of mutual fund companies should have a say on whether mutual funds invest in companies that finance genocide.

- ✓ Eight in ten (81%) agree that before investing in companies that finance genocide, mutual fund companies should get permission from their shareholders.
    - This trend is stronger among women where nearly nine in ten (86%) agree with the statement compared to nearly eight in ten men (77%).
- ✓ Seven in ten (71%) agree that Board of Directors of mutual funds should approve any investments in companies that fund genocide. This trend is consistent across geographies and demographic subgroups, but is more prevalent among:
    - Mutual fund owners than non-owners (75% vs. 67%).
    - Those earning more than $50,000 than less (78% vs. 68%).

KRC Research results from the 2010 study

- College grads than those with less than a college education (76% vs. 68%).

Do you completely agree, somewhat agree, somewhat disagree, or completely disagree?



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KRC Research results from the 2010 study

INVESTORS AGAINST GENOCIDE OMNIBUS
TOPLINE RESULTS
April 8, 2010

Random national sample:	1,016 adults, 18 years of age and older
Dates of interviews:	April 1 – 5, 2010
Margin of error:	+/- 3.1% at the 95% confidence level
Weights:	Data was weighted by demographic variables to ensure the sample accurately reflects the U.S. adult population
Note:	Numbers may not total 100% due to rounding

1. Before today, were you aware that some American mutual funds invest their customers' savings in foreign companies that fund genocide, in places like Sudan where hundreds of thousands of people have died?

	Total
Yes	29%
No	70%
Don't know/refused	1%

2. And do you find it acceptable that mutual funds are NOT currently required to disclose to the public or shareholders that they invest in foreign companies that fund genocide?

	Total
Yes	17%
No	76%
Don't know/refused	6%

KRC Research results from the 2010 study

3. And would you strongly support, somewhat support, somewhat oppose, or strongly oppose new regulations that would require mutual funds to disclose that they invest in foreign companies that fund genocide?

	Total
Strongly support	53%
Somewhat support	21%
Somewhat oppose	7%
Strongly oppose	13%
Don't know/refused	6%
NET: Support	**74%**
NET: Oppose	**20%**

KRC Research results from the 2010 study

Next, I am going to read you a few statements, and I'd like to know whether you completely agree, somewhat agree, somewhat disagree, or completely disagree with each.

4. The Board of Directors of mutual fund companies should be required to approve any investments in foreign companies that fund genocide.

	Total
Completely agree	50%
Somewhat agree	21%
Somewhat disagree	8%
Completely disagree	15%
Don't know/refused	6%
NET: Agree	**71%**
NET: Disagree	**23%**

5. Mutual funds should be required to get permission from at least a majority of their shareholders before they invest in companies that fund genocide.

	Total
Completely agree	61%
Somewhat agree	20%
Somewhat disagree	7%
Completely disagree	8%
Don't know/refused	3%
NET: Agree	**81%**
NET: Disagree	**15%**

6. I would like my mutual funds to be genocide-free.

	Total
Completely agree	72%
Somewhat agree	16%
Somewhat disagree	4%
Completely disagree	3%
Don't know/refused	5%
NET: Agree	**88%**
NET: Disagree	**7%**

KRC Research results from the 2010 study

7. Do you currently own any mutual funds either as part of your retirement savings plan or as part of your other investments?

	Total
Yes	46%
No	52%
Don't know/refused	3%

KRC Research results from the 2007 study

KRC RESEARCH

Following are the results of a nationally representative telephone survey of 1,022 adults, ages 18 and over, conducted April 12-15, 2007. The margin of error for the overall study is +/- 3.1% at the 95% confidence level and is higher for subgroups. The data was weighted by demographic variables to ensure the sample accurately reflects the U.S. adult population. Detailed results are appended at the end of this memo.

KEY FINDINGS

- ✓ When it comes to responding to genocide, Americans by wide margins put moral decisions ahead of financial ones – and are willing to back up these decisions with action. Solid majorities are willing to:
  - Withdraw their investments from American companies that directly or indirectly support genocide; and,
  - Warn their friends, family and coworkers against buying products or investing in American companies that have shares in firms that provide revenue to governments that perpetrate genocide.

DETAILED FINDINGS

When thinking about investing and genocide, Americans are more than three times as likely to believe that human rights abuses such as genocide should matter more than economic criteria and risk evaluation when American firms invest overseas.

- ✓ Seven in ten (71%) are likely to agree more with the statement that companies should take into account the most extreme cases of human rights abuses such as genocide when investing overseas rather than base their investment decisions on economic criteria only (19%).
  - College graduates (79%) are much more likely than those without a college degree (68%) to say that companies should take into account human rights abuses such as genocide in their investment decisions.
  - More than three quarter (78%) of those earning $50,000 or more also say that investment decisions should take into account genocide, compared to about two-thirds (66%) of those who earn less than $50,000.

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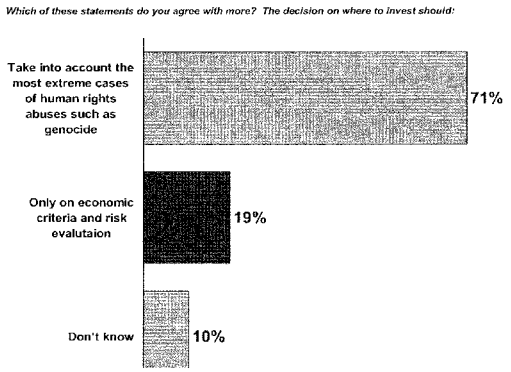
KRC Research results from the 2007 study

- The majority of Americans between the ages of 25-54 (78%) say that human rights should be taken into account, compared to just half of younger Americans (18-24: 56%), and two-thirds of those between the age of 55-64 (69%), or 65+ (63%).

✓ Only one in five (19%) believe that investment decisions should be based only on economic criteria and risk evaluation.

- A third of those between the ages of 18-24 (34%) are likely to say that economic considerations should be the only determinant for investment decisions, far more than any other age group: (Age 25-34: 11%; Age 35-44: 14%; Age 45-54: 20%; 55-64: 22%; 65+: 18%).

- Nearly one in five (19%) of those 65 or older are undecided.



When it comes to Sudan, Americans are willing to take action against companies active in Sudan. More than three-quarters (77%) say they would switch their investments to a different company if they learned that those managing their funds had significant investments in firms that were active in Sudan.

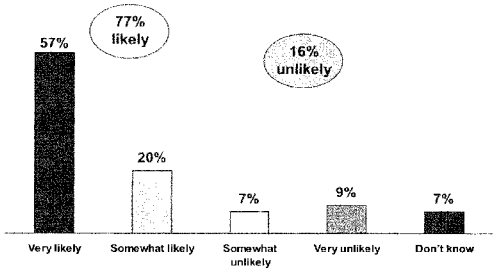
✓ When respondents were read a brief description of the situation in Sudan and asked if they would change their investments to another company if they learned that the company managing their investments was active in Sudan, the majority report that they are likely to do so. In fact, more than half (57%) say they are "very likely" to change their investments and another two in ten (20%) "somewhat likely" to do so.

KRC Research results from the 2007 study

- Those familiar with Darfur are significantly more likely than those who never heard of it to divest from Sudan (84% vs. 72%). There are no notable differences among those not too familiar or just heard the name Darfur (79%).
- Those earning $50,000 or more are also significantly more likely than those earning less to change their investments (83% vs. 75%).
- Americans between the ages of 25-34 are more likely to change their investments than any other age group. Nearly nine in ten (88%) say they are likely to change their investment to another company. This number is significantly higher than those between the ages of 35-44 (75%), 45-54 (77%), 55-64 (75%), and 65+ (69%). It is also directionally higher (but not significant) to those between the ages of 18-24 (80%).

✓ Less than one in five (16%) say they are unlikely to change their investments, with only one in ten (9%) saying "very unlikely."

If you learned that a U.S. company managing your investments or retirement plans had significant investments in companies that were economically active in Sudan, how likely would you be to change your investments to another company? Are you __?



Solid majorities agree with divesting from American companies that directly or indirectly do business with companies that support genocide or provide revenue to governments that perpetrate genocide.

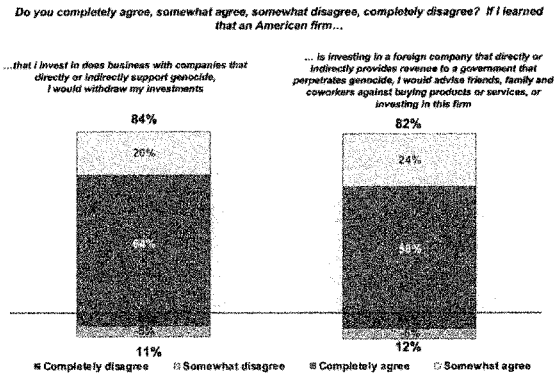
✓ Eight in ten Americans (84%) say they will withdraw their investments from American companies that do business with companies that directly or indirectly support genocide.

KRC Research results from the 2007 study

- Those with a college education (90% vs. 82%), and earning $50,000 or more (92% vs. 80%) are more likely to share this opinion than those without.

✓ Eight in ten (82%) also say they would advise friends, family and co-workers against buying products or services, or investing in American companies that invest in a foreign company that directly or indirectly provides revenue to a government that perpetrates genocide.

- Those more likely to share this opinion are:
  -College educated (89% vs. 80%)
  -Earning $50,000 or more (87% vs. 79%)



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KRC Research results from the 2007 study

SAVE DARFUR OMNIBUS
POSTED QUESTIONNAIRE
APRIL 2007

Random national sample: 1,022 adults, 18 years of age and older
Dates of interviews: April 12 – 15, 2007
Note: Numbers may not total 100% due to rounding

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1. As you may have heard, the government of Sudan is involved in perpetrating a genocide in Darfur that has left at least 400,000 dead and two million displaced. If you learned that a U.S. company managing your investments or retirement plans had significant investments in companies that were economically active in Sudan, how likely would you be to change your investments to another company? Are you **(READ LIST)**?

	Total
Very likely	57%
Somewhat likely	20%
Somewhat unlikely	7%
Very unlikely	9%
Don't know/refused **(DO NOT READ)**	7%
Total likely	***77%***
Total unlikely	***16%***

2. When American firms invest in companies overseas, some people say that the decision on where to invest should be based only on economic criteria and risk evaluation. Other people say that American companies should take into account the most extreme cases of human rights abuses such as genocide. Which of these statements do you agree with more?

	Total
Based only on economic criteria and risk evaluation	19%
Take into account most extreme cases of human rights abuses such as genocide	71%
Don't know/refused **(DO NOT READ)**	10%

Next, I am going to read you a few statements, and I'd like to know whether you completely agree, mostly agree, mostly disagree, or completely disagree with each. Here's the first one. (READ.) Do you completely agree, mostly agree, mostly disagree, or completely disagree?

