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Recommended Citation

Jessica V. Carter, *The Role of Local Government in Foreign Trade: the Case of Baltimore*, 15 Md. J. Int'l L. 169 (1991).
Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol15/iss2/3>

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NOTES AND COMMENTS

THE ROLE OF LOCAL GOVERNMENT IN FOREIGN TRADE: THE CASE OF BALTIMORE

In 1990, Kurt Schmoke, the mayor of Baltimore, Maryland, conducted several overseas trips to promote foreign trade on behalf of the city.¹ Governor William Donald Schaefer of Maryland likewise completed foreign trade missions to Taiwan, Hong Kong, Eastern Europe and the Soviet Union on behalf of Maryland in 1990.² As cities, counties and states, as well as the federal government, have struggled daily with a continuously shrinking fiscal budget,³ foreign trade has rapidly become the "in" fiscal planning strategy over the past decade and promises to remain so well into the 1990's and beyond. With the recent opening of the Eastern bloc countries and the imminent unification of the European Economic Community,⁴ foreign trade may prove to be a promising means of infusing fresh revenue and business into local economies.

Local governments have traditionally pursued foreign trade initiatives in a rather passive manner.⁵ Typically, cities and counties sought

1. Blair S. Walker, *Baltimore Ranked Among Top Ten for Global Commerce*, THE SUN (BALTIMORE), Aug. 8, 1990, at F1.

2. Richard Tapscott, *Schaefer Plans New Trade Mission During Campaign*, WASHINGTON POST, Aug. 8, 1990, at B3.

3. In 1991, Maryland faces a budget shortfall of \$423 million in general funds, with an additional \$521 million shortfall in the state transportation fund. Neal R. Peirce, *The Silver Lining in the States' Budget Crisis*, THE SUN (BALTIMORE), Jan. 16, 1991, at 11A. Likewise, Connecticut has a \$500 million deficit; Massachusetts has a deficit of \$600 million; Minnesota has a \$197 million deficit; and Michigan has a \$979 million deficit. *Id.*

4. Twelve European countries (Belgium, Germany, France, Italy, Luxembourg, the Netherlands, the United Kingdom, Ireland, Denmark, Greece, Spain, and Portugal) have set December 31, 1992, as the deadline for dismantling trade barriers among themselves and operating under one standard currency system. See, Final Act of the Conference of Representatives of the European Communities' Member States with Treaty Modifications Concerning Community Institutions, Monetary Cooperation, Research and Technology, Environmental Protection, Social Policy, and Foreign Policy Coordination, Feb. 17 and Feb. 28, 1986, art. 8A of the Single European Act, 25 I.L.M. 506.

5. See Hugh O'Neill, *The Role of the States in Trade Development*, in INTERNATIONAL TRADE: THE CHANGING ROLE OF THE UNITED STATES 182-83 (F. J. Macchia-

to attract foreign businesses to their locale by promoting their "good business climate,"⁶ which included their infrastructure, labor and skill markets, and their peaceful labor-management relations.⁷ Often these municipalities relaxed zoning and environmental laws in order to become more appealing to foreign businesses.⁸ Some local governments also offered tax incentives to foreign businesses that located in their jurisdictions.⁹ All of these efforts were designed to lure foreign businesses to particular localities, with the hope that the foreign business would generate revenue and jobs for the local economy.

Although cities and counties continue to pursue these strategies, they have recently begun taking an even more aggressive stance in foreign trade.¹⁰ Perhaps spurred by decreasing amounts of federal aid¹¹ or by what has been characterized as the disinterested trade policy of the federal government,¹² local and state governments have dramatically increased their involvement in foreign trade.¹³ For example, between

rola ed., 1990) [hereinafter INTERNATIONAL TRADE].

6. *Id.* at 182.

7. *Id.*

8. *Id.* at 183.

9. One favorite tax incentive involves exempting certain types of industrial property from local property taxes for a period of time. J. RICHARD ARONSON AND JOHN L. HILLEY, *FINANCING STATE AND LOCAL GOVERNMENTS* 136 (4th ed. 1986). *See also*, ERNEST S. GRIFFITH, *A HISTORY OF AMERICAN CITY GOVERNMENT: THE CONSPICUOUS FAILURE, 1870-1990* 228 (1974) [hereinafter *THE CONSPICUOUS FAILURE*]; Susan A. MacManus, *Financing Federal, State, and Local Government in the 1990s*, 509 *ANNALS AM. ACAD. POL. & SOC. SCI.* 22, 27-28 (May 1990).

