MULTISTATE EXPORT TRADE PROMOTION UNDER THE EXPORT TRADING COMPANY ACT OF 1982

I. INTRODUCTION

Unemployment and trade deficits are two critical factors which influence the United States economy.[1] Both are related to the success of United States exporters. Although the United States leads the world in the dollar volume of exports, its share of the world export market is declining.[2] Enlarging the United States portion of existing export sales through promotion would reverse this trend.[3]

Presently, one hundred corporations account for one half of all exports of manufactured goods,[4] yet an additional 20,000 small and medium sized businesses might profitably enter the export market.[5] The high costs of exporting, however, discourage the smaller companies from expanding beyond their relatively safe domestic markets. If smaller corporations sold their products abroad, export trade would increase as a percentage of the United States gross national product,[6] which would reduce the trade deficit[7] and im-

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[1]Unkovic & LaMont, *The Export Trading Company Act of 1982: Invitation to Aggressive Export Expansion*, 87 DICK. L. REV. 205, 213 (1983). In September 1982 United States unemployment reached its highest percentage (10.4%) since the Depression of the 1930's. *Id.* The United States trade deficit is expected to mushroom to an estimated 70 billion dollars in 1983 from 40 billion dollars in 1982. See Atlanta Journal & Constitution, Apr. 3, 1983, at J1, col. 1.

[2] *See* Unkovic & LaMont, *supra* note 1, at 213. The dollar volume of United States exports grew from $181 billion in 1979 to $233.7 billion in 1981. The United States share of the world market decreased from 18.2% in 1960 to 12.9% in 1981. *Id.*

[3] *See* Mullen, *Export Promotion: Legal and Structural Limitations on a Broad United States Commitment*, 7 LAW & POL'Y INT'L BUS. 57, 57 n.1 (1975). Government programs in areas such as financing, insurance, taxation, commercial reporting, and market development could increase a country's share in existing export markets rather than merely expand the total export sales. *Id.*

[4] *See* Hirschhorn, *A Shot in the Arm for American Exports*, 69 A.B.A.J. 746, 747 (1983).

[5] These smaller businesses lack the knowledge to find and evaluate foreign markets. They also do not have the resources to secure credit necessary to exploit foreign sales opportunities. *Id.*

[6] Exports currently constitute 8.2% of the United States gross national product, the lowest percentage in any industrialized nation. *See* Unkovic & LaMont, *supra* note 1, at 213.

[7] *See* Note, *Export Promotion Through Tax Incentives: The Future of DISC Under the GATT Subsidies Code*, 20 VA. J. INT'L L. 171 (1979). *See also Causes and Consequences of the U.S. Trade Deficit and Developing Problems in U.S. Exports: Hearings Before the Subcomm. on Trade of the House Comm. on Ways & Means*, 95th Cong., 1st Sess. 34 (1977) (statement of Representative Charles A. Vanik, Chairman, House Subcomm. on Trade).

prove overall employment statistics.[8]

As one means of encouraging exports and improving United States competitiveness in international commerce, Congress enacted the Export Trading Company Act of 1982 (ETCA).[9] The ETCA centralizes responsibility for export trading companies (ETCs) in the Department of Commerce, promotes participation of banks in ETC formation, and allays fears concerning the application of antitrust laws to ETCs.[10] The ETCA also acknowledges the importance of regional, state and local participation in the expansion of United States export trade, especially through the development of innovative regional export programs.[11]

Many states could pool and effectively utilize their resources for export trade promotion through multistate trading companies. This Note analyzes the prospects for and obstacles to multistate trading companies formed through a compact. It will address constitutional impediments to multistate compacts which arise under three clauses: 1) the compact clause; 2) the commerce clause; and 3) the supremacy clause. The Note proceeds on the basis of two presumptions: the ETCA represents a congressional invitation to states to form multistate exporting compacts, and the Act minimizes the threat of federal preemption.

II. EXPORT PROMOTION

A. *Federal Government*

Foreign trade does not occur in a vacuum; rather, it has substantial economic ramifications for those countries that trade with each other.[12] To create a favorable trade balance, each nation develops

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[8] *See Export Policy: Hearing Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs* (Pt. 2), 95th Cong., 2d Sess. 2 (1978) (statement of Senator H. John Heinz, Member, Sen. Subcomm. on International Finance). Between 1 in 7 and 1 in 10 of all the people employed in the United States work in export-related jobs. *See also* 128 CONG. REC. S13,115 (daily ed. Oct. 1, 1982) (remarks of Sen. Heinz). Over the past 10 years, one-third of all new jobs in the United States were created through exports.

[9] The Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified at 15 U.S.C. §§ 4001-4003 (Title I), 12 U.S.C. §§372, 635a-4, 1841, 1843 (Title II), 15 U.S.C. §§ 4011-4021 (Title III), 15 U.S.C. § 7 (Title IV)) [hereinafter cited as ETCA].

[10] *See* Unkovic & LaMont, *supra* note 1, at 213. United States businessmen perceive the antitrust laws to be ambiguous, confusing, and expensive obstacles to exporting activities. *Id.* at 214. *See also* ETCA, *supra* note 9, § 4001.

[11] ETCA, *supra* note 9, § 4001.

[12] *See generally* Williams & Baliga, *The U.S. Export Trading Company Act of 1982: Nature and Evaluation*, 17 J. WORLD TRADE L. 224, 224 (1983); Unkovic & LaMont, *supra* note 1, at 213-14; Moyer & Mabry, *Export Controls as Instruments of Foreign Policy: The*

policies to promote and protect its own exporters. The United States implements policies encouraging foreign trade through tax laws, federal programs and trade regulations.[13] The Federal Government not only promotes exporting but regulates it through licensing. All exports from the United States require government authorization.[14] The commerce clause[15] enables Congress to regulate trade; with this power, the Government can shape export policy to benefit the United States both domestically and abroad.[16]

Domestic fiscal policies can affect the amount of foreign trade of a country. Through tax incentives,[17] the Federal Government urges industries to engage in export activities and protects them from double taxation of profits earned overseas.[18] Tax policies influence how a corporation will sell its products: either through foreign subsidiaries or directly from the United States.[19]

The Domestic International Sales Corporation System (DISC)[20] represents a major tax incentive program aimed specifically at ex-

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History, Legal Issues, and Policy Lessons of Three Recent Cases, 15 LAW & POL'Y INT'L BUS. 1, 149-56 (1983); *U.S. Trade Policy: Administration and Other Public Agencies, Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 173 (1981) (statement of William H. Morris, Jr., Assistant Secretary for Trade Development, Department of Commerce) [hereinafter cited as *Hearings*]. The creation of new jobs and employment stability is directly linked to expanded United States exports. *Id.*

[13] *See Hearings, supra* note 12, at 175-81. Within the Department of Commerce, the International Trade Administration (ITA), the Trade Development Unit, and the Foreign Commercial Service are responsible for export trade promotion. The Departments of Agriculture and State perform similar promotion functions. The Internal Revenue Code provisions for Domestic International Sales Corporations (DISC) represent one of the major tax incentives to exporters. *See infra* notes 20-24 and accompanying text. The Webb-Pomerene Act, dating from 1918, was probably the last major legislative attempt to improve export performance before passage of the Export Trading Company Act of 1982. *See infra* notes 40-44 and accompanying text.

[14] Note, *Export Licensing: Uncoordinated Trade Repression*, 9 GA. J. INT'L & COMP. L. 333, 342 (1979). The most important and pervasive legislation regulating export trade is the Export Administration Act of 1979. *See infra* notes 46-54 and accompanying text.

[15] U.S. CONST. art. I, § 8, cl. 3. *See* Moyer & Mabry, *supra* note 12, at 116-19.