5. If I learned that an American firm that I invest in does business with companies that directly or indirectly support genocide I would withdraw my investments.	Total
Completely agree	64%
Somewhat agree	20%
Somewhat disagree	5%
Completely disagree	6%
Don't know/refused **(DO NOT READ)**	5%
Total agree	***84%***
Total disagree	***11%***

KRC Research results from the 2007 study

6. If I learned that an American firm is investing in a foreign company that directly or indirectly provides revenue to a government that perpetrates genocide, I would advise friends, family and coworkers against buying products or services, or investing in this American firm.	**Total**
Completely agree	58%
Somewhat agree	24%
Somewhat disagree	5%
Completely disagree	7%
Don't know/refused **(DO NOT READ)**	5%
Total agree	***82%***
Total disagree	***12%***

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Investors Against Genocide

Draw the line at investing in genocide

Biographical information for Eric Cohen

Eric Cohen is a co-founder and the Chairperson of Investors Against Genocide. He also is a Director of the Massachusetts Coalition to Save Darfur and serves as its President.

Mr. Cohen retired from a 30 year career in information technology, where he served in a variety of roles at the corporate vice president level. Mr. Cohen has been working full-time, on a volunteer basis, with Investors Against Genocide, the Massachusetts Coalition to Save Darfur, and other anti-genocide-related work.

Investors Against Genocide is a citizen-led initiative, dedicated to convincing mutual funds and other investment firms to make an ongoing commitment to genocide-free investing. Investors Against Genocide works with individuals, organizations, financial institutions, the press, and government agencies to build awareness and create financial, public relations, and regulatory pressure for investment firms to change their investing strategy to avoid investments in companies which substantially contribute to genocide or crimes against humanity.

Our work began in response to the genocide in Darfur, Sudan which started in 2003. Since then, most mainstream financial institutions have continued to make large investments in one or more of the four major oil companies that partnered with the Government of Sudan and helped fund the genocide. Since the humanitarian crisis in Sudan continues, we advocate for investment firms to avoid or divest holdings of PetroChina (China), Sinopec (China), ONGC (India), and Petronas (Malaysia). Looking forward, we advocate for investment firms to make an ongoing commitment to genocide-free investing.

Investors Against Genocide is staffed by volunteers and is a project of the Massachusetts Coalition to Save Darfur Inc., a 501(c)(3) non-profit charitable organization, incorporated in the state of Massachusetts.

Testimony of Adam M. Kanzer
Managing Director and General Counsel, Domini Social Investments LLC

Prepared for the U.S. House of Representatives, Committee on Financial Services
Subcommittee on International Monetary Policy and Trade
"Investments Tied to Genocide: Sudan Divestment and Beyond"
November 30, 2010

Domini Social Investments is an SEC-registered investment adviser based in New York. We manage more than $960 million for individual and institutional mutual fund investors who wish to incorporate social and environmental criteria into their investment decisions.

It is an honor to have the opportunity to address this committee and to share our perspectives on investor and regulatory responses to the genocide in Darfur and corporate human rights performance generally.

We begin our consideration of these issues with an affirmative obligation as investors to respect human rights, and to seek to do no harm. The Sudan Accountability and Divestment Act (SADA), and the recent Government Accountability Office (GAO) study that assessed its efficacy,[1] each recognized that investors operate in a legal and regulatory environment that fails to explicitly acknowledge this obligation, and does not provide investors with the tools needed to fulfill it. In some cases, our legal system may even impose obstacles to investors seeking to address the human rights implications of their activities. We believe that investment decisions must be bounded by an obligation to respect international human rights norms. Investors are not simply passive actors in this system – they are playing a critical capital allocation role, and should be mindful of the implications of their investment decisions.

Domini seeks to meet this obligation by establishing and implementing a comprehensive set of social and environmental standards to guide all of our investment decisions. These policies are directed toward the ultimate goals of universal human dignity and environmental sustainability.[2]

Investors have two tasks to address with respect to corporate human rights behavior – the impact of this behavior on the financial performance of their portfolios, and the impact that their investment decisions may have on human rights. As an increasing number of fiduciaries recognize the financial risks imposed by corporate human rights violations, however, these two tasks may be merging into a unified understanding that human rights violations are bad for investment, and should therefore be scrupulously avoided. Corporate activity in conflict zones such as Sudan present a variety of financial risks, including:

- Operational risks caused by physical disruptions and community opposition[3]

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[1] Government Accountability Office, "Sudan Divestment: U.S. Investors Sold Assets but Could Benefit from Increased Disclosure Regarding Companies' Ties to Sudan" (GAO-10-742, June 2010), available at *www.gao.gov/products/GAO-10-742*.
[2] Domini's Global Investment Standards are available at *domini.com/GlobInvStd/index.htm*.

[3] See, e.g., Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework (April 9, 2010), at paragraph 71, available at *http://www.reports-and-materials.org/Ruggie-report-2010.pdf*. In this report, Professor Ruggie reports that: "a study of 190 projects operated by the international oil majors indicates that the time for new projects to come on stream has nearly doubled in the past decade, causing significant cost inflation. Delays are attributed to projects' 'technical and political complexity.' An

- Reputational risks, when companies become associated with human rights violations
- Legal risks of complicity in human rights abuses
- Loss of license to operate (during conflicts, or post-conflict if the company is seen as a partner of the former regime)

Several of these risks, particularly reputational and legal risks and loss of license to operate, may follow the company long after it has ceased the activities in question.

In addition to these risks to the financial value of the company, investors should be mindful of broader systemic risks that are exacerbated by egregious human rights violations such as genocide. Regional instability and authoritarian rule present significant opportunity costs and long-term financial risks. Investors have a strong interest in supporting open, democratic governments around the world, and protection of human rights is inextricably linked to this interest. Addressing genocide is first and foremost a moral imperative, but it is also a perfectly appropriate concern for fiduciaries that see their role as exclusively focused on financial concerns.

Domini's Approach to Sudan

Domini manages a global family of mutual funds, covering North America, Europe and the Asia Pacific regions, and certain emerging markets. Our funds may only purchase securities that we deem to be in compliance with our Global Investment Standards, which cover a broad range of social, environmental and governance standards. Domini has an in-house team of analysts dedicated to evaluating the social, environmental and governance records of companies in our investable universe.

Our Global Investment Standards compel us to evaluate corporate activity against societal needs and international norms. We believe this helps our funds identify opportunities and avoid certain risks that will generally not be reflected on the balance sheet—at least not in the short term—and, if our standards are to have integrity, there must be a point at which we will sell our shares.

We believe that by setting social and environmental standards, investors can establish a means for dialogue about the appropriate role of corporations and investors in society. These standards also drive our research and engagement processes, which create an ongoing demand for corporate social and environmental data, and a continuous accountability mechanism.

In 2007, we adopted a formal policy on Sudan to supplement our pre-existing human rights investment standards. Our Sudan policy directs us to avoid investment in companies that do business in Sudan in cases where we have determined that the company's activities provide certain direct benefits to the government of Sudan, particularly in the areas of oil, mining, electricity infrastructure and military or where, in our view, the company is otherwise involved in human rights abuses in Sudan.[4] Domini has worked closely with the Sudan Divestment Task Force, and now serves on the advisory board[5] of the

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independent and confidential follow-up analysis of a subset of those projects indicates that non-technical risks accounted for nearly half of all risk factors faced by these companies, with stakeholder-related risks constituting the largest single category. It further estimated that one company may have experienced a US $6.5 billion "value erosion" over a two-year period from these sources, amounting to a double-digit fraction of its annual profits." (*footnotes omitted, emphasis added*)

[4] Domini's Sudan policy is available at: *domini.com/GlobInvStd/Darfur-Cri/InvestmentPolicy.doc_cvt.htm*

[5] This testimony is presented solely on behalf of Domini Social Investments, and may not represent the views of the Conflict Risk Network or its members.

Conflict Risk Network (CRN), the Task Force's successor organization. CRN's in-depth research on corporate activity in Sudan has been an invaluable resource for us.[6]

Corporations face human rights risks wherever they do business, in every country in the world. Most of the companies that Domini has determined violate our Sudan policy are excluded from our portfolios for a variety of other reasons as well, including a record of human rights violations in other parts of the world. In our experience, it is rare to find a company that meets our social and environmental standards but must be excluded solely based on its involvement in Sudan. Problematic involvement in Sudan, therefore, may serve as an indicator of a corporate culture that is not sufficiently respectful of its human rights obligations. Domini's preference is to apply consistent investment standards to all companies, in all regions of the world. Our Sudan policy is an exception to this rule, in recognition of the urgent need to address an ongoing genocide.

In Sudan, unlike the South African divestment movement, targeted divestment strategies implicate a very limited number of companies. This is a critical consideration for a fiduciary attempting to manage a well-diversified portfolio. Our policy, consistent with the policies advocated by the Conflict Risk Network, requires careful consideration of the role individual corporations are playing in Sudan. It does not target for exclusion every company operating in that country. It should also be noted that an investor's decision to avoid or divest a company's shares based on its Sudan operations does not necessarily equate to a message that the company must divest from Sudan.

Shareholder Engagement

Investment policies designed to address genocide are both warranted and achievable, and our decisions to sell holdings when they violate our standards can also influence corporate behavior. Each decision to buy, sell or vote shares sends a signal to the marketplace. Those investors that fail to adopt human rights policies to guide their investment decisions, however, should not feel free to stand on the sidelines—investors have other tools at their disposal.

My firm is engaged in direct dialogue with our fund holdings on a broad range of environmental and human rights issues and we have seen the results of these efforts. Concerned investors have achieved significant results with corporations, convincing companies to adopt more responsible climate change policies, to accept responsibility for working conditions in their global supply chains and to exit repressive regime countries, such as Burma or Apartheid-era South Africa, to name but a few issues.

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[6] About CRN: Conflict Risk Network (CRN), *http://crn.genocideintervention.net/* is a network of institutional investors, financial service providers and related stakeholders calling on corporate actors to fulfill their responsibility to respect human rights and to take steps that support peace and stability in areas affected by genocide and mass atrocities. Its goal is to increase such behavior by corporate actors, and thereby reduce conflict risk. CRN is a project of the newly merged Save Darfur Coalition / Genocide Intervention Network (SDC/GINET). The two organizations merged on November 1, 2010 to create a more powerful voice dedicated to preventing and stopping large-scale, deliberate atrocities against civilians. The organization remains committed to its work to end the crisis in Darfur and bring peace to all of Sudan as well as to end violence in other areas of mass atrocities such as Congo and Burma. The merger creates the world's largest anti-genocide organization, with a membership base of hundreds of thousands of committed activists globally, an unparalleled nationwide student movement, more than 190 faith-based, advocacy and human rights partner organizations, and a network of institutional investors collectively representing trillions in assets under management.