10. INTERNATIONAL TRADE, *supra* note 5, at 182-83.

11. Between 1980 and 1988, federal aid to states and local governments fell by almost 40%. Earl H. Fry, *State and Local Governments in the International Arena*, 509 *ANNALS AM. ACAD. POL. & SOC. SCI.* 118, 120 (May 1990). *See also* MacManus, *supra* note 9, at 27. Cuts in federal aid coupled with high unemployment have prompted states to become more active in attracting foreign industry for revenue investment and in adopting policies to increase the export of state products. JOINT COMMITTEE ON FEDERAL RELATIONS, *REPORT TO THE MARYLAND GEN. ASSEMBLY OF 1985, THE STATE'S ROLE IN EXPORT TRADE*, at 29 (Jan. 1985).

12. *See* Jeffrey E. Garten, *Gunboat Economics*, *FOREIGN AFF.* 538 (1984). "Fend-for-Yourself Federalism" has been used to describe President Reagan's domestic policies and the increasing budget deficits that created a fiscal climate which forced state and local governments to become more self-reliant. Richard P. Nathan and John R. Lago, *Intergovernmental Fiscal Roles and Relations*, 509 *ANNALS AM. ACAD. POL. & SOC. SCI.* 36, 41 (May 1990). *See also* INTERNATIONAL TRADE, *supra* note 5, at 183.

13. According to a survey by the National Governors' Association, governors from 41 states made 82 trade missions to a total of 35 countries in 1989. Allan Janesch, *U.S. Governors' Travel Abroad "Opens the Door" to Increased Exports and Jobs for Their States*, *BUS. AM.*, May 7, 1990, at 7 [hereinafter *U.S. Governors*]. By 1988 a total of

1983 and 1988, Maryland's export trade grew by a dramatic 134 percent and promises to continue growing at a fast pace.¹⁴

This comment will explore the expanding involvement of cities and counties ("local governments") in the foreign trade arena. First, this comment will analyze the authority of local governments to engage in an activity that has historically been considered the responsibility of the federal government. Local government involvement in foreign trade will also be considered in light of its relationship with both the federal and state governments. And finally, to give the reader a flavor of the nature of local governments' involvement in foreign trade, this comment will briefly survey three ways that local governments are participating in foreign trade. Specifically, the efforts of Baltimore and the State of Maryland in foreign trade zones, export financing and sister city relationships will be discussed.

I. THE AUTHORITY OF LOCAL GOVERNMENTS TO ENGAGE IN FOREIGN TRADE

Any discussion of the authority of local governments to engage in foreign trade is necessarily a two-tiered analysis. The first tier, essentially an issue of federalism, involves the question of the authority of local governments *vis a vis* the federal government to engage in foreign trade. The second tier examines the further limits placed on local governments by virtue of their legal relationship with the state in which they are located.

A. *Local Government Authority Vis A Vis the Federal Government*

1. Is Foreign Trade Within the Exclusive Domain of the Federal Government?

The United States Constitution confers broad power over foreign affairs to various branches of the federal government.¹⁵ With respect to

108 overseas trade offices had been opened by various states. Popular locations include Tokyo, where 32 states are represented, and (formerly West) Germany, Belgium, and South Korea, where 10 states are represented in each country. As many as 22 states had operational export financing programs as of the end of 1988. William O. Scouton, *States See Exports as a Tool for Local Business Expansion; National Governors' Association Winter Meeting*, BUS. AM., Feb. 27, 1989, at 7.

14. Mary Ruoff, *Maryland Puts Resources into Trade Programs*, BALTIMORE BUS. J., Aug. 14, 1989, at 4 [hereinafter *Maryland Puts Resources into Trade*].

15. See, e.g., U.S. CONST. art. I, § 8 (granting Congress power to regulate commerce with foreign nations; establish a uniform rule of naturalization; regulate the value of foreign coin; declare war); art. I, § 9 (forbidding a person without the consent

foreign trade, it specifically requires that "[t]he Congress shall have power . . . to regulate commerce with foreign nations . . ." ¹⁶ The Constitution further provides that "[n]o State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. . . [and] [n]o State shall, without the consent of Congress, . . . enter into any agreement or compact . . . with a foreign power . . ." ¹⁷ As with any issue of federalism, the constitutional grant to Congress of the power to regulate foreign commerce must be examined to determine whether this grant is exclusive and thus totally preempts state and local involvement or whether it allows states and local governments to retain some regulatory power over foreign trade. ¹⁸

Throughout the case law, the Supreme Court colors the authority of the federal government over foreign affairs as an exclusive one, not to be shared with the states or local governments. ¹⁹ In *Hines v. Davidowitz*, ²⁰ for example, the Court struck down a state alien registration law on the grounds that it invaded a province that was exclusively within the domain of federal government regulation. ²¹ Even though the state law was consistent with the federal alien registration law, ²² the Court emphasized, "[t]he Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full

of Congress to accept any present, etc. of any kind from any foreign state); art. I, § 10 (forbidding a state to enter any treaty, or without the consent of Congress, to lay any imposts or duties on imports or exports); art. II, § 3 (granting the president the power to receive ambassadors and other public ministers); art. III, § 2 (granting the judiciary the power to decide controversies between a state and foreign states or citizens).