[16] The domestic benefits of a strong export policy have already been mentioned. *See supra* notes 6-8 and accompanying text. The export performance of United States industry is a significant factor in shaping the attitudes of foreign governments toward the United States and in the achievement of United States foreign policy objectives. *See* H.R. REP. No. 637, 97th Cong., 1st Sess. 10 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2431, 2432 [hereinafter cited as H.R. REP. No. 637].

[17] *See generally U.S. Trade Policy: Private Sector, Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 16-17 (1982) (statement of Edmund T. Pratt, Jr., Chairman, Emergency Committee for American Trade).

[18] *Id.* at 16.

[19] Mullen, *supra* note 3, at 80.

[20] *See generally* I.R.C. §§ 911-997 (1982).

porters.[21] Congress enacted DISC for the express purpose of promoting exports by equalizing the tax treatment of exporters and corporations which sell goods through foreign subsidiaries.[22] To take advantage of the DISC tax deferral provisions, a company must satisfy seven requirements.[23] The formation of a DISC inevitably permits United States companies to lower the prices of their products traded internationally, not only because of immediate tax savings but also because the companies can accrue a fund of interest-free, low-cost capital for reinvestment in export activities.[24]

Tax deferral directly augments the advantages which Export-Import Bank (Eximbank) programs provide as a part of the integrated federal policy to foster expansion of exports.[25] Eximbank funding ensures that United States exporters do not lose sales because their customers lack credit.[26] Eximbank gives long term buy-

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[21] *See* Note, *supra* note 7, at 177 n.34. Other provisions which encourage export activity include I.R.C. §§ 951-964 which allow United States companies to defer payment of taxes on the income of foreign subsidiaries engaged in either the original production or ultimate sale of goods until repatriation of earnings. *Id.*

[22] *See* Mullen, *supra* note 3, at 81. Congress also hoped to provide United States exporters with incentives similar to those provided by foreign nations which use tax policies as export promotion devices. *Id.*

[23] *See* Note, *supra* note 7, at 179-80. These requirements are: 1) a DISC must be a United States corporation; 2) for each taxable year, 95% of the DISC's gross receipts must constitute "qualified export receipts"; 3) DISCs must maintain a minimum capital of $2500 at all times; 4) the corporation can have only one class of stock (voting common stock); 5) all shareholders must affirmatively elect DISC status; 6) the DISC must maintain separate books and records and have a bank account separate from its parent corporation; and 7) corporations with a special status under the tax laws generally cannot qualify as DISCs. *Id.*

[24] *See id.* at 183. Critics have questioned the use of tax incentives to stimulate exports. See, *e.g.*, arguments presented against DISC in Note, *supra* note 7, at 190-98. Opponents argue that small businesses, the target of recent export promotion activities, are often unable to take advantage of DISC provisions. *Cf. The Export Trading Company Act of 1982: Hearings and Markup Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 54-59 (1981) (statement of Jay Angoff, Staff Attorney, Congressional Watch) [hereinafter cited as *Hearings and Markup*]. Mr. Angoff argues for the repeal of DISC because it is an "anachronism in a world of flexible exchange rates." *Id.* at 57. *See also* Note, *supra* note 7, at 198-207. Tax practices such as DISC have been questioned closely during multinational trade discussions concerning the General Agreement on Tariffs and Trade (GATT). The DISC program of tax deferral arguably constitutes an export subsidy which the GATT subsidies code prohibits. *See* Agreement on Interpretation and Application of Articles VI, CIV, CCIII of the General Agreement on Tariffs and Trade, GATT Doc. No. MTN/NTM/N/236 (1979), *reprinted in* H.R. Doc. No. 153, 96th Cong., 1st Sess. 341-410 (1979).

[25] *See* 12 U.S.C. §§ 635-635n (1982); *see also* Mullen, *supra* note 3, at 82.

[26] Note, *The Exporting Process: Some Considerations for Practitioners*, 8 GA. J. INT'L & COMP. L. 408, 424 (1978). Eximbank was created in 1934 and became a federal agency in 1935. It is capitalized with federal funds. *Id.* at 424 n.82.

ers' credits to foreign purchasers of United States exports[27] and encourages private capital participation in export ventures with guaranteed repayment of loans.[28] Administering over twenty programs,[29] Eximbank plays an important role in export financing.

Eximbank was created[30] as one of many federal agencies which facilitate exports. Congress has also vested divergent responsibilities in executive departments, agencies, councils and offices such as the Departments of Commerce, State, Agriculture and Treasury.[31] The Department of Commerce, for instance, has general statutory authority over domestic and international trade promotion.[32] On the other hand, the Department of State controls all overseas trade operations.[33] Internal offices, such as the International Trade Administration (ITA) and Foreign Commercial Service (FCS), help the Department of Commerce achieve its export promotion objectives.[34] Some Department of State foreign service officers work in the FCS to assist the Department of Commerce in gathering trade information.[35]

One informational program which the Departments of Commerce and State sponsor jointly is the Trade Opportunities Program (TOP). TOP transmits specific export opportunities (trade leads) to United States firms.[36] Trade leads originate with foreign service commercial officers who forward the leads to the Department of Commerce where they are processed and sent to subscribers.[37] Interagency cooperation, such as that displayed in TOP,

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[27] *Id.*

[28] *See* Mullen, *supra* note 3, at 87. Eximbank also guarantees repayment of importers' debt obligations which are acquired by United States banking institutions from United States exporters against a portion of the commercial risks and all political risks. *Id.* at 89.

[29] *Id.* at 87. Eximbank also operates export finance counseling services, credit information services for banks, and training and orientation programs for bankers and businessmen. *Id.* at 93.

[30] 12 U.S.C. § 635a.

[31] *See* Mullen, *supra* note 3, at 60.

[32] Note, *Interagency Conflict: A Model for Analysis*, 9 GA. J. INT'L & COMP. L. 241, 269 (1979).

[33] *Id.*

[34] *See Hearings*, *supra* note 12, at 175.

[35] *Id.* at 184 (statement of William Edgar, Acting Deputy Assistant Secretary for Trade and Commercial Affairs, Department of State). State Department responsibilities are also carried out through the Bureau of Economic and Business Affairs. *See* Note, *supra* note 32, at 268.

[36] Mullen, *supra* note 3, at 63.

[37] *See* Note, *supra* note 32, at 269. The Department of Commerce transmits leads: 1) through its United States field offices; 2) through its publications, *Commerce Today* and *Commerce Business Daily*; and 3) through direct mail contact with firms identified as inter-

helps the Federal Government produce a cohesive foreign trade policy.[38]

Favorable fiscal policies and cooperation among government agencies, however, do not provide the main ingredient for successful export trade, that is, the ability of United States industry to compete with foreign trade monopolies.[39] Until enactment of the Webb-Pomerene Act[40] sixty-five years ago, the Sherman Antitrust Act[41] deterred firms from cooperating in export trade ventures. The Webb-Pomerene Act exempts export trade associations from the Sherman Act's antitrust prohibitions,[42] allowing the associations to practice monopolistic techniques abroad, such as setting quotas and fixing prices, so long as those activities do not affect

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ested exporters. *See* Mullen, *supra* note 3, at 63 n.34.

[38] Multi-agency activity in international trade has, however, been criticized. *See, e.g., Export Policy: Hearing Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 2d Sess. 8 (1978) (statement of Fredrick W. Huszagh, Executive Director, Dean Rusk Center for International and Comparative Law, University of Georgia School of Law) [hereinafter cited as *Hearing, Export Policy*]. Professor Huszagh stated that the government structure pertaining to international exports lacked the capacity to synchronize and coordinate in order to implement strategic decisions. Export business activities are subject to several non-coordinated governmental demands. The agencies responsible for export promotion are disparate in terms of chain of responsibility to cabinet level personnel, legislative oversight committees, and bodies of judicial doctrine. Efficient coordination of trade promotion plans of the Department of Commerce, data acquisition of the State Department, revenue collection of the Treasury Department, credit services of Eximbank, antitrust enforcement of the Justice Department, and disclosure requirements about marketing activities of the Securities and Exchange Commission and the Department of Commerce is impossible. For a theoretical analysis of interagency conflict, see Note, *supra* note 32.