The Conflict Risk Network reports engagement successes with a number of companies operating in Sudan, including La Mancha Resources, Schlumberger, Weatherford and others. Domini has participated in dialogues with banks[7] about their approach to the Darfur crisis, telecommunication firms[8], and others, including companies we have excluded from our portfolios. These efforts are ongoing and are a critical aspect of the investor response to Darfur.

Few tough negotiations—in any field—go very far without both carrots and sticks. We therefore believe that the most effective approach to changing corporate behavior must combine both divestment and engagement.

The Global Growth of Responsible Investment

In 2005, the law firm of Freshfields Bruckhaus Deringer issued a survey of the law of fiduciary duty in the United States, Europe, Japan, Canada and Australia, and concluded that the consideration of environmental, social and governance factors in the investment process is clearly permissible in every jurisdiction.[9]

Freshfields, however, went a step further. They concluded that the law arguably *requires* fiduciaries to take environmental, social and governance factors into account when they may impact the long-term value of the portfolio. They also noted that the law of fiduciary duty accords fiduciaries wide discretion in making this determination. In our view, fiduciary duty compels investors to act, and to act now, particularly to address the most egregious violations of human rights—genocide and other crimes against humanity.

The initial Freshfields study helped to accelerate a global trend towards greater consideration of social and environmental factors by investors, and greater disclosure. For example:

- The UN-backed Principles for Responsible Investment (PRI) now counts among its endorsers investors representing more than $20 trillion. PRI signatories endorse the following statement "As institutional investors, we have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios (to varying degrees across companies, sectors, regions, asset classes and through time)." PRI signatories also commit to "seek appropriate disclosure on ESG issues by the entities in which we invest."[10]

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[7] See, e.g, the Sudan policy statement issued by Citigroup at www.citigroup.com/citi/citizen/approach/humanrights/sudan.htm.
[8] See Conflict Risk Network, "Major U.S. Institutional Investors Urge Telecommunications and Oil Companies in Sudan to Help Ensure Human Rights During Anticipated Contentious Referendum Process (Nov. 4, 2010), available at *http://www.savedarfur.org/page/-/PDFs/11-04-2010_CRN_Press_Release.pdf*, and a Fact Sheet describing the engagement at *http://crn.genocideintervention.net/files/company_profiles/CRN%20Engagement%20Fact%20Sheet 11.4.10.pdf*

[9] "*A legal framework for the integration of environmental, social and governance issues into institutional investment*", produced for the Asset Management Working Group of the UNEP Financial Initiative by Freshfields Bruckhaus Deringer (October 2005). Freshfields produced a sequel to its initial report in 2009, available at *http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf.*

[10] *www.unpri.org*

- Regulators and stock exchanges in numerous other jurisdictions, including Brazil, France, Malaysia, South Africa, Sweden and Denmark, have mandated or encouraged corporate social and environmental performance disclosure.[11] Between September 2009 and February 2010 the European Commission hosted a series of multi-stakeholder workshops on the disclosure of corporate environmental and social information to inform policy development.[12] In 2008, the Chinese government announced that many state-owned entities would need to begin reporting on corporate social responsibility initiatives. Most recently, the UK government announced it intends to reinstate the "Operating and Financial Review" in an effort to ensure that environmental and social information is included in corporate reporting.

- In August, the world's major accounting bodies, the International Organization of Securities Commissioners (IOSCO) and a number of major non-governmental organizations and corporations joined in the formation of the International Integrated Reporting Committee (IIRC), to "create a globally accepted framework for accounting for sustainability: a framework which brings together financial, environmental, social and governance information in a clear, concise, consistent and comparable format."[13]

- Approximately 1,000 companies worldwide utilize the Global Reporting Initiative's sustainability reporting format.[14] Worldwide, the Corporate Register anticipates that approximately 4,000 corporate sustainability reports will be published in 2010 (a small proportion of the world's 82,000 transnational corporations). Ninety three of the S&P 100 publish some sustainability data on their websites and, according to a 2008 KPMG study, 80% of the worlds' 250 largest companies publish stand-alone corporate responsibility reports.

As discussed below, U.S. investors depend primarily upon voluntary disclosure to assess corporate social and environmental performance.

The Ruggie Framework

It is important to place this discussion of SADA and Sudan divestment in its broader context. In June 2008, the United Nation's Human Rights Council unanimously endorsed a framework for understanding the human rights obligations of corporations. The "Protect, Respect and Remedy" framework, developed

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[11] For a comprehensive survey of global developments, see "Carrots and Sticks—Promoting Transparency and Accountability: An update on trends in voluntary and mandatory approaches to sustainability reporting" (May, 2010), at *http://www.globalreporting.org/NR/rdonlyres/08D0C5D6-3B19-4BA2-9F12-540F66F73C5E/4198/Carrrots2010final.pdf*. The report was prepared by the Global Reporting Initiative, KPMG, UNEP FI, and the Unit for Corporate Governance in Africa.

[12] *http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/index_en.htm*

[13] See www.*integratedreporting.org*. The IIRC, formed by The Prince's Accounting for Sustainability Project (A4S) and the Global Reporting Initiative (GRI), includes among its membership senior representation from IOSCO, the International Federation of Accountants, FASB, the International Accounting Standards Board, KPMG, PriceWaterhouseCoopers, Ernst & Young, Deloitte Touche Tohmatsu, the Tokyo Stock Exchange Group, the International Corporate Governance Network and several major corporations and NGOs.

[14] www.*globalreporting.org*

by Professor John Ruggie, the Special Representative of the UN Secretary-General on business and human rights (hereinafter, "the Ruggie Framework" and "the SRSG," respectively), should provide useful guidance for Congress in considering how to improve SADA and more effectively address the genocide in Darfur and corporate human rights performance more generally. The framework is based on:

> "the **State duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; the **corporate responsibility to respect** human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access for victims to **effective remedy**, judicial and non-judicial." (*emphasis added*)[15]

In resolution 8/7 (June 2008), the UN Human Rights Council extended the SRSG's mandate in order for him to "operationalize and promote" it. Earlier this month, the SRSG has posted for public comment a set of "Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework."[16] The SRSG expects to present his final report in April, for a vote by the Council in June.

The SRSG notes that "The worst corporate-related human rights abuses, including acts that amount to international crimes, take place in areas affected by conflict, or where governments otherwise lack the capacity or will to govern in the public interest. But companies can impact adversely just about all internationally recognized human rights, and in virtually all types of operational contexts." [17] As a genocide, the situation in Darfur rises to particularly important prominence. However, corporations face human rights issues wherever they operate around the world, and investors need better information to assess how they are managing these issues in order to help avert future humanitarian crises.[18]

The SRSG comments that "States have been slow to address the more systemic challenge of fostering human rights-respecting corporate cultures and conduct" and notes that "the most prevalent cause of legal and policy incoherence is that the units of Governments that directly shape business practices—in such areas as corporate law and securities regulation, investment promotion and protection, and commercial policy—typically operate in isolation from, are uninformed by, and at times undermine the effectiveness of their Government's own human rights obligations and agencies."[19]

The SRSG makes several recommendations that are particularly important to keep in mind. SADA can be viewed as an attempt to address the policy incoherence discussed by Professor Ruggie, by helping to align government contracting and investor decision-making with the larger policy goal of ending the genocide

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[15] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework (Posted for public review and comment until January 31, 2011), at paragraph 11. Available at http://www.srsgconsultation.org/index.php/. The Guidance document can be downloaded in pdf format at http://www.srsgconsultation.org/GPsDiscussionDraftFinal.pdf (hereinafter cited as "Guiding Principles")

[16] *Id.*

[17] *Id.* at paragraph 2.

[18] Congress, for example, through the Dodd-Frank Wall Street Reform and Consumer Protection Act, acknowledged the importance of disclosure requirements relating to the sourcing of conflict minerals from the Democratic Republic of the Congo, and the human rights implications of revenues transparency as well.

[19] *Guiding Principles* at paragraph 6.

in Darfur. Securities regulation is not generally placed in the context of the State's duty to protect against human rights abuses, but it can be an effective tool for mitigating these abuses.

Just as the Guidance sets the context for the State's obligations to legislate and regulate in this area, his guidance for corporations can provide a useful framework for setting disclosure requirements, based on the need for a company to adopt policies consistent with international human rights norms and develop appropriate due diligence and remedial procedures.

The Need for Comprehensive Corporate Human Rights Performance Disclosure

In the United States, there are currently no explicit rules requiring corporate issuers to disclose their social or environmental policies, procedures or performance in their securities filings, including those relating to human rights. Although there are no explicit rules regarding "social" risks, such as human rights violations or community opposition to new capital-intensive projects, general requirements to disclose material risk information apply equally to all sustainability issues, as long as management determines that these issues present "material" risks to the issuer.

The GAO report provides a useful review of SADA and investor views regarding Sudan divestment, and we were pleased to provide our perspective to the GAO during its preparation. The GAO makes the following recommendation:

> "In order to enhance the investing public's access to information it needs to make well-informed decisions when determining whether and how to divest Sudan related-assets, we recommend that the SEC consider issuing a rule requiring companies that trade on U.S. exchanges to disclose their business operations related to Sudan, as well as possibly other state sponsors of terrorism."[20]

We endorse the GAO's disclosure recommendation as a necessary, but insufficient measure to provide investors with the information needed to make more informed investment decisions and to ultimately hold companies accountable for their impact on human rights, in Darfur and elsewhere, and would like to focus the remainder of this testimony on the need for expanded human rights disclosure requirements.

The GAO's stated goal—providing information to help investors implement a program of Sudan divestment—focuses on a tactic, not a long-term strategic goal. If our goal is to affect an outcome on the ground—to end the genocide in Darfur and contribute to stabilization of the region—we believe the recommendation should be recalibrated.

As noted above, Domini utilizes a *targeted* model of divestment. Some companies operating in Sudan should remain in Sudan. Some should remain in Sudan and improve their practices. Some companies should exit Sudan. Investors and other stakeholders need appropriate disclosure to help distinguish between these different categories of companies, and to highlight key areas for corporate executives to manage and measure. In addition, investors need additional qualitative information to enable more effective engagements with corporate management.

A requirement for companies to disclose "their business operations related to Sudan" is therefore necessary, but not sufficient. For Domini, a company's connection to Sudan is merely the first step in our analysis, and is insufficient to gauge how a company is meeting its obligations outlined by the Ruggie

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[20] *GAO Report* at 8.

Framework. We would therefore encourage Congress to consider requiring the SEC to take a broader view of the matter, and require issuers to disclose human rights policies, procedures and performance, with additional specific disclosure requirements for companies operating in conflict regions or other designated state sponsors of terrorism, including Sudan.