16. U.S. CONST. art. I, § 8, cl. 3.

17. U.S. CONST. art. I, § 10, cl. 2 and 3.

18. James Madison, who in 1788 examined the question of whether foreign trade is within the exclusive domain of the federal government, responded quite decisively in the affirmative. "The regulation of foreign commerce . . . has been too fully discussed to need additional proofs here of its being properly submitted to the federal administration." THE FEDERALIST NO. 42, at 281 (J. Madison) (J. E. Cooke ed., 1961). See also, THE FEDERALIST NO. 22, at 136 (A. Hamilton) (J. E. Cooke ed., 1961) ("It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance that more strongly demands a federal superintendence.").

19. See *infra* text accompanying notes 20 to 45.

20. 312 U.S. 52 (1941).

21. *Id.* See also LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 243-44 (1972) (discussing the Supreme Court's treatment of *Hines*, *supra* note 20) [hereinafter HENKIN].

22. Even "identical, consistent or supplementary state regulations" have often been preempted by federal regulation when the federal government "'occupied the field.'" HENKIN, *supra* note 21, at 242.

and exclusive responsibility for the conduct of affairs with foreign sovereignties."²³

A few years later, in *Clark v. Allen*,²⁴ the Court warned states against entering into the "forbidden domain of negotiating with a foreign country."²⁵ And, as if it is not enough to say that the federal government has exclusive authority, the Court narrowly focuses on the President as "the constitutional representative of the United States."²⁶ Thus, it is "the President alone [who] has the power to speak or listen as a representative of the nation. . . . [H]e alone negotiates" in matters dealing with foreign nations.²⁷

In support of exclusive federal power over foreign trade, the Court and other proponents have often stressed the need for uniformity in the United States' dealings with foreign countries.²⁸ The Supreme Court relied on this justification as a rationale for striking down a state property tax on six Japanese shipping companies.²⁹ Noting that Congressional power to regulate foreign commerce "is preeminently a matter of national concern,"³⁰ the Court expressed its fear that such a tax would "impair federal uniformity in an area where federal uniformity is essential."³¹ The Court detailed the disastrous consequences that would

23. *Hines*, 312 U.S. at 63.

24. 331 U.S. 503 (1947).

25. *Id.* at 517.

26. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936) (quoting SENATE COMM. ON FOREIGN RELATIONS, REPORT TO THE SENATE, Vol. 8, p. 24 (Feb. 15, 1816)).

27. *Curtiss-Wright*, 299 U.S. at 319. *But see* *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("[C]ongress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs."); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 182 (2d Cir. 1967) ("[T]here is ample constitutional authority for an assertion of congressional power" in the field of foreign relations).

28. This need for uniformity in foreign affairs has its roots in the early writings of the country's founding fathers. Writing to the people of the State of New York, Alexander Hamilton explained:

The importance of the Union, in a commercial light, is one of those points, about which there is least room to entertain a difference of opinion, and which has in fact commanded the most general assent of men, who have any acquaintance with the subject. This applies as well to our intercourse with foreign countries, as with each other.

THE FEDERALIST NO. 11, at 65 (A. Hamilton) (J. E. Cooke ed., 1961). Echoing Hamilton, James Madison admonished, "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." THE FEDERALIST NO. 42, at 279 (J. Madison) (J. E. Cooke ed., 1961).

29. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

30. *Id.* at 448.

31. *Id.*

arise if the state was allowed to tax instrumentalities of foreign commerce:

[I]nternational disputes over reconciling apportionment formulae may arise. . . . [F]oreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. . . . If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation.³²

Ruling against the tax in question, the Court declared that the constitutionality of a state tax on foreign instrumentalities depends in part on "whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" ³³

Intertwined with this notion of preserving uniformity in relations with foreign countries is the need to prevent state and local interference in national matters. Local interference, in effect, hampers the federal government's ability to "speak with one voice,"³⁴ thus causing embarrassment to the federal government when it deals with foreign nations. To illustrate the calamity that could be caused by "the interfering and unneighborly regulations of some States contrary to the true spirit of the Union,"³⁵ Alexander Hamilton in 1787 noted the poor state of foreign commercial affairs in Germany:

[t]he commerce of the German empire, is in continual trammels from the multiplicity of the duties which the several Princes and States exact upon the merchandizes passing through their territories; by means of which the fine streams and navigable waters with which Germany is so happily watered, are rendered almost useless.³⁶

State interference bothers the Supreme Court as much today as it bothered Alexander Hamilton in the eighteenth century. In 1941, the

32. *Id.* at 450-51.