[39] *See* Golden & Kolb, *The Export Trading Company Act of 1982: An American Response to Foreign Competition*, 58 NOTRE DAME L. REV. 743, 746 (1983). "If small producers and manufacturers are to obtain their share of foreign business on profitable terms, they must be free to unite their efforts. They often face foreign government-assisted enterprises and multinational, multidimensional trading companies." *Id.*

[40] 15 U.S.C. §§ 61-65 (1965).

[41] 15 U.S.C. §§ 1-7 (1976). Section 1 of the Act declares illegal "every contract, combination . . . or conspiracy in restraint of trade or commerce . . . with foreign nations." *See* Murphy, *The Export Trade Association Act of 1981—A Brief Analysis*, 4 HASTINGS INT'L & COMP. L. REV. 399, 400-01 (1980).

[42] Golden & Kolb, *supra* note 39, at 747. Section 62 of the Webb-Pomerene Act defines a Webb-Pomerene Association as:

> an association entered into for the sole purpose of engaging in export trade and actually engaged solely in export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association.

15 U.S.C. § 62 (1976).

United States markets, prices or domestic competitors.[43] Exporters of services cannot claim Webb-Pomerene's antitrust exemptions, and many manufacturers agree that the Webb-Pomerene Act provides insufficient protection from antitrust penalties.[44]

The United States Government promotes international commerce through favorable fiscal policies and trade laws, but it never guarantees the right to export.[45] Governmental control of exporting takes the form of licensing procedures under the Export Administration Act of 1979 (EAA).[46] A growing conflict among Congress, the executive branch, United States allies and the exporting community centers on the EAA.[47] Export controls found in the EAA apply only after the President[48] fully considers their economic im-

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[43] Golden & Kolb, *supra* note 39, at 748; *see also* Murphy, *supra* note 41, at 400-02.

[44] *See* H.R. REP. No. 637, *supra* note 16, at 12. Of the 150 Webb-Pomerene Associations created since 1918, only 33 survive. Only a few of those still in existence are substantial exporters. Webb-Pomerene Associations account for only 2% of all United States exports. *See* Hirschhorn, *supra* note 4, at 748. Antitrust challenges to Webb-Pomerene Associations have diminished the effectiveness of the Associations by creating confusion as to the scope of the Sherman Act and the protection offered by Webb-Pomerene. *See, e.g.*, United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950) (Webb-Pomerene Associations may fix prices and quotas and control foreign markets without violating the Sherman Act). *But see* United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949) (antitrust protection of Webb-Pomerene does not extend to unfair methods of competition prohibited under the Federal Trade Commission Act). *Cf. Hearings and Markup, supra* note 24, at 61-62. Webb-Pomerene has failed to achieve its purpose. Export associations today pursue traditional cartel-related activities instead of performing cost-reducing functions. *Id.*

[45] *See* Moyer & Mabry, *supra* note 12, at 116-19. *See also* Buttfield v. Stranahan, 192 U.S. 470, 493 (1904) (an individual has no vested right to trade with foreign nations).

[46] 50 U.S.C. app. §§ 2401-2420 (Supp. V 1981). For a history of United States export controls, see Berman & Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 791 (1967).

[47] *See* Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right to Export" Versus National Security and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 255, 256 (1981). The EAA represents the most recent effort to strengthen and streamline export administration, both in licensing and regulatory enforcement. Further simplification is needed. *See The Export Administration Act Amendments of 1983, Rep. of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. REP. No. 170, 98th Cong., 1st Sess. 1-3 (1983).

[48] Lurking beneath statutes like the EAA is the question of whether the President has inherent constitutional authority to control exports, regardless of statutory authorization. Nowhere in the Constitution is the President endowed specifically with power to make and conduct foreign policy or to restrict or regulate exports. *See generally* U.S. CONST. art. II. The President historically has exercised much broader powers than those suggested by the Constitution. *See* Moyer & Mabry, *supra* note 12, at 116-17. *See also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (with respect to foreign affairs, the Federal Government is not limited to powers specifically enumerated in the Constitution); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring) (implied presidential powers fluctuate depending on whether the President acts pursuant to implied

pact and only as necessary to promote national security,[49] foreign policy[50] and economic welfare.[51] The controls extend to the export of goods and technical data from the United States and to their reexport from the country to which they are originally shipped.[52] Export licenses vary according to the category into which a particular commodity may fall.[53] After filing an application, the exporter must wait while the Secretary of Commerce thoroughly reviews it and makes a final decision to either issue or deny the license.[54] The process consumes time and money which smaller industries cannot profitably allocate to exports.

B. *State Government*

Federal trade programs may be inaccessible to smaller businesses which, due to their size, cannot commit the time and resources to secure federal export trade services. State marketing activities[55] provide those companies with the necessary support and expertise at lower costs.

State foreign trade endeavors date from the seventeenth and eighteenth centuries when the Colonies developed transatlantic commerce with other nations.[56] After the Colonies ratified the Con-

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or express congressional authorization, in the absence of congressional grant or denial of authority, or incompatibly with Congress' implied or expressed will); *cf.* Dames & Moore v. Regan, 452 U.S. 654 (1981) (failure by Congress to delegate specific authorities does not, especially in areas of foreign policy and national security, imply congressional disapproval of presidential action).

[49] 50 U.S.C. app. § 2404.

[50] *Id.* § 2405.

[51] *Id.* § 2402(2).

[52] Comment, *supra* note 47, at 268. The Office of Export Administration (OEA), which is located within the Department of Commerce's Industry and Trade Administration (ITA), issues two types of licenses: 1) general licenses—a broad authorization published in the Export Administration Regulations to export categories of items that do not require a specific license application or document in order to be exported (a shipper's export declaration may be necessary); and 2) validated licenses—a formal application must be received from OEA before certain goods and data can be exported. The EAA authorizes a third type of license, the qualified general license, designed to permit multiple exports under a single license to a particular consignee or for a specified end use. *Id. See* 50 U.S.C. app. § 2404(e).

[53] Comment, *supra* note 47, at 269. A commodities control list identifies, for each technical category, the country groups to which controls apply and what types of controls apply, but only for those commodities which the Commerce Department controls.

[54] *See* 50 U.S.C. app. § 2409.

[55] Prominent state marketing efforts include the Washington State Apple Advertising Commission, *see* WASH. REV. CODE ANN. §§ 15.24.020-.900 (1971), and the Florida Citrus Commission, *see* FLA. STAT. ANN. § 601.04 (West 1978).

[56] *See generally* H. CARMAN, SOCIAL AND ECONOMIC HISTORY OF THE UNITED STATES 158-68 (1930). The foreign trade of the Colonies rivaled that of Europe before the American

stitution, trade promotion and regulation became centralized.[57] Growing trade deficits in the early 1970's, however, again focused the Government's attention on the need for an expanded state role in export promotion.[58]

The economic health of small, locally or regionally based companies profoundly affects local economies;[59] thus, the states have a major interest in the success of those businesses. To create markets for locally produced goods and services, states have expanded their presence abroad in the form of trade offices and missions.[60] They also offer marketing programs which assist businesses in identifying suitable sales opportunities, tailoring products to specific foreign markets, and developing an export strategy.[61] States provide trade development programs through agencies which give small companies highly focused data on credit analysis and market opportunities.[62] State departments of industry, trade and agriculture generally have primary responsibility for trade development,[63] often with guidance from the United States Departments of Commerce and Agriculture.[64]

Revolution. Problems which hampered post-colonial trade efforts included a lack of capital, absence of a uniform system of money, and inadequate credit facilities. *Id.* at 165.