Reliance on the Materiality Standard

The GAO reports that the SEC will consider the GAO's recommendation, but is "committed to the practice of relying on companies to ensure that their disclosures contain all material information about their operations in these countries."[21]

The SEC has provided the following definition of materiality: "Information is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision, or, put another way, if the information would alter the total mix of available information."[22]

In our view, the materiality standard has failed to provide investors with necessary information about corporate human rights performance in any area of the world, including Sudan, for the following reasons:

- Although materiality is an "objective" standard, and "companies are not free to make their own judgments as to whether these matters are 'material,'"[23] in practice we do depend on the company to determine and disclose material risks. It is very difficult to second-guess these determinations, and the GAO report does an excellent job in highlighting the results of the SEC's efforts in this area.[24]

- The SEC's materiality standard is focused on financial risks *to the issuer*, not to stakeholders affected by corporate activities. "Externalities", including human rights abuses, are not generally considered "material" by companies unless they believe they may present a risk to the issuer, and corporate counsel generally considers these risks to be too tenuous or difficult to predict to rise to the level of required disclosure.

- Materiality is a broad, ambiguous standard that can lead to confusion. Issuers are often uncertain whether an emerging risk factor should be disclosed and, if it is material, *how* it should be disclosed.

Domini's researchers assess corporate social and environmental performance every day. In our experience, securities filings provide relatively little information in these areas. In fact, it is rare to find any human rights data in securities filings at all.

To "foster business respect for human rights," the SRSG states that States should encourage, and where appropriate, require "business enterprises to provide adequate communication on their human rights

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[21] *GAO Report* at 33.
[22] Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82 (Feb. 8, 2010), available at http://www.sec.gov/rules/interp/2010/33-9106.pdf, citing TSC Industries v. Northway, Inc., 426 U.S. 438 (1976).
[23] *GAO Report* at 76-77, Appendix IV, Comments from the Securities and Exchange Commission.
[24] *GAO Report* at 32-33.

performance."[25] He notes that "there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable businesses to respect human rights…." He recommends that "financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" from the investors' point of view and indicate when they should be disclosed."[26] In our view, a broadly defined "materiality" standard that applies to each and every conceivable risk a company may face falls short of the SRSG's recommendation that the State "encourage" or "require" and provide clarity around corporate human rights obligations and reporting.

The SEC's Division of Corporate Finance expressed the view to the GAO that "companies have a strong incentive to make appropriate judgments about materiality because they may face significant federal securities law liability for disclosure that includes material misstatements or material omissions that make the information provided misleading."[27]

The GAO's assessment of the SEC's monitoring of companies tied to Sudan, however, "appears limited."[28] The GAO reports that the SEC's efforts to elicit disclosure from these companies have, at best, met with mixed success and only one referral to the SEC's Division of Enforcement.[29] Despite the concerted efforts of SEC staff, we are left to conclude that there is currently no meaningful sanction for companies that fail to disclose material human rights information, and we assume this is apparent to issuers as well.

Management's incentives—particularly in the face of a global divestment campaign—are to disclose *as little as possible*, in direct opposition to what investors need. This can be particularly dangerous when a company is blind to the risks it faces, or is engaged in particularly destructive behavior. The companies that are the most likely to experience—or contribute to—avoidable catastrophic disasters are therefore the least likely to provide advance warnings. A "reasonable" investor needs something more than management's perception of risk. A reasonable investor needs information to allow her to second-guess management, and to arrive at a more complete view of the company. This is particularly true when seeking to address a particular crisis, such as the genocide in Darfur. When this crisis is filtered through the 'judgment' and financial risk assessment metrics of a large company, very little—if any—usable data emerges and the market's ability to mitigate these risks is dramatically undermined.

The SEC has the authority to determine categories of information that are *per se* material, rather than rely on management's judgment of materiality. The GAO reports that the SEC's Division of Corporate Finance "expressed concern that adopting a disclosure requirement that is excessively broad and beyond what GAO recommends could possibly lead to a volume of information that would overwhelm the investor and possibly obscure other material information."[30] This is a valid concern, but it is equally clear to us that the status quo is not acceptable. The SRSG recommends that States ensure that "current policies, regulation and enforcement measures are effective in addressing the risk of business involvement in situations which could amount to the commission of international crimes."[31] As noted by the GAO,

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[25] *Guiding Principles* at 8 (Guiding Principle 5(c))
[26] *Id.*
[27] *GAO Report* at 30-31.
[28] *Id.* at 32.
[29] *Id.* at 33.
[30] *Id.* at 8.
[31] *Guiding Principles* at 10.

however, "companies have generally resisted [the SEC's instructions to disclose] and, at times, have refused to disclose information about their ties to Sudan."[32]

Investors need clear, comparable and relevant data to allow them to effectively implement targeted divestment and engagement strategies. We believe it is possible, and desirable, to require companies to disclose a tailored set of key indicators that would allow investors to make more effective decisions in this area. We recommend that Congress consider requiring the SEC to adopt a mandatory disclosure framework that ensures that:

- Investors have reliable, consistent, comparable and relevant information to allow them to make prudent investment decisions and to monitor corporate human rights activity; and
- To further implement the State's duty to protect against human rights abuses, in keeping with the Ruggie Framework.

This requirement could be implemented through the SEC, or through the stock exchanges in the form of new listing standards, and should be consistent with the Ruggie Framework.

There will always be companies that refuse to comply with the law, and intentionally hide material information. Without a clear and explicit disclosure requirement, however, it is difficult for investors to interpret why a company chose to say nothing about its human rights performance. Explicit requirements to disclose human rights policies, due diligence procedures, risks identified and performance reports, however, would provide investors with a basis for evaluating corporate human rights performance, and could serve to significantly raise the bar globally.

Additional Recommendations

We would welcome broader Congressional hearings to consider all of the various tools that could be brought to bear to end this urgent humanitarian crisis, as well as to more effectively evaluate corporate human rights performance globally in order to guard against future crises. Below, Domini respectfully offers a handful of recommendations.

Federal Government

1. As discussed above, the Securities & Exchange Commission should require issuers to disclose key aspects of their human rights policies, procedures and performance, with a particular focus on genocide and other crimes against humanity. Investors and the public need consistent, reliable and comparable data on corporate human rights performance in order to effectively address these risks. In this context, the Global Reporting Initiative, the Conflict Risk Network and the Ruggie Framework should be particularly useful.[33]

2. The GAO notes that SADA has been interpreted to permit the U.S. government to contract with subsidiaries or affiliates of companies that would otherwise be subject to sanction. We believe it is critical for this loophole to be closed. The current interpretation of this section of SADA

[32] *GAO Report* at 78.
[33] See, also, the Social Investment Forum's petition to the SEC for mandatory sustainability reporting, available at http://www.socialinvest.org/news/releases/pressrelease.cfm?id=143 (Domini is a member of the Social Investment Forum, and the author was part of the committee that drafted this proposal).

undermines the principle that corporations bear human rights obligations throughout the enterprise, and significantly undermines the effectiveness of the provision.

The SRSG notes that "a corporate group may consider itself to be a single business enterprise, in which case the responsibility to respect human rights attaches to the group as a whole and encompasses both the corporate parent and its subsidiaries and affiliates. Alternatively, entities in a corporate group may consider themselves distinct business enterprises, in which case the responsibility to respect attaches to them individually and extends to their relationships with other entities – both within the group and beyond – that are connected to their activities." Congress should consider closing this loophole entirely, or adopting a more nuanced case-by-case approach to evaluating these corporate relationships.

3. Despite the two Freshfields studies, there is still a broad perception that fiduciary duty presents an obstacle to consideration of human rights standards in investment decision-making, and the GAO notes several individual state laws that have been interpreted to place portfolio returns above considerations of even the most egregious violations. SADA's safe-harbor provision, and "sense of Congress" relating to ERISA helped to address these concerns, but only in the narrow context of Sudan divestment. Congress should consider ways to align standards of fiduciary duty with the Ruggie Framework to ensure that responsible fiduciaries never feel legally compelled to ignore issues such as genocide or other egregious violations of human rights.

   To this end, the Department of Labor should issue interpretative guidance to assure ERISA fiduciaries that decisions to divest individual holdings, or to engage with these holdings in order to avoid the fund's complicity in genocide or other egregious human rights violations, are consistent with the intent of the Act.

Stock Exchanges and Index Managers

Human rights criteria at the exchange or index level could have significant ripple effects throughout the markets and, more importantly, on the ground in Darfur.

1. If a company is complicit in genocide, it should not be permitted to list on a national exchange. The stock exchanges are the gateways to the capital markets. These gates should be closed to the small group of firms that choose to actively profit from, or knowingly finance, genocide or other gross human rights violations. Such standards would be consistent with the SRSG's comment that States should reduce or withdraw "access to public support and services for a business enterprise that is involved in gross human rights abuse and fails to cooperate in addressing the situation." [34] Although the NYSE and the NASDAQ adopted various corporate governance standards in the wake of Enron and the associated accounting and governance scandals, currently neither exchange includes any social or environmental listing standards. Sustainability standards—even those that merely required the disclosure of certain human rights performance data—would be a very powerful incentive for corporations. Such standards would also help to safeguard the competitiveness of the U.S. markets in light of rapid regulatory developments in foreign markets to promote corporate social responsibility.

[34] *Guiding Principles* at 10.

2. Portfolio managers are evaluated against public benchmarks. When they seek to avoid investing in certain companies that are included in their portfolio's public benchmark, they may face challenges in meeting their investment objectives. It is often a company's inclusion in a particular benchmark that creates the obstacle to divestment. A number of indexes currently incorporate social and environmental factors, including the MSCI KLD 400 Social Index, the Dow Jones Sustainability Index and the FTSE4Good Index Series. These standards, however, have not been incorporated into the mainstream indexes that are most widely used as benchmarks, such as the S&P 500.

Mutual Funds

1. Mutual funds should adopt formal investment policies that address genocide and other crimes against humanity, and should be required to publicly disclose how they address human rights concerns. Funds that believe that the adoption of a human rights policy would impose material risks to performance will need to review these policies with their fund's board of trustees, and may need to amend their prospectus. The Domini Funds' prospectus clearly discloses the potential risks imposed by the application of social and environmental standards. There is no legal obstacle to adopting such policies.

2. Mutual funds should amend their proxy voting policies to support shareholder proposals addressing the crisis in Darfur, and human rights generally. Most of the largest mutual fund families in the country currently routinely vote against or abstain on all shareholder proposals addressing human rights issues. Not only are these funds ignoring human rights issues in the investment process, they are affirmatively telling corporate management to ignore them as well through their proxy votes.