33. *Id.* at 449, 451 (citing *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)). See also *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 404-06 (3d Cir. 1987) (considering the constitutionality of a coastal zone statute which banned product transfer facilities in the state's coastal zones).

34. *Japan Line*, 441 U.S. at 451.

35. THE FEDERALIST NO. 22, at 137 (A. Hamilton) (J. E. Cooke ed., 1961).

36. *Id.*

Supreme Court echoed Hamilton's sentiment by stating that "[t]he interest of the cities, counties and states . . . imperatively requires that federal power in . . . foreign relations be left entirely free from local interference."³⁷ The Court then struck down Pennsylvania's Alien Registration Act as it did an earlier California immigration law because the state law infringed upon subject matter within the exclusive province of the federal government.³⁸ The Court rhetorically asked, "If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?"³⁹

The Court has hinted at what has become known as "the dormant foreign relations clause."⁴⁰ In *Zschernig v. Miller*,⁴¹ the Court was called upon to assess the constitutionality of an Oregon escheat law which, as applied, barred East German residents from inheriting property from a state resident who died intestate.⁴² Acknowledging that states themselves traditionally regulate probate matters, the Court af-

37. *Hines*, 312 U.S. at 63. Early in its history, the Court used this "local interference" argument when it refused to extend the Fifth Amendment's prohibition against takings without just compensation to the State of Maryland. *Barron v. Mayor and City Council*, 32 U.S. 243 (1833). The Court reiterated the various limitations placed on the states by the Constitution. *Id.* at 249. Included was the prohibition against entering into agreements with foreign nations. *Id.* Specifically, "[n]o State shall enter into any Treaty, Alliance, or Confederation. . . . [nor shall any State], without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power." U.S. CONST. art. I, § 10. The Court stressed that "[i]f these compacts [by states] are with foreign nations, they interfere with the treaty making power which is conferred entirely on the general government." *Barron*, 32 U.S. at 249. This statement implies that the "agreement making power," as set forth in the last clause of art. I, § 10, may not be "entirely conferred" on the federal government as is the treaty making power. Later, the Court clarified its understanding of the word "agreement" in this part of the Constitution. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840).

[I]t was the intention of the framers of the constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a State and a foreign power; and we shall fail to execute that evident intention, unless we give to the word "agreement" its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied.

Holmes, 39 U.S. (14 Pet.) at 572.

38. *Hines*, 312 U.S. at 63-64, 68.

39. *Id.* at 64 (quoting *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875 Term)).

40. Richard B. Bilder, *The United States Constitution in its Third Century*, 83 AM. J. OF INT'L L. 821, 825 (1989) (interpreting *Zschernig v. Miller*, 389 U.S. 429 (1968)). See also HENKIN, *supra* note 21, at 238-41.

41. 389 U.S. 429 (1968).

42. *Id.* at 430.

firmed that "those regulations must give way if they impair the effective exercise of the Nation's foreign policy."⁴³ To dispel any misunderstanding about the federal government's exclusive authority, the Court further warned that, "even in absence of a treaty, a State's policy may disturb foreign relations."⁴⁴ Thus, the Court may be signaling that it will be obliged to curtail state interference in foreign trade even when the federal government has not acted.⁴⁵

2. Under What Circumstances May Local Governments Engage in Foreign Trade?

As the above discussion indicates, state and local governments appear to be left with very little authority to engage in foreign trade activities. Yet, many cities, counties, and states participate in foreign trade and, in effect, create their own foreign policy agendas.⁴⁶ Given such increased activity over the last decade, one is left with only one logical conclusion: local governments must have at least implied authority to engage in foreign trade despite the repeated assertions that the federal government holds exclusive authority over matters involving foreign nations. This authority may be implied in two manners — either as an indirect result of the federal government's express approval of state involvement in foreign trade⁴⁷ or through the federal government's recognition of local government's authority to manage its own affairs.