[57] *See* U.S. CONST. art. I, § 8. The Constitution vests Congress with powers which obviate the states' need to engage in foreign trade. Congress can regulate trade with foreign nations, *id.* cl. 3; coin money, *id.* cl. 5; and lay and collect taxes, duties, imposts, and excises, *id.* cl. 1. States, on the other hand, cannot lay any imposts or duties on imports or exports, except as may be absolutely necessary for executing their inspection laws. *Id.* § 10, cl. 2.

[58] *See generally Extension and Revision of the Export Administration Act of 1969: Hearings and Markup Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 573 (1979) (statement of Richard A. Snelling, Governor, Vermont). States and their planning and development departments can play an important role in stimulating exports to the benefit of their own people and of the national economy. *Id.*

[59] *Id. See also id.* at 583, 585 (statement of Robert E. Mulcahy III, Chief of Staff to the Governor, New Jersey).

[60] *See* Barovick, *State Governments Build Bigger Export Role*, BUS. AM., Aug. 24, 1981, at 7. In 1976, 19 states had overseas offices. By 1980, 33 states had a total of 66 overseas offices. Several states may share an office, or one state may have more than one office. *Id.*

[61] *Id.* at 7. State programs are used primarily by small manufacturing firms with less than five years experience in exporting activity.

[62] *See Hearing, Export Policy, supra* note 38, at 18.

[63] *See* Barovick, *supra* note 60, at 7. Maryland promotes trade through its Office of Business and Industrial Development of the Department of Economic and Community Development. Georgia's trade efforts proceed through the Departments of Industry and Trade, and Agriculture. For a comprehensive study of Georgia's trade programs, see GA. WORLD CONG. INSTITUTE, ENHANCING GEORGIA'S COMPETITIVE POSITION IN INTERNATIONAL BUSINESS: A WHITE PAPER FOR DEVELOPING STATE POLICY (J. Goodnow, J. Crupi & C. Mahone, eds. 1982).

[64] *See generally Hearings, supra* note 12. The Foreign Agricultural Service gathers information on export opportunities and funnels the information to state agencies. *See id.* at

As at the federal level, state fiscal policies influence export trade. Foreign trade zones,[65] industrial revenue bonds and job training programs provide businesses with incentives to enter the export market.[66]

Each state relies on similar programs to attract businesses, promote trade and develop a stronger economy, but economic problems extend beyond state boundaries, reaching regional proportions. In the past, states have successfully used the interstate authority as a tool in combatting regional problems.[67] The New York Port Authority is one conspicuous example of concerted multistate action. Established in 1921 by New York and New Jersey, the Authority facilitates trading activities in the harbor and freight yards surrounding New York City.[68] The Authority borrows money and builds facilities such as bridges, tunnels, grain elevators and marine terminals.[69] It also provides regional trade offices and offers services such as warehousing, documentation and market information for export-import shippers.[70]

State and regional commissions, port authorities and local development offices exist throughout the United States to promote

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185-88. *See also* Barovick, *supra* note 60, at 9. The Commerce Department, through its Office of Federal/State Liaison, helps states coordinate trade promotion efforts with federal programs. *Id.*

[65] *See generally* Note, *Foreign Trade Zones—International Business Incentives*, 7 GA. J. INT'L & COMP. L. 669 (1977). Foreign trade zones are enclosed facilities into which foreign merchandise may be brought without being subject to financial burdens imposed by tariffs. *Id.* at 670. Public and private corporations can establish foreign trade zones pursuant to 19 U.S.C. § 81(a)(u) (1978) and state enabling statutes. *See, e.g.*, O.C.G.A. §§ 52-10-1 to 52-10-4 (1983).

[66] States may establish free ports through which goods move tax-free. Localities within the state may also issue industrial revenue bonds to finance construction of manufacturing plants. *See generally* COUNCIL OF STATE GOVERNMENTS, ECONOMIC DEVELOPMENT IN THE STATES 1 (1965).

[67] *See* Leach, *Interstate Authorities in the United States*, 26 LAW & CONTEMP. PROBS. 666, 681 (1961); *see also* Leach, *The Federal Government and Interstate Compacts*, 29 FORDHAM L. REV. 421, 422 (1961) [hereinafter cited as Leach, *The Federal Government*]. Using interstate compacts, states combine efforts to conserve oil and water, alleviate pollution problems, and conduct research projects. *See, e.g.*, 33 U.S.C. §§ 567, 567b, 567b-1 (1970) (pollution control compacts); 33 U.S.C. § 1253 (1978) (interstate cooperation and uniform laws).

[68] *See* Fair, *Port Authorities in the United States*, 26 LAW & CONTEMP. PROBS. 703, 707 (1961).

[69] *See* Goldstein, *An Authority in Action—An Account of the Port of New York Authority and Its Recent Activities*, 26 LAW & CONTEMP. PROBS. 715, 717-20 (1961).

[70] *Id.* at 720. The New York Port Authority has trade promotion offices in New York City, Chicago, Washington, D.C., Rio de Janiero, London, and Zurich.

healthy exploitation of local and regional economic resources.[71] Traditionally, these quasi-governmental entities have encouraged outside investment in specific geographic areas.[72] Enactment of the ETCA offers states an opportunity to move beyond the traditional methods of export trade promotion. The multistate compact would enable states to form quasi-governmental nonprofit ETCs to foster local and regional growth.[73] The Constitution, however, limits the freedom with which states may enter into compacts.[74]

C. *The United States Constitution and Multistate Compacts*

1. *Compact Clause*

Groups of states within the United States develop interests, cultures, interdependencies[75] and problems which transcend state boundaries and affect the whole region. They may wish to cooperate in particular situations, but not all interstate endeavors require a federally approved compact.[76] The compact is only one form of agreement available to states.[77] Its legal and administrative charac-

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[71] Unkovic & LaMont, *supra* note 1, at 245.

[72] *Id.*

[73] *Id.* at 245-46. These state-run ETCs could provide export financial and informational assistance that local banking institutions are ill-equipped to offer, especially in rural agricultural areas which could profit from foreign market development. They would also act as "magnets" to draw additional small to medium sized companies to rapidly expanding areas. *See also Export Trading Companies and Trade Associations: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 110 (1979) (statement of Carlos Romero Barceló, Governor, Puerto Rico). State governments could decrease reliance on federal resources and foster a correspondingly closer relationship between themselves and the firms which operate within their borders. Including states in export promotion increases the number and type of resources dedicated to exports.

[74] U.S. CONST. art. I, § 10, cl. 3. "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state, or with a foreign power." *Id.*

[75] *See generally* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 695-708 (1925).

[76] M. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 19 (1971). States are subject to judicial inquiry if their actions infringe upon or abridge fundamental individual rights guaranteed by the United States or state constitutions. States are bound by their own constitutions and statutes as well as by the laws, treaties, and judicial decisions of the United States. *Id.* Principal vehicles of cooperation include uniform laws, reciprocal laws, administrative agreements, various forms of informal cooperation, and interstate compacts. *See* F. ZIMMERMAN & M. WENDELL, THE INTERSTATE COMPACT SINCE 1925, at 30 (1951).

[77] Leach, *The Federal Government*, *supra* note 67, at 425. In addition to other informal methods, *see supra* note 76, the Constitution provides two formal methods of dispute resolution or adjustment among states: 1) the compact (art. I, § 10, cl. 3); and 2) litigation (art. III, § 2, cl. 1).

teristics make it a desirable method[78] of solving regional problems which Congress can neither effectively[79] nor constitutionally[80] address.