Other Financial Institutions

1. Investment banks should consider the broad range of influence they have over their portfolio holdings, as well as their clients, and should raise the very serious human rights risks that are imposed on the bank and its clients by corporate complicity in genocide and other crimes against humanity. Specifically, banks should adopt formal human rights policies to guide their activities, and publicly disclose how these policies are implemented. These policies should include the full range of a bank's activities, including mutual fund advisory services, project finance, debt underwriting, consulting, etc.

2. Wall Street analysts should incorporate corporate involvement in egregious human rights violations into their analyses. Their reports, for example, should assess the risk to shareholder value imposed by potential corporate complicity in genocide, and should provide investors with quality data to allow clients to fully assess these activities.

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on International Monetary Policy and Trade, Committee on Financial Services, House of Representatives

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SUDAN DIVESTMENT

U.S. Investors Sold Assets but Could Benefit from Additional Information about Companies' Ties to Sudan

Statement of Thomas Melito, Director
International Affairs and Trade

GAO-11-245T

November 30, 2010

GAO
Accountability • Integrity • Reliability

Highlights

Highlights of GAO-11-245T, a testimony before the Subcommittee on International Monetary Policy and Trade, Committee on Financial Services, House of Representatives

SUDAN DIVESTMENT

U.S. Investors Sold Assets but Could Benefit from Additional Information about Companies' Ties to Sudan

Why GAO Did This Study

Recognizing the humanitarian crisis in Darfur, Sudan, Congress enacted the Sudan Accountability and Divestment Act (SADA) in 2007. This law supports U.S. states' and investment companies' decisions to divest from companies with certain business ties to Sudan. It also seeks to prohibit federal contracting with these companies. This testimony (1) identifies actions that U.S. state fund managers and investment companies took regarding Sudan-related assets, (2) describes the factors that these entities considered in determining whether and how to divest, and (3) determines whether the U.S. government has contracted with companies identified as having certain Sudan-related business operations and assesses compliance with SADA's federal contract prohibition provision. This testimony is based on a GAO report (GAO-10-742), for which GAO surveyed states, analyzed investment data, assessed federal contracts, and interviewed government officials.

What GAO Recommends

The related GAO report recommends that the SEC consider issuing a rule requiring companies that trade on U.S. exchanges to disclose their business operations tied to Sudan, as well as possibly other state sponsors of terrorism. The SEC's Division of Corporation Finance agreed to present GAO's recommendation to the commission.

View GAO-11-245T or key components.
For more information, contact Thomas Melito at (202) 512-9601 or melitot@gao.gov.

What GAO Found

Since 2006, U.S. state treasurers and public pension fund managers have divested or frozen about $3.5 billion in assets primarily related to Sudan in response to their states' laws and policies; U.S. investment companies, which also sold Sudan-related assets, most commonly cited normal business reasons for changes in their holdings. State fund managers GAO surveyed indicated that their primary reason for divesting or freezing Sudan-related assets was to comply with their states' laws or policies. Thirty-five U.S. states have enacted legislation or adopted policies affecting their investments related to Sudan, primarily in response to the Darfur crisis and Sudan's designation by the U.S. government as a state sponsor of terrorism. GAO also found that the value of U.S. shares invested in six key foreign companies with Sudan-related business operations declined by almost 60 percent from March 2007 to December 2009. The decline cannot be accounted for solely by lower stock prices for these companies, indicating that U.S. investors, on net, decided to sell shares in these companies. Investors indicated that they bought and sold Sudan-related assets for normal business reasons, such as maximizing shareholder value.

U.S. states and investment companies have often considered three factors when determining whether and how to divest. First, they have considered whether divesting from Sudan is consistent with fiduciary responsibility—generally the duty to act solely and prudently in the interest of a beneficiary or plan participant. Second, they have considered the difficulty in identifying authoritative and consistent information about companies with Sudan-related business operations. GAO analyzed three available lists of these companies and found that they differed significantly from one another. Although information directly provided by companies through public documents, such as Securities and Exchange Commission (SEC) disclosures, is a particularly reliable source of information, federal securities laws do not require companies specifically to disclose business operations in state sponsors of terrorism. The SEC has the discretionary authority to adopt a specific disclosure requirement for this information but has not exercised this authority. Third, investors have considered the effect that divestment might have on operating companies with Sudan-related business activities, such as prompting companies interested in promoting social responsibility to leave Sudan, creating room for companies that do not share that interest to enter the Sudanese market.

GAO's analysis, including a review of a nonrandom selection of contracts, indicates that the U.S. government has complied with SADA's contract prohibition provision. Specifically, the U.S. government has contracted with only one company identified on a widely used list of companies with business ties to Sudan, and the contracts awarded to this company did not violate SADA. The U.S. government has contracted with subsidiaries and affiliates of companies with business ties to Sudan, as SADA permits.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here to discuss our work regarding the Sudan Accountability and Divestment Act (SADA). Sudan has long been a source of concern for the U.S. government both because of its support for acts of international terrorism and its campaign of genocide in the Darfur region. Congress enacted SADA in 2007 to support U.S. states' decisions to divest from foreign companies conducting specific business operations in Sudan in four economic sectors—power production, mineral extraction, oil-related activities, and production of military equipment—and to give investment companies that divest from these companies "safe harbor"[1] from certain lawsuits. The act also contains a contract prohibition clause, which requires all U.S. government agencies to ensure that each contract entered into for the procurement of goods or services includes a clause requiring the contractor to certify that it does not conduct certain business operations in Sudan in the four key economic sectors.

My testimony summarizes our June 2010 report.[2] As requested, in this report we (1) identify actions that U.S. state treasurers and public pension fund managers and U.S.-based investment companies have taken regarding their Sudan-related assets and attempt to determine the reasons for these actions, (2) describe the factors that these entities considered in determining whether and how to divest, and (3) determine whether the U.S. government has contracted with companies identified as having certain Sudan-related business operations and assess compliance with SADA's federal contract prohibition provision.

For our report, we conducted a survey of treasurers and public pension fund managers (hereafter referred to as "state fund managers") in all 50 states and the District of Columbia.[3] Ninety-one percent (or 138 of 151) of the fund managers we contacted responded to our survey, with at least 1 fund manager from each of the 51 states providing a response. We also

[1]The safe harbor provision of SADA limits the civil, criminal, and administrative actions that may be brought against firms that, in accordance with the act, divest from, or avoid investing in, companies with prohibited business operations in Sudan.

[2]GAO, *Sudan Divestment: U.S. Investors Sold Assets but Could Benefit from Increased Disclosure Regarding Companies' Ties to Sudan*, GAO-10-712 (Washington, D.C.: June 22, 2010).

[3]Throughout this report, the term "state" refers to the 50 states and the District of Columbia.

reviewed state laws and policies regarding investment of their Sudan-related assets and interviewed various advocacy organizations. To identify the actions that investment companies took regarding their Sudan-related assets, we selected six key foreign companies that have operations in Sudan's oil sector and then used shareholder ownership and market data to analyze U.S. investment companies' holdings in these companies over time. We also interviewed investment companies regarding Sudan-related assets, as well as eight primarily European foreign operating companies that have or used to have Sudan-related business operations. Because the Securities and Exchange Commission (SEC) is responsible for overseeing the federal securities laws and, through its Office of Global Security Risk, for monitoring operating companies' disclosure of material[4] business activities in or ties to state sponsors of terrorism, we reviewed documents and interviewed officials from this agency. We also interviewed officials from the Department of State, which oversees U.S. foreign policy toward Sudan, and the Department of the Treasury, which administers and enforces U.S. sanctions against Sudan. Finally, we searched the Federal Procurement Data System—Next Generation to determine whether the U.S. government awarded federal contracts to foreign companies identified as having business ties to Sudan, as well as to some of their subsidiaries and affiliates. We selected the highest dollar amount contract or contract modification for each of the companies we identified and reviewed the contract solicitation or other relevant documentation for presence of the applicable Sudan-related certification clause, if required. We also reviewed federal rules related to the contract prohibition provision of SADA and interviewed officials at the Office of Management and Budget.

In preparing this testimony, we relied on our work supporting the accompanying report. That report contains a detailed overview of our scope and methodology. All of our work for this testimony was performed in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

[4]The meaning of "material information" is not explicitly defined by law, but the Supreme Court has determined that information is material if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision or the information would significantly alter the total mix of available information.

U.S. State Fund Managers and Investment Companies Have Sold Sudan-Related Assets for Varying Reasons

We found that several states have divested or frozen assets primarily related to Sudan and that the value of U.S. investment companies' Sudan-related asset holdings has declined considerably since March 2007. Our survey responses show that state fund managers have divested or frozen about $3.5 billion in assets primarily related to Sudan (see table 1). Specifically, fund managers from 23 of the states responding to our survey reported that, from 2006 to January 2010, they divested or froze about $3.5 billion in assets held in 67 operating companies they identified as related either to Sudan specifically or to a larger category of divestment targets, such as state sponsors of terrorism.

Table 1: Total Sudan-Related Assets Divested or Frozen by U.S. States, 2006 to January 2010[a]

State	Total amount divested or frozen	Earliest divestment or freezing action	Most recent divestment or freezing action
New Jersey	$2,162,564,000	[b]	May 2006
Oregon	362,000,000	2006	2009
Texas	225,990,790	October 2008	January 2009
Massachusetts	164,489,806	March 2008	March 2008
Florida[c]	154,947,926	April 2008	July 2008
California	81,739,949	May 2006	September 2008
Colorado	76,066,122	July 2007	January 2010
Indiana[c]	67,203,695	December 2008	December 2009
Maryland[c]	35,430,790	September 2007	April 2008
Michigan[c]	24,332,285	May 2009	December 2009
Maine[d]	21,500,000	April 2006	June 2009
Connecticut[c]	15,388,947	May 2007	September 2009
Kansas	13,378,022	[b]	June 2008
Hawaii	13,288,052	February 2008	December 2008
New York[c]	12,300,000	June 2009	June 2009
New Mexico	12,000,000	[b]	January 2008
Iowa	10,576,749	October 2007	October 2008
New Hampshire	5,636,966	September 2008	March 2009
Ohio[c]	2,341,595	November 2009	November 2009
Minnesota	1,012,038	January 2008	April 2009
Pennsylvania	945,247	January 2008	January 2008
Arizona[c]	727,480	November 2009	November 2009
Total[e]	**$3,463,860,458**		

Sources: GAO's survey of states and public state investment reports.

[a]Illinois was one of the 23 states that reported divesting or freezing its Sudan-related assets, but it did not provide the value or dates of these actions.

[b]States with no entry for "earliest date" did not provide us with this information.

[c]The state has a law or policy, which either focuses on both Sudan and Iran or targets state sponsors of terrorism.

[d]Maine's law on Sudan-related investments, enacted in 2005, expired July 1, 2009.