The federal government's express approval of state involvement in foreign trade certainly resolves many of the concerns raised by state and local government's participation in an area considered to be within the federal government's exclusive control. The federal government is free to appoint any representative to assist it in conducting national affairs.⁴⁸ Presumably, express approval of state action involves not only assent of the federal government to the state engaging in a particular activity, but also some continuing federal control over the activity. Consequently, express approval of state involvement does not violate

43. *Id.* at 440.

44. *Id.* at 441.

45. HENKIN, *supra* note 21, at 238.

46. *See supra* notes 1, 2 and 8 and accompanying text.

47. *See infra* notes 52-61 and accompanying text. *See, e.g.*, 15 U.S.C. § 4001(a)(9) (Supp. 1990).

48. Even the Court in *Curtiss-Wright* acknowledged that the President, the sole negotiator, may act through agents in carrying out his foreign affairs duties. *Curtiss-Wright*, 299 U.S. at 320.

the need to "speak with one voice,"⁴⁹ nor does it "interfere"⁵⁰ with or have the potential to embarrass the federal government on the international level.⁵¹ Local governments, as "mere 'creatures of the state,'"⁵² may embrace the federal government's express approval of state action as indirect or implied authorization for their activity.

State involvement in foreign trade, undertaken with express federal approval, may actually be insulated from any constitutional attack. At least with respect to interstate commerce, the Court acknowledged this heightened protection given to state action when Congress had expressly authorized the state statute in question.⁵³ If "state actions which [Congress] plainly authorizes are invulnerable,"⁵⁴ the only potential trouble spot concerns the scope and reach of the express approval. Does the mere mention of congressional approval for state involvement in a foreign trade activity qualify to shield the state from attack or must Congress specify the exact nature of its approval? Also, may one conclude that express approval of state action necessarily implies approval of local government action?

The interstate commerce activity, which was held in *Northeast*

49. *See supra* note 33.

50. *Hines*, 312 U.S. at 63.

51. *See supra* note 34 and accompanying text.

52. *See infra* notes 89-92 and accompanying text.

53. *Northeast Bancorp, Inc. v. Bd. of Governors, Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985). It is unclear whether foreign trade activities should be considered in the same manner as interstate commerce activities. The Supreme Court has implied that foreign commerce and interstate commerce are two distinct areas, subject to separate limitations. In *Japan Line*, for example, the Court clarified that Congress' power to regulate interstate commerce may be limited by "considerations of federalism and state sovereignty [while] [i]t has never been suggested that Congress' power to regulate foreign commerce could be so limited." *Japan Line*, 441 U.S. at 449 n.13. This sentiment may be linked, in part, to the hard line approach taken by the Court in *Curtiss-Wright*, *see supra* note 26, regarding state's authority in the field of foreign affairs. In *Curtiss-Wright*, the Court emphatically held that states have no constitutional authority in foreign affairs and, in fact, "never possessed international powers." *Curtiss-Wright*, 299 U.S. at 316. Comparing the states' authority in internal affairs with their lack of authority in foreign affairs, the Court explained that

In [the field of internal affairs], the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers.

Curtiss-Wright, 299 U.S. at 316.

54. *Northeast Bancorp*, 472 U.S. at 174.

*Bancorp v. Board of Governors*⁵⁵ to be "invulnerable to constitutional attack,"⁵⁶ involved a congressional amendment to the Bank Holding Company Act of 1956⁵⁷ which authorized the particular state statutes in question.⁵⁸ The Court did not indicate whether it would extend the same protection to local laws expressly authorized by an act of Congress. In contrast, in the Export Trading Company Act of 1982,⁵⁹ Congress acknowledged its support for state and local government activities in the exportation of goods. Specifically, Congress found that

those activities of State and local governmental authorities which initiate, facilitate, or expand exports of goods and services can be an important source for expansion of total United States exports.⁶⁰

Proponents of increased local government activity in foreign trade may construe this congressional finding as granting local governments express approval to export goods and services. Such a construction, however, is too broad. The congressional finding should instead be taken as evidence that the federal government gives local governments implied authority to participate in foreign trade.⁶¹ However, extending the reach of federal government approval of state action to include approval of local government action is troublesome. To do so would link the federal government and local governments directly, thus glossing over the complexity and importance of the intervening level of state government.⁶²

With respect to the federal government's recognition of local government's authority to manage its own affairs, the Supreme Court has acknowledged that local governments have "vast leeway in the management of [their] internal affairs."⁶³ The only limitation on this leeway is that local governments must not run "afoul of a federally protected

55. 472 U.S. 159 (1985).

56. *Id.* at 174.

57. 12 U.S.C. §§ 1841-50 (1989 and Supp. 1990).

58. 12 U.S.C. § 1842(d) (1989). *See also* *Northeast Bancorp.*, 472 U.S. at 163.