Compacts originally developed as a means of settling boundary disputes in both the colonial and post-revolutionary eras.[81] The framers of the Constitution contemplated agreements among the states which would not threaten the authority of a central government.[82] They incorporated what had been royal approval necessary for valid colonial agreements[83] into the Constitution in the form of congressional consent, giving Congress supervisory power and legal control over multistate activities which have national consequences.[84]

The Constitution, however, does not distinguish between interstate agreements lying outside the constitutional prohibition and those requiring congressional consent.[85] Supreme Court decisions have added a judicial gloss to the compact clause, supplying the

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[78] *See* F. ZIMMERMAN & M. WENDELL, *supra* note 76, at 103. The advantages of the compact are its flexibility, its legal strength (especially its binding character), its enforceability through the Supreme Court's original jurisdiction, and its superior position in the hierarchy of state laws. *Id.* at 104. Five areas seem most appropriate for the use of compacts: 1) boundary adjustments; 2) conservation and allocation of natural resources; 3) construction, maintenance, and operation of joint institutions and provision of joint services; 4) construction, operation and maintenance of joint public works; and 5) metropolitan area planning and development. *See* Leach, *The Federal Government*, *supra* note 67, at 444.

[79] *See* Frankfurter & Landis, *supra* note 75, at 708.

[80] *See* Celler, *Congress, Compacts, and Interstate Authorities*, 26 LAW & CONTEMP. PROBS. 682 (1961). The range of federal constitutional authority has been given broad sweep by constitutional interpretation. The areas in which state or multistate action is the only available means of control, therefore, have been sharply reduced. Some situations call for federal-state cooperation, such as river valley development. *Id.* at 682-83. The interstate compact is a strong legal instrument for expanding cooperative federalism in situations to which other cooperative methods are not as suitable. F. ZIMMERMAN & M. WENDELL, *supra* note 76, at 126.

[81] Note, *Congressional Supervision of Interstate Compacts*, 75 YALE L.J. 1416, 1422 (1966). Almost all colonial charters were vague and expansive. Boundary disputes arose more frequently as the populations of bordering colonies began to impinge upon one another. *Id. See also* Frankfurter & Landis, *supra* note 75, at 692.

[82] *See* Frankfurter & Landis, *supra* note 75, at 693-94. To protect the new Union and to settle boundary disputes, the Articles of Confederation provided for an appeal to Congress in all disputes over boundaries. The Articles of Confederation also barred alliances among the states without congressional consent. These two forms of conflict resolution derive from the pre-revolution practices of seeking Crown approval for boundary dispute settlements and of appealing to the Privy Council where no settlement could be reached. *Id.*

[83] *Id.* at 694.

[84] *Id.* at 695.

[85] *See* F. ZIMMERMAN & M. WENDELL, *supra* note 76, at 34.

necessary distinction. In *Virginia v. Tennessee*[86] Virginia asked the Court to nullify a compact between Virginia and Tennessee which established without congressional consent their common state boundary.[87] The Court's analysis forms the basis of modern compact law. The Court rejected the argument that the compact clause prohibits all agreements between states without congressional consent, stating that "there are many matters upon which different states may agree that can in no respect concern the United States."[88] According to the opinion, the compact clause is a bar only to the formation of those combinations which increase the states' political power and which may encroach upon or interfere with federal supremacy.[89]

The Court stated that the compact clause does not clearly indicate the nature of the required consent.[90] Congress might, for instance, give explicit or implicit consent either before or after the states form a compact.[91] The consent of Congress is generally given to a multistate agreement either by legislation or joint resolution, which sets forth and approves the text of the compact and adds provisions protective of the national interest.[92] Congress sometimes grants unrestricted advance consent or invites states to sign a compact to further desirable regional and national objectives, providing that they submit the agreement for approval.[93] Congressional consent, in whatever form, means that the compact does not infringe federal powers or jurisdiction.[94]

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[86] 148 U.S. 503 (1893).

[87] *Id.* at 517.

[88] *Id.* at 518. As examples of joint agreements not requiring congressional consent, the Court cited agreements to fight diseases or their causes and agreements for the transportation of goods across several states. *Id.*

[89] *Id.* at 519. The Court relied on the rule of construction known as *noscitur a sociis* to interpret the meaning of the word "compact." Citing Story's *Commentaries*, the Court indicated that compacts usually involved treaties of confederation in which the parties joined together for mutual government, political cooperation, and the exercise of political sovereignty. *Id.*

[90] *Id.* at 521.

[91] *Id.*

[92] *See* Celler, *supra* note 80, at 686. Congress has imposed conditions to protect national interests in legislative consents. It may reserve the right to alter, amend, or repeal its consent, although such reservation is unnecessary. *Id.* at 688. *See also* Louisville Bridge Co. v. United States, 242 U.S. 409 (1917) (even in the absence of a specifically reserved right to alter, amend, or repeal its consent, Congress retains this right).

[93] *See* Celler, *supra* note 80, at 686. Congress may also limit the agency created by a compact to the performance of the enumerated functions and require congressional consent for each new or additional duty. *Id.* at 689.

[94] *See* Leach, *The Federal Government*, *supra* note 67, at 439.

The consent question arose more recently in *United States Steel Corp. v. Multistate Tax Commission.*[95] The compact in that case differed from traditional dispute resolution agreements; it represented a widespread attempt among states to promote uniformity in state tax systems.[96] Congress had not approved the compact which the appellant challenged. Applying the test of *Virginia v. Tennessee*, the Court stated that "the relevant inquiry must be one of impact on our federal structure."[97] According to the Court, the tax compact did not purport to authorize its member states to exercise any power that they could not exercise individually.[98] *Multistate Tax Commission* reaffirmed Congress' role as guardian of federal and non-compacting states' interests.[99]

In *Multistate Tax Commission* the Court established principles applicable to multistate export agreements. To avoid the invalidating effect of the compact clause, states forming an export trade compact should conform their actions to the rules stated in *Multistate Tax Commission* and *Virginia v. Tennessee.*[100] Since multistate exporting implicates both interstate and foreign commerce, it may impinge on federal supremacy and state sovereignty.[101] Congress could, then, invoke the consent requirement of the compact clause.[102] The increased use of the multistate compact as a tool for responding to regional problems will require a reconciliation of the constitutional powers granted to the Federal Government and those reserved to the states.[103]

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[95] 434 U.S. 452 (1978).

[96] *Id.* The compact also prompted proper determinations of the state and local tax liability of multistate taxpayers, of taxpayer convenience and compliance in the filing of tax returns, and of nonduplicative taxation. Members of the compact included Alaska, Colorado, Florida, Hawaii, Illinois, Kansas, Texas, Utah, and Wyoming. *Id.* at 454-56.

[97] *Id.* at 471. The Court indicated that the compact clause reaches both agreements and compacts whether formal or informal. *Id.* at 470.

[98] *Id.* at 470. The Court also emphasized that the compact did not delegate any sovereign power to the multistate tax commission, nor did it limit member states' freedom to adopt or reject commission rules and regulations or to withdraw from the compact at any time. *Id.*

[99] *See* Comment, *The Interstate Grain Marketing Compact—Should Washington Be a Partner?*, 15 GONZ. L. REV. 797, 808 (1980); *see also* Celler, *supra* note 80, at 684.

[100] *See supra* notes 86-91, 94-99 and accompanying text.

[101] *See generally* Frankfurter & Landis, *supra* note 75, at 718-29; Comment, *supra* note 99, at 808.

[102] *See supra* notes 90-93 and accompanying text. *See also* M. RIDGEWAY, *supra* note 76, at 20-24.

[103] *See* F. ZIMMERMAN & M. WENDELL, *supra* note 76, at 36.

2. *Commerce Clause*

The Constitution grants Congress authority to regulate interstate and foreign commerce.[104] Congress need not act to exercise its power; the dormant commerce clause circumscribes states' commercial regulatory role even in the absence of federal regulation.[105] Analysis of the commerce clause differs from that of the compact clause since states may legislate in interstate commerce until an actual impact upon federal supremacy over trade among the states occurs.

a. *Interstate Commerce*

Discriminatory, self-protective and retaliatory state economic practices which occurred during the period of the Articles of Confederation precipitated the necessity for a centralized commercial authority.[106] The commerce clause vests Congress with the general power of commercial regulation in matters that concern the Union, especially where individual states lack the capacity for effective action or where they threaten to disrupt good relations among themselves through legislation.[107] The commerce clause does not totally void the concept of federalism. It allows, within limits, autonomous state solutions to special problems not common to all the people and states of the Union.[108]

Early interpretations of the commerce clause spoke in terms of absolute congressional regulatory power, leaving the states with a limited police power over commerce,[109] while later interpretations

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[104] *See* U.S. CONST. art. I, § 8, cl. 3.