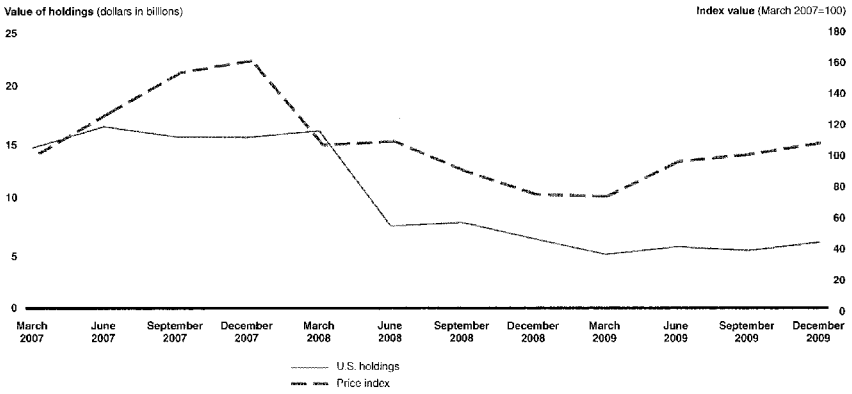
[e]This total reflects the amounts divested or frozen as reported in responses to our survey or in public documents. There may be additional fund managers whose funds were not included in our survey population or who divested but did not respond to our survey.

All of the states that reported having divested or frozen Sudan-related assets had laws or policies regarding their Sudan-related assets, and the state fund managers who responded to our survey cited compliance with these laws and policies as their primary reason for divestment. Thirty-five U.S. states have enacted legislation, adopted policies, or both, affecting their Sudan-related investments. These 35 states did so often out of concern for the genocide in Darfur, as well as some concerns about terrorism. Their laws and policies vary in the specificity with which they address the sale and purchase of Sudan-related assets. For example, most states with laws and policies requiring divestment also prohibit or restrict future investments in Sudan-related companies. However, some laws and policies only mention prohibiting future investments but do not require divestment of Sudan-related investments held prior to enactment of the measures. In addition to divestment, many state laws and policies also mandate or encourage engagement—identifying companies and leveraging power as a shareholder or potential shareholder in an effort to change the investment or operating behavior of that company.

Like the states, U.S.-based investment companies have sold Sudan-related shares. Specifically, our analysis shows that the value of U.S. holdings in six key foreign companies with Sudan-related business operations fell from $14.4 billion at the end of March 2007 to $5.9 billion at the end of December 2009, a decline of nearly 60 percent. This decline cannot be accounted for solely by changes in share price, indicating that U.S. investors, on net, chose to sell shares of these companies. Based on a price index weighted to the U.S. portfolio of Sudan-related equities, prices rose by roughly 7 percent from March 2007 to December 2009, while equity holdings fell by nearly 60 percent (see fig. 1). This suggests that net selling of Sudan-related equities explains the majority of the decline in U.S. holdings. It is not certain if this selling is related to conditions specific to Sudan or represents a more general reallocation of assets by U.S. investors. Nevertheless, some evidence suggests that Sudan-specific factors may have influenced investors' decisions to sell. Specifically, from

December 2007 to December 2008, U.S. holdings in Sudan-related equities declined as a percentage of foreign oil and gas equity holdings and as a percentage of all foreign equity holdings.

Figure 1: U.S. Holdings and Prices of Sudan-Related Companies, March 2007 to December 2009



Source: GAO analysis of Thomson Reuters data.

Investors said they weighed various factors in their decisions regarding Sudan-related assets. Most commonly, investors stated that they bought and sold Sudan-related assets for normal business reasons, such as maximizing shareholder value consistent with the guidelines in each fund's prospectus, as well as in response to specific client instructions. Each of the investment companies we interviewed issued a corporate statement regarding Sudan-related investing, and these corporate statements reflect a variety of investor perspectives. For example, one firm's statement indicated that it would ensure that its funds did not invest in companies materially involved in Sudan, while another's explained that it would remain invested in these companies in order to actively oppose their practices that it did not condone.

U.S. Investors Have Often Considered Three Factors When Determining Whether and How to Divest from Companies Tied to Sudan

We found that U.S. investors have often considered three factors when determining whether and how to divest from companies tied to Sudan: fiduciary responsibility, the difficulty identifying operating companies with ties to Sudan, and the possible effects of divestment on operating companies and the Sudanese people.

Fiduciary Responsibility

Both state fund managers and private investment companies we contacted told us that they consider whether a decision to divest Sudan-related assets is consistent with fiduciary responsibility—generally the duty to act solely and prudently in the best interests of the client. Representatives from organizations that advocate for the interests of state fund managers told us that fiduciary duty could be a disincentive to divesting, depending on how each individual state's law is written. For instance, they expressed concerns that if the laws place emphasis on maximizing returns first and on divesting as a second priority, then fiduciary responsibility can be a disincentive to divesting. While some states make no explicit mention of fiduciary responsibility in their divestment policies and laws, some state constitutions emphasize its priority above all other responsibilities. Many state laws allow fund managers to stop divesting or to reinvest if there is a drop in the fund's value. In addition, while most of the 35 states' Sudan-related measures generally require divestment of Sudan-related assets consistent with the investing authority's fiduciary responsibilities, laws and policies in six states include clauses explicitly stating that the investing authority should only divest if doing so will not constitute a breach of fiduciary trust.

Our survey results demonstrate that state fund managers, when expressing concerns about fiduciary responsibility, focused on the impact that divestment might have on a fund's returns and administrative costs. Specifically, 17 of the 29 fund managers (or 59 percent) who had divested or frozen their Sudan-related assets, or planned to do so, said they were concerned to a moderate or large extent that it would be difficult to divest while ensuring that fiduciary trust requirements were not breached, and

their offices or states were not made vulnerable to lawsuits.[5] This same concern was also cited as a moderate to large concern for 25 of the 41 (or 61 percent) fund managers who did not divest. Survey results also showed concern among state fund managers, regardless of whether they divested, regarding the financial risk of divesting. Specifically, 20 of the 29 managers (or 69 percent) who divested or planned to divest and 18 of the 41 (or 44 percent) who did not divest were concerned to a large or moderate extent that divestment could cause their funds to incur high transaction costs, earn reduced returns on investment, or both.

Private investment companies expressed differing perspectives on whether divesting from Sudan is consistent with their fiduciary responsibilities. According to investment companies whose primary goal is maximizing returns, ceasing to invest in companies with Sudan-related operations based on criteria other than financial merit is inconsistent with their fiduciary responsibilities, unless their clients established these restrictions. Some of these investors stated that limiting the number of investment opportunities based on nonfinancial criteria can result in lower investment returns. Other investment companies, particularly those identifying themselves as socially responsible, maintain that divesting from Sudan based on nonfinancial criteria is consistent with fiduciary responsibility, as long as alternative equities selected can compete on the basis of financial criteria. For these investment companies, creating financially viable investment options that respond to social concerns, such as genocide or the environment, is the primary goal. These firms expressed confidence that taking nonfinancial factors into account results in an investment product that is competitive with other investments.

As of May 2010, two companies that sold their Sudan-related assets had relied upon the safe harbor provision in SADA. Most companies told us

[5]In 2009, the New Hampshire Retirement Plan and the New Hampshire Judicial Retirement System sued the state, arguing that complying with the state's Sudan divestment legislation would have been inconsistent with their fiduciary trust obligations under the state constitution. The trial court found on a preliminary basis that the trustees could not comply with the legislation without violating their common law fiduciary duties, but did not decide what standard to apply in determining whether a trustee who complies with the legislation has met his fiduciary duties. On October 27, 2010, the New Hampshire Supreme Court ruled that the state's Sudan divestment law was constitutional, but sent the case back to the trial court to determine whether the law interferes with the trustees' statutory or common law fiduciary duties. See *Board of Trustees of the New Hampshire Judicial Retirement Plan v. Secretary of State* (Merrimack, No. 2009-621, October 27, 2010).

that the provision was not necessary to their decision-making regarding Sudan-related assets.

Difficulty Identifying Operating Companies with Ties to Sudan, Including Those Monitored by the SEC

Investors considering whether and how to divest from companies with ties to Sudan have faced difficulties identifying these companies. SADA requires that, before divesting from Sudan-related companies, responsible entities must use credible, publicly available information to identify which companies have prohibited business operations related to Sudan. Nongovernmental organizations and private companies have sought to create and, in some cases, sell their lists of operating companies with business ties to Sudan to the public. Our survey results indicate that state fund managers have relied heavily on these sources of information. However, our analysis of available lists indicates that they differ significantly from one another. We compared three lists of companies with business ties to Sudan and found that, of the over 250 companies identified on one or more of these lists, only 15 appeared on all three.

Representatives from the organizations that created these lists told us that obtaining and evaluating information on operating companies with business ties to Sudan is difficult, and that information that comes directly from companies is particularly useful. For example, they would consider an SEC disclosure filing to be a reliable source of information. However, the federal securities laws do not require companies specifically to disclose operations in countries designated as state sponsors of terrorism. While SEC regulations require disclosure of such operations if they constitute "material information," the meaning of "material information" is not explicitly defined by law and companies are ultimately responsible for the accuracy and adequacy of the information they disclose to investors.

The SEC's Office of Global Security Risk, created in 2004, monitors whether the documents public companies file with the SEC include disclosure of material information regarding global security risk-related issues. According to officials from this office, they focus their reviews on companies with business activities in U.S.-designated state sponsors of terrorism, including Sudan. This office has suggested to companies that any operations they have in state sponsors of terrorism might be considered material because divestment campaigns and legislation mandating divestment from Sudan indicate that investors would consider this information important in making investment decisions. However, in their correspondence with the SEC, companies have raised concerns about these instructions. For example, one energy company wrote that its business dealings in state sponsors of terrorism did not need to be further

disclosed in annual reports because, while these dealings may have been of interest to certain investors, they were not material to the general investing public.

The Office of Global Security Risk provides limited monitoring of companies that conduct business in the four sectors covered under SADA. For example, SEC officials told us that they have corresponded with 59 of the 74 companies that file periodic reports with the SEC, and that they have identified as having ties to Sudan. However, many of these companies operate in industries not covered under SADA, such as food services, telecommunications, and pharmaceuticals. In addition, our analysis shows that the office has only corresponded with 5 of the 15 companies that are identified in all three of the lists we analyzed and that file with the SEC. All 15 of these companies operate in the four economic sectors identified in SADA. Furthermore, the office has not always followed up with companies concerning their correspondence. For example, in December 2005, the Office of Global Security Risk asked an oil company that was reported to have possible ties to Sudan to describe all current, historical, and anticipated operations in, and contacts with, Sudan, including through subsidiaries, controlling shareholders, affiliates, joint ventures, and other direct and indirect arrangements. The company did not provide a response to the request. Four years later, the office reiterated its question to the company.