59. 15 U.S.C. §§ 4001-4053 (Supp. 1990).

60. 15 U.S.C. § 4001(a)(9) (Supp. 1990).

61. In a case involving a state's violation of the Commerce Clause, the Court warned that "[a]n unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation." *Maine v. Taylor*, 477 U.S. 131, 139 (1986).

62. *See infra* text accompanying notes 79-141.

63. *Sailors v. Bd. of Educ.*, 387 U.S. 105, 109 (1967).

right" in the management of its local affairs.⁶⁴ Implicit in this recognition of local governments' authority to regulate local affairs is the understanding that such regulation may nevertheless affect interstate and foreign commerce.⁶⁵ As long as the local government's actions cause only incidental or indirect effects, the Court has been willing to permit such local actions.⁶⁶

Local governments' involvement in this area has brought about incidental or indirect effects on foreign trade. However, Congress contemplates that such effects, at least in the exportation of goods, will be more than just incidental or indirect — Congress views local government activity in exports as "an important source for expansion of total United States exports."⁶⁷ Furthermore, the nature of the activity itself indicates that local governments also intend to affect foreign trade directly. This is especially so given the active and aggressive stance that many local governments have taken to maximize foreign trade opportunities on behalf of their constituents.⁶⁸ Thus, because local govern-

64. *Id.* at 109. Stated somewhat differently, "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 669 (1981) (citing *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945)). While this statement is directed to matters that affect interstate commerce, the Court, arguably, has drawn this same conclusion with respect to matters that affect foreign affairs. See *infra* note 65.

65. See *Clark v. Allen*, 331 U.S. 503, 517 (1947) ("What California has done [in passing a probate law] will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line" of negotiating with a foreign country.) See also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (The "extent of the burden [on interstate commerce] that will be tolerated" depends on a number of factors.); *Kassel*, 450 U.S. at 669.

66. See *Maine*, 477 U.S. at 138; *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Pike*, 397 U.S. at 142. If, on the other hand, the law discriminates against interstate commerce, thus causing more than mere incidental or indirect effects, the Court holds the law to a higher standard. The state or local government must prove that the law serves a legitimate local purpose and that this purpose could not be served by other nondiscriminatory means. The Court may also find incidental or indirect effects on foreign trade unconstitutional "if the burdens they impose . . . are 'clearly excessive in relation to the putative local benefits.'" *Maine*, 477 U.S. at 138 (citing *Pike*, 397 U.S. at 142). See also *Baltimore Gas and Electric Co. v. Heintz*, 760 F.2d 1408, 1422-27 (4th Cir. 1985).

67. 15 U.S.C. § 4001(a)(9) (Supp. 1990).

68. See, e.g., INTERNATIONAL TRADE, *supra* note 5, at 183-87; Fry, *supra* note 11, at 118-27; Dyan L. Brasington, *Development Focuses on Foreign Markets, Labor Enhancement*, WASH. BUS. J., July 2, 1990, at 19; Mary Ruoff, *State Changes its Tactics as European Market Evolves*, BALTIMORE BUS. J., Aug. 13, 1990, at 25; Paul Dykewicz, *New Study Reflects Surge in Region's Overseas Trade*, THE DAILY REC-

ments' involvement will have direct and perhaps substantial effects on foreign trade, their activity may be "subject to more demanding scrutiny."⁶⁹

With respect to laws that "affirmatively discriminate" against interstate commerce, i.e., those that have more than an incidental or indirect effect, the Court examines such laws using a higher standard of review. The state must "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means."⁷⁰ While it is not entirely clear that involvement in foreign trade will be treated similarly to involvement in interstate commerce,⁷¹ local governments should expect to be held to a standard that is at least as demanding as that applied to local government involvement in interstate commerce. Local government involvement in foreign trade serves the "legitimate" local purposes of attracting revenue to the community, creating jobs for local residents and developing markets for local goods and services.⁷² What could be a more legitimate local purpose than these?

However, local governments may have a more difficult time showing that these legitimate local purposes could not be served by less discriminatory means. Their argument must necessarily focus on how the federal government has taken a passive role in the federal trade arena.⁷³ Furthermore, with a soaring federal deficit and less federal aid being directed to state and local governments, cities and counties are left scrambling to protect their fiscal positions in whatever manner they can.⁷⁴

Given the above analysis, local governments seem far from being "invulnerable to constitutional attack under the Commerce Clause"⁷⁵ in their pursuit of foreign trade opportunities. As the Supreme Court explained in *Kassel v. Consolidated Freightways Corp.*,⁷⁶ an "inquiry under the Commerce Clause is [not] ended without . . . a sensitive consideration of the weight and nature of the state . . . concern in light of the extent of the burden imposed on the course of interstate com-

ORD, Jan. 25, 1990, at 1.