[105] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 320 (1978).

[106] *Id.* at 321. *See also* 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (1911) (letter from James Madison to J.C. Cabell). Madison wrote:

> Yet it is very certain that it [the power to regulate commerce among the several states] grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventative provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

Id.

[107] Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 440 (1941).

[108] *Id.* at 483. Customs regulations, maritime regulations, and the conduct of more awesome types of mercantile enterprises are areas over which Congress gained sole control. *Id.* at 494.

[109] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The Court permitted states to enact quarantine, inspection, health, and intrastate commerce laws even though such laws might touch interstate commerce. *See also* L. TRIBE, *supra* note 105, at 322, 323 n.9.

gave the states room to regulate commerce so long as their actions did not conflict with any validly enacted federal legislation.[110] The Supreme Court in *Cooley v. Board of Wardens*[111] reconciled the two interpretations by allowing states to govern local interstate and foreign commerce that did not require a uniform national system of regulation.[112] Modern commerce clause analysis conceptualizes the United States as a free trade unit[113] which can endure only if states do not practice discriminatory economic policies toward each other.[114] States have tried to limit out-of-state sellers' and suppliers' access to local markets through legislation in order to protect local economies.[115] Protectionist laws of this type discriminate against interests that do not have fair representation within the state, placing an impermissible burden on interstate commerce.[116] States may validly impede interstate commerce to protect local residents from deceptive trade practices and threats to health or environment.[117] Unfortunately, the distinction between unconstitutional and permitted state regulation is not always clear.

Given the concept of the Nation as a free trade unit, state economic regulations which promote local businesses to the detriment of interstate commerce are presumptively unconstitutional. Courts, however, have treated regulations focused on preserving local employment, as opposed to profits, almost as favorably as laws con-

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[110] *See* The License Cases, 46 U.S. (5 How.) 504, 573 (1847).

[111] 53 U.S. (12 How.) 299 (1851).

[112] *Id.* at 319-20.

[113] *See* H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949). Justice Jackson stated that:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, . . . every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

Id. at 539.

[114] *See* Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WISC. L. REV. 125, 131.

[115] *See, e.g.*, Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511 (1935) (regulation prohibiting the sale of milk imported from another state unless the price paid in the other state to the producer was at least the minimum prescribed by the first state for purchases from local producers is unconstitutional); *H.P. Hood & Sons*, 336 U.S. at 525 (denial of license which would help milk buyer export his product out of a given market held unconstitutional).

[116] *See* South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938); *see also* L. TRIBE, *supra* note 105, at 327.

[117] *See, e.g.*, Mintz v. Baldwin, 289 U.S. 346 (1933) (certification of cattle imported into state as being free from Bang's Disease not unconstitutional); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (state program to purchase scrap cars in furtherance of environmental goals does not unconstitutionally burden interstate commerce).

cerned with health or other nonfinancial aspects of well-being.[118] Production or price controls that affect interstate commerce also do not violate the Constitution *per se*, especially when they coincide with congressional policy in the regulated area.[119] Undoubtedly, concerted economic or promotional activity by a group of states encroaches upon the free market interests of nonmember states,[120] but no hard rules exist to determine if that infringement violates the commerce clause.[121]

b. *Foreign Commerce*

Congress' foreign commerce power developed as an answer to hostile mercantile regulations of foreign countries[122] and as a means of ending inconsistent practices among the states, such as coastal states' charging high tariffs on imported goods and passing the resulting higher costs on to landlocked states.[123]

In *Gibbons v. Ogden*,[124] the Supreme Court asserted that the power over commerce with foreign nations is vested absolutely in

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[118] L. TRIBE, *supra* note 105, at 340. *See, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (safety measures carry a strong presumption of validity and may be upheld even though they may have an impact on interstate commerce); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (safety interests of the state outweighed by interest of nation in an adequate, economical, and efficient railway transportation system). The Court has upheld nondiscriminatory state regulations aimed at improving the economic status of depression-struck farmers. *See, e.g.*, Milk Control Board v. Eisenberg Farm Prods., 306 U.S. 346 (1939). In Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), the Court struck down local regulations ostensibly enacted to promote local health interests but which the Court found only erected an economic barrier protecting local industry against competition outside the state. The Court may have upheld the regulations if reasonable, nondiscriminatory alternatives adequate to conserve legitimate local interests were not available. *Id.* at 354.

[119] *See* Parker v. Brown, 317 U.S. 341, 363 (1943). In *Parker*, the Court upheld a California regulation granting the California Agricultural Prorate Advisory Commission power to control marketing of raisins enhancing or maintaining the prices by restraints on competition among producers in the sale of their crops. According to the Court, the regulations applied to wholly intrastate transactions. *Id.* at 361. Considering all the relevant factors, the Court stated that the matter is one which may be regulated appropriately in the interest of the safety, health and well-being of local communities and which may never be addressed adequately by Congress. *Id.* at 362. *But cf.* Shafer v. Farmers Grain Co., 268 U.S. 189 (1925) (grain purchased in-state without resale or processing was a part of interstate commerce; therefore, state regulation of buyers held invalid).

[120] *See* Comment, *supra* note 99, at 808.

[121] *See* Frankfurter & Landis, *supra* note 75, at 723-27. *See also Multistate Tax Comm'n*, 434 U.S. at 478.

[122] *See* Abel, *supra* note 107, at 466. The framers of the Constitution sought to increase revenues from uniform customs regulation and to prevent foreign nations from shipping goods through states with the most favorable commercial laws. *Id.* at 448.

[123] *Id.* at 448-49.

[124] 22 U.S. (9 Wheat.) 1 (1824).

Congress, precluding the states from conducting foreign trade.[125] *Japan Line Ltd. v. County of Los Angeles*[126] expands the degree to which states may involve themselves in foreign commerce. Japanese shipping companies, operating exclusively in international trade, owned cargo shipping containers which California taxed as property within the state during a given tax period. The Japanese Government also taxed the containers.[127] According to the Court, when construing Congress' power to regulate foreign commerce, a more extensive constitutional inquiry is necessary than the one involving interstate commerce;[128] state action touching foreign commerce must not affect national concerns to any significant degree.[129] By examining the effects of state activities on foreign commerce, the Court does not exclude the possibility of multistate export trade; instead, it balances state and federal interests.

3. *Supremacy Clause*

If a constitutionally enacted federal law conflicts with a state statute, the latter must yield to the former.[130] The conflict may arise either because the state legislation directly interferes with the actual operation of a federal program or because, whatever its substantive impact, the state legislation intrudes upon a field in which Congress has not legislated but has by implication reserved for exclusive federal control.[131] Individual states have entered the foreign trade promotion field with some encouragement from the Federal Government, but the Congress and the executive branch may resist multistate export trade efforts as contrary to a uniform national

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[125] *Id.* at 85. According to the Court, states could not limit, qualify, or impede the exercise of the foreign commerce power. *Id.* at 86-88. *But see* Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851) (local state regulation affecting foreign commerce is allowed).

[126] 441 U.S. 434 (1979).

[127] *Id.* at 436-37.