SEC officials also told us that, in cases where the office determines that its comment process has not resulted in full disclosure of material operations by a company, it will refer the company to the SEC's Division of Enforcement for possible investigation. According to these officials, the Office of Global Security Risk has referred one company to this division since the office was created in 2004. The SEC also has the discretionary authority to adopt a specific disclosure requirement for companies that trade on U.S. exchanges (such as requiring disclosure of any operations in state sponsors of terrorism). Although the SEC has not done so, it could exercise this authority by issuing an interim rule for comment and a final rule in the *Federal Register*. However, the agency has indicated that it is committed to the practice of relying on companies to ensure that their disclosures contain all material information about their operations in these countries.

The Possible Effects of Divestment on Operating Companies and the Sudanese People

Some companies that have ceased operating in Sudan warned of a negative effect on the Sudanese people. For example, one company we spoke with told us that when it decided to leave Sudan and sell its stake in a project to another company, that company refused to sign the sales agreement until language conferring responsibility for continuing the seller's humanitarian programs was removed from the agreement. Another company that left the Sudanese market stated that it had been involved in a nationwide anti-AIDS program in Sudan, which it could no longer participate in after leaving Sudan.

Because of concerns about these possible negative effects, some investors have shifted their approach toward engaging with companies in order to leverage their resources as shareholders to influence companies' behavior and promote efforts aimed at improving the lives of the Sudanese people. Some advocacy groups that were originally at the forefront of the divestment campaign also have shifted their focus toward engagement. One advocacy group we spoke with stated that it believed that divestment was too blunt of an approach because it targeted a wide array of companies, some of which may not have had material operations in Sudan. Instead, this group argued for an approach that targets companies involved in the industries that are most lucrative for the Sudanese government and that provides alternatives to divestment, such as engaging companies to try to influence their behavior. Like advocacy groups, some U.S. investment companies have also embraced the idea of engagement, and increasingly view divestment as a last resort because engagement allows companies to continue operating and provides positive incentives for them to use their resources to help the Sudanese people. U.S. states have also endorsed engagement as a viable alternative to divestment, with a few states identifying divestment only as a last resort. Nineteen of the 25 states whose laws or policies require divestment also encourage or require engagement.

The eight foreign operating companies we spoke with generally agreed that, for them, engagement is preferable to divestment because it allows them to continue operating in Sudan and to discuss possible ways to improve the situation there. These companies consistently told us that they believe their business operations positively impact the Sudanese people. For example, a mining company told us that it built seven schools and a medical clinic, brought water and power supplies to the area around the mine, and started agricultural training programs for the local population. This company said it also convinced its business partners from the Sudanese government to contribute some of their profits from the mine to support a humanitarian organization operating in Darfur. Almost

all of the companies we spoke with said they donated to or became directly involved in humanitarian projects as a direct result of their engagement with various advocacy groups and shareholders. A few of the companies we spoke with decided to limit their business activities in Sudan as a result of engagement processes. For example, one company we spoke with committed to not pursue any new business in Sudan until the situation in Darfur changes and United Nations peacekeepers are allowed in the country. The company indicated that this commitment sent a strong signal to the government of Sudan, which depends on the company to explore and identify natural resource deposits.

Our Analysis Indicates That the U.S. Government Has Complied with the Federal Contract Prohibition Provision of SADA

Our analysis indicates that the U.S. government has complied with SADA's federal contract prohibition. Specifically, we found no evidence to suggest that the U.S. government has awarded contracts to companies identified as having prohibited business operations in Sudan or has violated the Federal Acquisition Regulation (FAR) rules implementing section 6 of SADA (Prohibition on United States Government Contracts).[6] SADA seeks to prohibit the U.S. government from contracting with companies that conduct certain business operations in Sudan. To that end, section 6 of the act requires the heads of federal agencies to ensure that each contract for the procurement of goods or services includes a clause requiring the contractor to certify that it does not conduct prohibited business operations in Sudan in the four key economic sectors. Based on our analysis of one of the most widely used lists of companies with prohibited business ties to Sudan,[7] we found that only 1 of 88 companies identified in the list has received federal contracts since the FAR requirements implementing SADA took effect in June 2008. However, the contract certification provision was not required for these particular contracts because they were purchase orders under simplified acquisition procedures, which generally do not require SADA certification under the FAR.

In addition to the purchase orders with this company, we found that from June 12, 2008 to March 1, 2010, the U.S. government awarded 756

[6]See FAR § 52.225-20 and FAR § 52.212-3(m) for commercial item acquisitions.

[7]We chose to use this list because it focuses on companies identified in the four business sectors targeted in SADA and identifies subsidiaries and affiliates of those companies.

contracts to 29 affiliates and subsidiaries[8] of the companies identified in the list as having prohibited business ties to Sudan. While SADA aims to prevent companies with prohibited business operations in Sudan from receiving federal contracts, it does not restrict federal contracting with these companies' affiliates and subsidiaries, provided that the affiliates and subsidiaries certify that they do not have prohibited business operations in Sudan. Some advocacy groups have disagreed with the FAR councils' decision to apply the requirement only to the entity directly contracting with the government because it allows companies that have certified to the federal government that they do not conduct prohibited business operations to continue operating in Sudan through their subsidiaries or affiliates. The FAR councils, however, stated that expanding the scope of the rule to include subsidiaries and affiliates would require the parties seeking federal contracts to attest to the business operations of parent companies, subsidiaries, and other affiliates about which they may not have information. In addition, the FAR councils noted that the company may not have any influence over the affairs of its related companies. Our review of a nonrandom selection of contracts awarded to these affiliates and subsidiaries indicates that the contractors provided the necessary certification, when required. Therefore, for these specific contracts, the U.S. government has complied with the contract prohibition section of SADA. We also found that the U.S. government has not granted any waivers pursuant to SADA, as allowed under the act, or determined that any companies submitted false certifications under SADA.

Conclusions

As global awareness of the genocide in Darfur has grown, so too have efforts to combat this humanitarian crisis. Divestment from Sudan has been at the forefront of these efforts. However, in deciding whether and how to divest, stakeholders must consider how divestment affects foreign companies operating in Sudan, particularly those that strive to make a positive contribution to the Sudanese people. They must also ensure that divestment is consistent with their fiduciary responsibility. Additionally, they must identify and evaluate conflicting sources of information about which companies have Sudan-related business operations. Requiring

[8]These affiliates and subsidiaries were identified from the list that also identified the 88 companies with prohibited business ties to Sudan. The list defines affiliates and subsidiaries as companies where there is a 50 percent or greater ownership stake. For example, for a publicly traded company with Sudan-related operations, the list identifies as subsidiaries and affiliates those companies of which the parent company owns 50 percent or more.

companies to disclose their own operations in Sudan (as well as other state sponsors of terrorism) would provide more accurate and transparent information to investors carefully weighing whether and how to divest from Sudan. Furthermore, the strong demand for this information from states that require divestment, as well as from other investors, indicates that this information could be considered material—a judgment that the SEC has suggested in its correspondence with operating companies.

GAO Recommends That SEC Consider More Complete Disclosure by Companies with Business Operations Related to Sudan

In our report released today, we recommend that, in order to enhance the investing public's access to information needed to make well-informed decisions when determining whether and how to divest Sudan-related assets, the SEC consider issuing a rule requiring companies that trade on U.S. exchanges to disclose their business operations related to Sudan, as well as possibly other U.S.-designated state sponsors of terrorism.

Mr. Chairman, this concludes my statement. I would be pleased to respond to any questions that you or other Members of the Subcommittee may have.

GAO Contact and Staff Acknowledgments

For questions or further information about this testimony, please contact Thomas Melito at (202) 512-9601, or melitot@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals who made key contributions to this testimony include Cheryl Goodman, Assistant Director; Elizabeth Singer; Kay Halpern; Katy Forsyth; Michael Hoffman; R.G. Steinman; Julia Becker Vieweg; Sada Aksartova; Debbie Chung; JoAnna Berry; Noah Bleicher; Martin de Alteriis; Patrick Dynes; Justin Fisher; Cathy Hurley; Ernie Jackson; Debra Johnson; Julia Kennon; Jill Lacey; and Linda Rego.

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THE NEED TO STAND UP TO ATROCITY CRIMES & THE SUDAN ACCOUNTABILITY AND DIVESTMENT ACT

Testimony of Ambassador Richard S. Williamson
Hearing: "Investments Tied to Genocide: Sudan Divestment and Beyond"
Subcommittee on International Monetary Policy and Trade
Committee on Financial Services
United States House of Representatives
Washington, D.C.
November 30, 2010

I want to thank Chairman Meeks and Congressman Gary Miller and the other members of the Subcommittee on International Monetary Policy and Trade for holding this hearing on the Sudan Accountability and Investment Act (SADA) and for inviting me to testify today.

During the past 30 years I have held a variety of diplomatic positions including three Ambassadorial posts, served as Assistant Secretary of State for International Organization Affairs, and most recently as President George W. Bush's Special Envoy to Sudan. I am now in the private sector where, among other things, I am a Non-Resident Senior Fellow in Foreign Policy at the Brookings Institute and I am a Senior Fellow at the Chicago Council on Global Affairs. I also have written extensively about the sad situation in Sudan.

This hearing to "review how SADA has been utilized and consider recommendations for improvements" is timely and important. I hope my observations will constructively contribute to your ongoing deliberations.

As a general rule, I am not an enthusiast for economic sanctions as a tool of foreign policy. And I generally am a skeptic about investment divestiture policies. Admittedly, often short of unacceptable robust actions, economic sanctions are the preferred available coercive diplomatic step. And divestiture campaigns, on occasion, have proven successful. The case of the divestment campaign against the apartheid regime in South Africa seems to be most frequently cited by proponents of this penalty. But these are imperfect, blunt instruments. Often the impact is difficult to quantify. There is collateral damage to innocents, often the very people subjected to the repression of the oppressors targeted by these punitive measures. Sometimes the intended target, a regime engaged in unacceptable behavior, displays the capacity to hunker down and endure. And often these steps cause discomfort, dislocation, and even distress but are not decisive in deterring abhorrent behavior. The act of applying these punitive measures meanwhile can give a sense of addressing an issue of concern without making

substantive progress in resolving the real problems. In sum, however well intended, these steps often fail to drive the change in behavior desired.

Not with standing my general concerns about these instruments of foreign policy, I strongly support the continued application of the Sudan Accountability and Divestment Act. Its application, among other things and along with other measures, brings into question the legitimacy of the Government of Sudan. This challenge is appropriate so long as Khartoum engages in unacceptable behavior including its failure to live up to its Responsibility to Protect its own people.