69. *Maine*, 477 U.S. at 138.

70. *Id.* (citing *Hughes*, 441 U.S. at 336); *Pike*, 397 U.S. at 142.

71. See *supra* note 53.

72. *U.S. Governors*, *supra* note 13, at 7.

73. See *Gunboat Economics*, *supra* note 12, at 538; Fry, *supra* note 11, at 120.

74. See R. Nathan & J. Lago, *Intergovernmental Fiscal Roles and Relations*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 36, 41 (May 1990); Fry, *supra* note 11, at 119-22.

75. *Northeast Bancorp*, 472 U.S. at 174.

76. 450 U.S. 662 (1981).

merce."⁷⁷ Balancing the benefits of local government involvement in foreign trade against the burdens that such activity may have on the nation's foreign commerce makes any decision concerning local power much more difficult to resolve.

Alexander Hamilton's warning is often quoted:

[T]he peace of the WHOLE ought not be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it.⁷⁸

Certainly the federal government has an interest in asserting exclusive authority in the area of foreign affairs, including foreign trade. Likewise, local governments have an interest in participating in activities, such as foreign trade, which provide local employment opportunities, stimulate the local economy and improve fiscal viability. With implied authority, local governments are nevertheless active players in the foreign trade arena. Depending on the extent and nature of their involvement, local governments run the risk that the federal government will challenge and possibly curtail their tenuous authority regarding foreign trade.

B. Local Government Authority Vis A Vis the State

1. History of Local Government in Foreign Trade⁷⁹

The autonomy of local governments, particularly cities, has ranged from one extreme to the other throughout Western history. In medieval times, the town operated as a complex economic and commercial association, organized primarily around the merchants of the town.⁸⁰ The

77. *Kassel*, 450 U.S. at 670-71 (citing *Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429, 443-44 (1978)). See also *Pike*, 397 U.S. at 142; *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977).

78. THE FEDERALIST NO. 80, 535-36 (Alexander Hamilton) (J. E. Cooke ed., 1961).

79. For a history of American city government, see CHARLES R. ADRIAN & ERNEST S. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE FORMATION OF TRADITIONS, 1775-1870 (1976) [hereinafter, FORMATION OF TRADITIONS]; THE CONSPICUOUS FAILURE, *supra* note 9; JON C. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA (1975); JON C. TEAFORD, THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870-1900 (1984) [hereinafter THE UNHERALDED TRIUMPH].

80. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1083-85 (1980).

town

controlled individual commercial conduct . . . protected the worker from competition and exploitation, regulated labor conditions, wages, prices, and apprenticeships, punished fraud, and asserted the town's interests against neighboring competitors.⁸¹

As an economic oligarchy, the town enjoyed a high degree of autonomy and power — often posing a threat to the country's political ruling power.⁸²

Even in America, prior to the Revolutionary War, cities and towns were sometimes organized as chartered municipal corporations whose functions were primarily to serve as "instruments for stimulating commercial development and promoting trade."⁸³ Operated in a fashion similar to that of the medieval town,⁸⁴ these municipal corporations

preserv[ed] monopolies in the hands of licensed tradesmen and artisans; regulat[ed] markets; [fixed prices]; and [set] standards of quality, weight, and measure for commodities authorized to be sold in the city.⁸⁵

Most early American towns, whether incorporated or not, exercised a considerable amount of autonomy and independence, including commercial independence, from the state legislatures.⁸⁶

This autonomy was soon suppressed as states asserted their sovereignty over municipal corporations and other unincorporated towns.⁸⁷ Instead of having autonomy, local governments increasingly became subordinated to state governments.⁸⁸ According to the "Dillon Rule,"⁸⁹

81. *Id.* at 1084 (citations omitted).

82. *Id.* at 1090-93. See also FORMATION OF TRADITIONS, *supra* note 79, at 32.

83. Michael A. Libonati, *Intergovernmental Relations in State Constitutional Law: A Historical Overview*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 107 (March 1988).

84. Frug, *supra* note 80, at 1097.

85. Libonati, *supra* note 83, at 111 (citations omitted). Charles Town, South Carolina, in contrast, was not incorporated and its power was also based "on the influence of merchants . . . [who] dominated both the colonial legislature and the complex organizations that ran the town." Frug, *supra* note 80, at 1096.