[128] *Id.* at 446. In the first level of analysis, the state must demonstrate that the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the state. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

[129] L. TRIBE, *supra* note 105, at 370. *See also Japan Line, Ltd.*, 441 U.S. at 451. In addition to the *Complete Auto* test, a state tax on instrumentalities of foreign commerce must survive further scrutiny to remain constitutional. It cannot create a substantial risk of international multiple taxation and cannot prevent the Federal Government from speaking with one voice when regulating commercial relations with foreign governments. *Id.*

[130] *See Gibbons*, 22 U.S. (9 Wheat.) at 209. *See also* U.S. CONST. art. VI, cl. 2. "This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." *Id.*

[131] L. TRIBE, *supra* note 105, at 377.

trade policy. Formerly, the Supreme Court invalidated state laws purporting to govern the same area regulated by the Federal Government.[132] Now, the Court will uphold state police power unless Congress clearly indicates an intent to preempt it through legislation.[133]

To determine if a federal statute preempts state law, the Court decides whether the state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[134] The Supreme Court will not presume or infer a preemptive congressional intent without persuasive reasons evidencing such intent.[135] In the case of a federal statutory scheme which does not expressly exclude state activity, the Court has resorted to a balancing of federal and state interests, upholding state regulations based on legitimate local concerns.[136] A regional export compact might threaten the purpose underlying the federal foreign commerce power, the uniformity of a federal scheme or the United States commitment to an open international trading system,[137] thus mandating the conclusion that federal law preempts such a compact. Federal encouragement of individual state export promotion, however, demonstrates a willingness to recognize a state role in developing United States trade abroad.[138]

D. *The Export Trading Company Act of 1982*

To remove exporting disincentives and to stimulate export ini-

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[132] *Id.* at 379. *See Gibbons*, 22 U.S. (9 Wheat.) at 8-18.

[133] Rice v. Sante Fe Elevator Corp., 335 U.S. 218, 230 (1947). According to the Court, intent to preempt state regulation is evidenced by: 1) pervasive federal regulatory schemes which create an inference that Congress left no room for state supplement; 2) an act of Congress which touches a field with a dominant federal interest, precluding enforcement of state laws on the same subject; and 3) state policy which produces a result inconsistent with the objectives of a federal statute. *Id.*

[134] *See* Perez v. Campbell, 402 U.S. 637, 649 (1971) (Arizona statute barring full discharge of a bankrupt debtor directly conflicts with United States Bankruptcy Act).

[135] J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 295 (1983).

[136] *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 168-73 (1978) (where the Secretary of Transportation has not promulgated tug requirements under federal statute, state's tug-escort requirement not preempted by federal scheme).

[137] Trade Agreements Act, 19 U.S.C. §§ 2501-2582 (1980). The purposes of the statute include fostering the "growth and maintenance of an open world trading system." *Id.* § 2502.

[138] *See supra* note 64 and accompanying text. *See also* 7 U.S.C. § 1756b (1978) (United States Agricultural Trade Office aid to regional export marketing programs). Any state or regional export compact would be subject to the provisions of the Export Administration Act, but this alone does not signal a federal effort to preempt multistate export activity. See *supra* notes 46-54 and accompanying text.

tiatives through the formation of new export trading companies, Congress began considering new export legislation in 1978.[139] The Webb-Pomerene Act had not achieved its expected goals,[140] leaving many small and medium sized exporting businesses uncertain of their antitrust immunity.[141] Capitalization for export trade remained a problem, especially for smaller companies, since federal law prohibits banking institutions from having equity positions in commercial ventures.[142] In October 1982 Congress passed and sent to the President an export trade law which encourages formation of export trade intermediaries as a means of developing economies of scale and low per-unit costs to facilitate the profitable export of goods and services.[143]

Title I[144] of the ETCA describes its general provisions. Unlike the Webb-Pomerene Act, the ETCA permits companies to export services such as accounting, data processing and communications.[145] It also authorizes the Secretary of Commerce to establish an export trade promotion office within the Department of Commerce "to promote and encourage to the greatest extent feasible" the formation of export trade associations and companies.[146] The ETCA recognizes that innovative and experimental export development programs keyed to local, state and regional economic needs serve an important function in United States export expansion.[147]

The Bank Export Services Act, Title II of the ETCA,[148] amends the Bank Holding Company Act of 1956[149] and the Federal Reserve Act[150] to encourage greater bank participation in ETCs. Banking institutions provide financing and access to a wide variety of economic, information, and communication services.[151] Only holding companies, bankers' banks and Edge Act Corporations may invest in ETCs, with approval of the Federal Reserve

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[139] *See* Golden & Kolb, *supra* note 39, at 754.

[140] *See supra* notes 39-44 and accompanying text.

[141] *See* Hirschhorn, *supra* note 4, at 749.

[142] *Id.* at 748. This prohibition stems from fears during the Depression about the safety of bank depositors' funds and their use in risky commercial activity.

[143] 15 U.S.C. § 4001.

[144] *Id.* §§ 4001-4003.

[145] *Id.* § 4002.

[146] *Id.* § 4003.

[147] *Id.* § 4001.

[148] 12 U.S.C. §§ 1841-1843.

[149] *Id.* § 1843(c).

[150] *Id.* § 372. This section makes bankers' acceptances available to small and medium sized firms.

[151] *See* Unkovic & LaMont, *supra* note 1, at 217.

Board.[152]

Export trade certificates of review under Title III[153] protect ETCs from antitrust sanctions. The Secretary of Commerce, in conjunction with the Attorney General, establishes rules and regulations for certification and issues the certificates.[154] Applicants must satisfy specified standards found in the ETCA before the Secretary can grant certification.[155] Each certificate indicates the recipient, the export trade, trade activities and methods of operation to be used as well as any conditions or terms that the Secretary imposes.[156] Certificates of review bar criminal and civil action which may be brought under the antitrust laws against the holder so long as he acts in accordance with the stipulated conditions and methods.[157]

Title IV,[158] the Foreign Trade Antitrust Improvements Act, amends the Sherman Antitrust Act[159] and the Federal Trade Commission Act[160] and develops jurisdictional thresholds for enforcement of the two Acts.[161]

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[152] *Id.* at 217-18. *See id.* at 218 nn.75-76. A holding company is a bank which: 1) is organized solely to do business with other banks; 2) is owned primarily by banks with which it does business; and 3) does not deal with the general public. A banker's bank is not affiliated with holding companies but is an institution through which bankers may invest in export trading companies. Edge Act Corporations are organized for the purpose of engaging in international or foreign banking and other financial operations under 12 U.S.C. §§ 611-631 (1976). The Federal Reserve Board, under 12 U.S.C. § 1843, has 60 days to disapprove of any of the institutions' investments. It can base disapproval on one of three grounds: 1) prevention of unsound banking practices; 2) prevention of materially adverse effects on the financial or managerial resources of the institution; and 3) failure of an institution to supply required information.

[153] 15 U.S.C. §§ 4011-4021.

[154] *Id.* § 4011.

[155] The applicant must establish that its export trade, export trade activity, and methods of operation will: 1) result in neither a substantial lessening of competition or restraint of trade in the United States nor a substantial restraint of any competitor's export trade; 2) not unreasonably enhance, stabilize, or depress prices in the United States; 3) not constitute unfair methods of competition against competitors in export trade; and 4) not result in resale for consumption within the United States of the goods or services exported. *See* 15 U.S.C. § 4013.

[156] *Id.*

[157] *Id.* § 4016. The Attorney General may file suit to enjoin conduct threatening clear and irreparable harm to the national interest. An exporter may be subject to private suit for actual damages and injunctive relief should he fail to comply with the certificate's standards to the detriment of any persons. *Id.*

[158] *Id.* § 6a.

[159] *Id.* §§ 1-7.

[160] *Id.* § 45(a).