I am not before you today as an expert on the intricacies of the application of SADA nor can I authoritatively comment on its impact on the economy of Sudan and the consequent stress it may be creating for the Government of Sudan. But I am intimately familiar with the tragic events on the ground in Sudan and the need to keep pressure on the regime in Khartoum, especially at this time during the run up to the Referendum stipulated in the Comprehensive Peace Agreement now scheduled for January 9, 2011, and while the horrific "genocide in slow motion" relentlessly continues in Darfur.

NORTH/SOUTH CONFLICT AND THE REFERENDUM

The North/South conflict in Sudan blighted this country from its independence from Britain in 1956. Except for an interregnum from 1973 to 1983, this war raged on during which 2 million people, overwhelmingly innocent non-combatants, perished and over 4 million were displaced. Finally a fragile peace was reached with the Comprehensive Peace Agreement (CPA) signed on January 9, 2005. The United States played a central role in hammering out this complex deal which dealt with a wide diversity of difficult issues. Pivotal to the CPA was the provision to hold a referendum in 20ll that would allow Southern Sudanese to vote on unity or independence. The date currently agreed to for this plebiscite is January 9, 2011.

So far despite numerous breaches the CPA has held, but often by a very thin thread. And the possibility for large-scale fighting disrupting the Referendum or soon thereafter to derail the will of the people is a clear and present danger.

Since signing the CPA, the Government of Sudan in Khartoum has continued to marginalize the South, denying full political participation and perpetuating economic and other forms of discrimination.

The North also has failed to live up to many of its other CPA commitments. It did not disarm and demobilize the Arab militias it used as proxy warriors against the South. It did not create the fully integrated North/South army and police units. It did not hold national and local elections on time or in a free and fair manner. It has not provided transparent accounting of oil revenue. It did not live up to commitments to accept agreed-upon procedures to demarcate contested border areas: first by Abyei Boundaries Commission created by the CPA and then by the Permanent Court of Arbitration based in The Hague. And the North has provided arms to Arab tribes and incited violence that last year claimed more than 1,000 more South Sudanese lives. The list goes on.

Furthermore, the North has failed repeatedly to meet deadlines to arbitrate issues related to the referendum such as citizenship, freedom of movement, and treaties. It was slow to form the referendum commission and failed to set up the machinery to hold the referendum on time. Many observers believe current talks on these issues are part of a well-established pattern by Northern leaders of setting up elaborate and complicated forums for discussing, deliberating, and eventually denying commitments they never intended to honor in the first place. Meanwhile, their leverage grows.

As Francis Deng, former Minister of State for Foreign Affairs of Sudan, has written in his new book, SUDAN AT THE BRINK: SELF-DETERMINATION AND NATIONAL UNITY, "It is easy to see that the North, which has dominated the unity framework as conventionally understood, would want to sustain that framework, with all it offers in terms of control over power, wealth, services, development opportunities, and the definition of the country as Arab and Islamic."

For me watching the unfolding situations in Sudan is not an academic exercise nor are the casualties dry statistics. I have listened to the victims of the violence tell their heart wrenching stories. I have seen the carnage. I have smelled the smoking wreckage of Abyei after it was burnt to the ground. I have visited displaced persons in Agok living under plastic sheets during the rainy season trying to hold onto life in desperate conditions. The murder, mayhem and misery are the daily reality for so many South Sudanese.

In May 2008 Abyei, a large town in an area which remains contested between the North and South, suffered a terrible flash point of violence. There were casualties and up to 50,000 people fled their homes. I visited Abyei just days after the terrible destruction.

Where just days earlier thousands of families lived, laughed, and loved, there were only remnants of lives lost. Moving down the dirt roads, except for three teenage soldiers carrying Kalashnikovs, there was no one. As far as I could see were burnt out huts, here and there blackened metal bed frames and chairs, scattered fragments of clothes, burnt out 55 gallon water drums, the occasional charred skeleton of a truck , the contorted remnants of a child's bicycle, smoke rising from smoldering remnants. Tens of thousands instantly added to the casualty list of Sudan's endless violence.

The violence is brutal and barbaric. The stories of such death, destruction, devastation and deep despair are too common. They are imbedded in the lives of the survivors. Peace of mind is unknown. Aspirations are fragile. Hope seems unattainable.

The CPA offered a six year window for the North to make unity attractive. It has failed to do so. No observer familiar with the situation believes the Southerners will not vote for independence. But major concerns remain unaddressed such as oil revenue and a final resolution of Abyei' status. The long history of broken promises, marginalization, and violence as acceptable instruments of power has led both the North and South to prepare for renewed war. Tensions are high and rising. The prospect of a peaceful, credible referendum is precarious.

Last week there were reports that the North engaged in an aerial attack on the South that wounded four Southern Sudan People's Liberation Army soldiers. The SPLA said this was part of the North's efforts to try "to drag Sudan back into war again and to disrupt or prevent the referendum."

The pro-government daily Akhir-Lahza reported that last week President Omar al-Bashir's adviser for security affairs, Salah Gosh, delivered a speech at a public rally at Karima town in which he "accused the SPLM of refusing to sign agreements relating to post-referendum arrangements under the influence of the United States." According to the Sudan Tribune, "The presidential adviser also claimed that the U.S. had asked the SPLM not to cede the central contested area of Abyei, saying that Washington has 'hijacked' the ex-Southern rebel group. ... Gosh warned that Abyei would remain part of the north whether through a bilateral agreement, the referendum or through war and peace."

Concerned interested parties, including the United States, are offering incentives to the North if they follow through on the agreements they already have made and the referendum proceeds on schedule.

Therefore, I think it is important to note that the Referendum voting to begin January 9, 2011 is not an end. It may not even be the beginning of the end. Yes, it will be a milestone. But that plebiscite is only a step in a process scheduled to continue for at least six months in which a number of crucial issues will be negotiated regarding separation. The South believes that July, 2011, is a firm deadline. The North has said it is a soft target.

The incentives tendered by President Special Envoy Gration, and more recently by Senator Kerry, have left unrealistic expectations in Khartoum. However well intended, these promises may make the situation worse. Failure to deliver promptly on these proffered benefits will add to the turmoil that may lead to tragedy.

It is my experience of meeting and negotiating and dealing with all the leading personalities in Sudan that the Government of Sudan needs strict and specific and severe consequences tied to verifiable concrete steps to get progress on alleviating humanitarian suffering and living up to its commitments. Engagement is important, but it is merely a beginning. Incentives may be useful. But history shows they are insufficient. Therefore, this is not time to ease SADA but to reaffirm a commitment to it and, if anything, to strengthen it.

DARFUR

It is important to recognize that Darfur is integrally intertwined with the ongoing Sudan North/South difficulties. The root cause of conflict in both areas is a pattern, practice and precedent of marginalizing the peripheries by the powerful Arab Muslims at the center. In Darfur, the vast majority of the people are not Arab and they are not Muslim.

Throughout the period of colonial subjection during the Ottoman Empire in the 19th century and then the British Empire up to 1956, the northern Arabs of Sudan along the Nile River were favored and all those outside this central area were marginalized. It was a way to control this geographically large and enormously diverse country. Just as the South was marginalized, so was Darfur disadvantaged

economically and politically. This gave rise to a modest revolt in 2003. However, rather than a proportional response targeted at the rebels, Khartoum opened the gates of hell.

Similar to the manner in which they had prosecuted their wars against Southern Sudan, in Darfur the Government of Sudan armed Arab militias. Then in coordinated attacks against the non-Arab African civilians of Darfur they bombarded villages from the sky with airplanes and attack helicopters, often dumping 55 gallon drums of burning oil on innocent people below. Then Sudan Armed Forces riding on flatbed trucks would race through the village firing their guns in every direction. They would be followed by waves of Janjaweed, the so-called devils on horseback and camel, who would swoop into the village burning crops, stealing livestock, destroying homes, poisoning wells, killing boys and men, and beating and gang raping small girls and women. As both President George W. Bush and President Barack Obama have said, this has been genocide. More recently, the International Criminal Court has issued arrest warrants for President al-Bashir for crimes against humanity, war crimes and genocide for the atrocities committed in Darfur.

I have met with scores of internally displaced persons in IDP camps throughout Darfur. I have listened to the horrific stories of the fire from the sky that rained down on villages, the destruction, the brutality, the lose, the sorrow. I have heard women tell me about the barbaric killings of their fathers, their husbands, and their sons. I have heard the heart ache of mothers telling me about children dying during the long walks across the desert seeking refuge. I have seen the anguished faces of women who have been violated and, worse yet, witnessed the brutal beating and rape of their daughters. I have seen the hopelessness in their eyes.

It is true that in Darfur the worst atrocities took place in 2003 and 2004. Today it is low intensity violence. There are fewer targets of opportunity with 300,000 dead and over 2 million displaced. But make no mistake, the genocide in slow motion grinds relentlessly on. Humanitarian assistance for these people has declined in the past two years. Millions are captives in these overcrowded, unsanitary camps where women still are beaten and raped as they go out to collect fire wood. For many their ancestral land has been taken by Arabs so they not only have no shelter to which they can return and no land. Security has not been restored. And there continue to be aerial bombings from the Sudan Armed Forces in violation of numerous agreements.

Meanwhile, the Doha peace talks continue without resolution. Qatar is to be commended for their leadership in organizing and facilitating these Darfur discussions. Unfortunately, progress remains elusive.

I fear that if full scale conflict reignites between the North and the South any possibility of progress toward peace in Darfur will be lost. And even if progress is made on that front, Khartoum may be even less accommodating to the desire of the people of Darfur for an end to their marginalization, their persecution, and their requirement for empowerment and some degree of autonomy. As one senior Government of Sudan official said to me in a private meeting, "If we give up the South, then Darfur will want the same thing. Where will the dismemberment end? Eventually there will be no Sudan left."

In working for progress in Darfur, as with the recent tragic situation between the North and South, engagement with the Government of Sudan has not produced positive results. I do not believe that incentives alone can alleviate the suffering and lead to sustainable peace. Disincentives are required. Therefore SADA should be strengthened and kept in place. Pressure is required. Easing of those punitive actions can only be tied to specific, concrete, verifiable progress. Anything less rigorous, I am afraid, will contribute to continuing the genocide in slow motion in Darfur.

CONCLUSION

I applaud the Obama Administration's willingness to engage with all parties of the various conflicts in Sudan. From personal experience, I know that progress is very difficult. Patience, perseverance, and pragmatism need to be practiced. The full foreign policy tool box is required to make progress. That includes both coercive measures and incentives. Experience demonstrates that incentives alone will not bend the trajectory of tragedy in Sudan. Instruments such as the Sudan Accountability and Disinvestment Act are useful to achieving progress for the millions of innocent Sudanese who have suffered unimaginable horrors and continue to face a bleak future.

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