[161] The Acts shall not apply to conduct involving trade or commerce unless such conduct has a direct, substantial, and reasonably foreseeable effect on domestic commerce or on ex-

Though the ETCA does not solve all United States trade problems, it demonstrates a resolve to leave no stone "unturned in the search for means that even marginally . . . expand exports."[162]

III. THE EXPORT TRADING COMPANY ACT OF 1962 AND MULTISTATE TRADING COMPANIES

The major Japanese trading companies, *sogo shoshas*, provide the best example for analyzing the effects that a multistate trading company might have on the constitutional balance of power between the state and federal governments. *Sogo shoshas* act, in part, as intermediaries, moving finished goods from one place to another.[163] They establish offices in many foreign countries, creating a communications network and an efficient system of physical distribution.[164] As dependable links in the chain running from production to distribution, trading companies inspire confidence among foreign dealers in the ability of producers to deliver high grade, low cost products.[165]

Sogo shoshas achieve economies of scale by granting loans and loan guarantees, supplying information to clients about foreign markets, handling paperwork and documentation, and providing warehousing and transportation.[166] Trading companies furnish the manpower and financing necessary for export trade, consequently freeing capital for investment in plants and equipment.[167]

Individual states, as well as private companies, provide services similar to those of the *sogo shoshas*.[168] States, however, might find

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port commerce of a resident competitor. *See id.* § 6a.

[162] H.R. REP. No. 637, *supra* note 16, at 16.

[163] *See* K. YOSHIHARA, SOGO SHOSHA: THE VANGUARD OF THE JAPANESE ECONOMY 218 (1982); *see also* A. YOUNG, THE SOGO SHOSHA: JAPAN'S MULTINATIONAL TRADING COMPANIES (1979). The *sogo shoshas* also import and export raw materials, foodstuffs, and intermediate and finished manufactured goods in a broad range of product groups. They own subsidiaries which engage in resource prospecting and development, manufacturing and processing, construction, financing, and leasing. *Id.* at 12.

[164] *See* K. YOSHIHARA, *supra* note 163, at 218-19.

[165] *Id.* at 220.

[166] *See* A. YOUNG, *supra* note 163, at 58-68.

[167] *Id.* at 68. Large-scale capital investment in production reduces production costs through economies of scale, thereby increasing a manufacturer's price competitiveness. *Id.* *See generally* Colairacovo, *Export Development in Latin America*, in EXPORT POLICY: A GLOBAL ASSESSMENT 102, 104 (M. Czinkota & G. Tesan eds. 1982). Since the cost of producing and marketing goods is too high for smaller businesses, these businesses do not enter the export market. The major cost arises from securing support services such as financing, warehousing, marketing, and transportation. A multistate organization could alleviate this cost.

[168] *See supra* notes 60-64, 69-70 and accompanying text.

combined regional export promotion more efficient. The interstate compact represents a formal means of achieving this end; it is more structured than informal cooperation among state export officials.[169] Through a compact authority or commission, the states can act as intermediaries for the export of goods and services from businesses within their region. A multistate trading company absorbs financial risks[170] involved in dealing with small companies that private enterprises do not readily accept. The presence of a governmental entity abroad creates confidence among foreign buyers, encouraging them to deal with domestic exporters.

Multistate trading companies represent a novel approach for expansion of United States exports, but they raise several constitutional issues which influence their formation.

A. *Compact Clause*

The initial question of validity turns on whether Congress must give its consent to a multistate export trade compact. Not all multistate agreements require congressional consent;[171] the nature of each compact determines its validity. A compact that grants states powers which they could not exercise individually necessitates congressional consent.[172] Jointly facilitating exports, however, does not threaten federal supremacy to any greater extent than does furnishing export services individually as some states do presently.

Congressional authority to regulate interstate compacts protects federal supremacy and nonmember states' sovereignty. Judged by the principles found in the *Multistate Tax Commission* case, an export trade compact giving any state the option to join or withdraw at any time safeguards these federal and state interests.[173] The Constitution does not completely proscribe competition among the states.[174] For instance, a multistate export trading company might attract export business to the detriment of nonmember states. The compacting states could not, however, impose exporting standards on products and services which are more strict than the federal criteria. The multistate export trade company should only facilitate trade.

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[169] *See* F. ZIMMERMAN & M. WENDALL, *supra* note 76, at 104.
[170] *See* A. YOUNG, *supra* note 163, at 62-64.
[171] *See* Virginia v. Tennessee, 148 U.S. at 519.
[172] *See Multistate Tax Comm'n*, 434 U.S. at 473.
[173] *Id.*
[174] *Id.* at 478.

Although a multistate export trade compact without congressional consent may be invalid *per se*, Congress clearly meant to stimulate experimentation in export trade promotion by granting implicit consent in advance to the states.[175] Recognizing the benefits of regional planning and promotion, Congress gave the states a signal through the ETCA that a compact is consistent with federal trade policy.

B. *Commerce Clause*

Congress conceded that keying exporting activity to regional economic needs and circumstances[176] provides one solution for United States trade deficits. Creating foreign markets for regional products through promotion makes local manufacturers and businesses more productive. Improved production and distribution leads to higher employment in the region.[177] Greater profitability makes industries served by the export trading company more competitive than businesses and suppliers in non-compacting states. This uneven competition apparently contradicts the concept of the Nation as a free trade unit. The commerce clause does not absolutely preclude states, however, from favoring local businesses,[178] especially when such action coincides with congressional policy or concerns local welfare.[179]

A multistate export trading compact also challenges the Federal Government's goal of uniformity in foreign commerce policy. Pervasive federal export licensing laws prevent the states from varying the types of products which companies export or the markets which they enter. The ETCA invites states to cooperate with the Federal Government in export trade promotion, demonstrating that Congress does not view state action as an obstacle to successful foreign trade policy. Arguably, Congress may wish only to encourage individual states to continue their traditional export promotion efforts through their departments of industry and trade or port authorities. The ETCA, however, does not limit its scope to local or state levels; it speaks of programs keyed to *regional* economic needs.[180]

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[175] *See* 15 U.S.C. § 4001.

[176] *Id.*

[177] *See, e.g.*, H.R. REP. No. 629, 97th Cong., 1st Sess. 9 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2467 (citing a study by the New England Congressional Institute).

[178] *See supra* notes 118-21 and accompanying text.

[179] *See supra* note 119.

[180] *See* 15 U.S.C. § 4001.

C. *Supremacy Clause*

No federal trade law explicitly declares an intention to preempt state export promotion. In view of the overriding concern for uniformity in foreign commerce regulation, Congress need only demonstrate an intent to exclude all state activity from the area of foreign commerce for such activity to be precluded.[181] If a multistate export trade compact interferes with the accomplishment of Congress' purposes and objectives, then the compact is preempted. One congressional objective is the development of free world trade.[182] Multistate trading companies represent a form of monopoly which conflicts with open market, free world trade. While acknowledging the advantages of free world trade, Congress has favored the expansion of opportunities for United States commerce in international trade.[183] The Federal Government cooperates with individual states to promote export trade and now has demonstrated a willingness to foster the development of multistate export activities. Although the ETCA does not completely preclude the possibility of federal preemption, it does offer states room to experiment in export promotion.

IV. CONCLUSION

The goals stated in the Export Trading Company Act of 1982 lend credence to the presumption that Congress invites multistate participation in an expanded federal export trade policy. The United States economy is an economic whole made up of many regional economic parts. By encouraging regional export promotion, the ETCA facilitates the achievement of economies of scale and lower costs by small and medium sized producers and exporters. Fostering regional export activity improves the overall United States trade balance and employment figures.

Multistate trading companies, established by compacts, could complement the goals expressed in the ETCA. Explicit consent for such projects may not be necessary since Congress has already recognized the role that innovative export programs can play in export trade. The multistate trading company should act only as an intermediary, easing the movement of finished products into foreign markets. In this intermediate role the company would be less

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[181] *See supra* note 131 and accompanying text.
[182] 19 U.S.C. § 2502(2).
[183] *Id.* § 2502(3).

likely to unconstitutionally burden interstate commerce or to contravene United States foreign trade policy. Through the multistate trading company, states can supply more efficiently and at a lower cost the same services to exporters that they currently provide with the Federal Government's encouragement on an individual basis.

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