86. See Frug, *supra* note 80, at 1096-97, 1105. In Maryland, however, the opposite was true. Historically, the counties, cities, and towns in Maryland enjoyed very little autonomy and to a large extent have been dominated by the Maryland General Assembly. See Moser, *infra* note 93, at 342-44.

87. Libonati, *supra* note 83, at 112-14; Frug, *supra* note 80, at 1105-09.

88. Frug, *supra* note 80, at 1105-09.

propounded by Judge John F. Dillon, local governments

owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control.⁸⁹

As "mere 'creatures of the state,'"⁹¹ local governments were thrust to the other end of the spectrum and left with no practical authority with which to govern themselves.⁹²

In Maryland, the current view continues to be one of subordination of local governments to the will of the State.⁹³ The balance of state control versus local government control over local matters is strongly tilted in favor of the State. Perhaps the primary reason for this bias in favor of state control is the lack of any effective limitations on the power of the Maryland General Assembly to legislate on matters of local concern.⁹⁴ Furthermore, throughout the State's history, the General Assembly has exerted its dominance in enacting public local laws

89. See J. F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (5th ed. 1911). See also Frug, *supra* note 80, at 1109; FORMATION OF TRADITIONS, *supra* note 79, at 39.

90. *Clinton v. Cedar Rapids and Missouri R. R.*, 24 Iowa 455, 475 (1868) (opinion by Judge John F. Dillon).

91. Frug, *supra* note 80, at 1063. The Maryland Court of Appeals once characterized counties as "nothing more than political subdivisions of the state, . . . mere administrative instrumentalities of state government." *Ritchmount Partnership v. Bd. of Supervisors of Elections*, 388 A.2d 523, 528 (Md. 1978). Compare *Maryland Comm'n for Fair Representation v. Tawes*, 184 A.2d 715, 718 (Md. 1962) ("While it is true that the counties are not sovereign bodies, . . . [i]n the diversity of their interests and their local autonomy, they are quite analogous to the states, in relation to the United States.") See also *Hughes v. Maryland Comm'n for Fair Representation*, 217 A.2d 273, 290 (Md. 1966) (Barnes, J., dissenting) (footnote omitted) ("The counties in Maryland occupy a far more important position than do similar political divisions in many other states.") (citing *The Counties of Maryland, Their Origin, Boundaries and Election Districts*, MARYLAND GEOLOGICAL SURVEY (1907)).

92. Frug, *supra* note 80, at 1063-65 and 1105-09.

93. M. Peter Moser, *County Home Rule — Sharing the State's Legislative Power with Maryland Counties*, 28 MD. L. REV. 327, 342-344 (1968) [hereinafter Moser]. See also *Ritchmount Partnership*, 388 A.2d at 527-28.

94. See Moser, *supra* note 93, at 342-344. The General Assembly, for example, is prohibited from enacting any public local law on any subject covered by the express powers. See, e.g., MD. CONST. art. XI-A, § 4 (1981); MD. CONST. art. XI-F, § 4 (1981). This restriction does not apply to General Assembly enactments that apply to two or more charter or code counties. See Moser, *supra* note 93, at 342.

through the delegates of the legislative districts.⁹⁵ The State often did this to the detriment of locally elected officials.⁹⁶

The concept of "home rule," allowing cities and counties to govern themselves on local matters, has been tried in Maryland and in other states.⁹⁷ Advocating for increased local self-government, the home rule movement,⁹⁸ at least in Maryland, has been tempered by the Dillon Rule.⁹⁹ For example, in keeping with the Dillon Rule, charter counties, one form of home rule government in Maryland, are limited to enacting local laws in accordance with the express powers granted to them by the General Assembly.¹⁰⁰ These express powers "may be extended, modified, amended or repealed by the General Assembly."¹⁰¹ Just what constitutes local matters and therefore the extent to which local governments are actually allowed to govern themselves is key to analyzing local government authority *vis a vis* the State with respect to participating in foreign trade.

2. Local Governments in Maryland — Their Role in Foreign Trade

In Maryland, local governments may operate either under home rule or without home rule.¹⁰² For clarity's sake, this comment will focus

95. See THE UNHERALDED TRIUMPH, *supra* note 79, at 86-91; A MARYLAND HISTORY 1632-1974, at 804 (R. Walsh & W.L. Fox eds., 1974); Moser, *supra* note 93, at 343.

96. As explained by Moser, senators and delegates often exerted a tremendous amount of power over the enactment of local laws. City and county officials, the more appropriate makers of local laws, found themselves fighting to retain their authority while citizens were forced to voice their concerns over local matters to two competing governing bodies. See Moser, *supra* note 93, at 343.

97. Frug, *supra* note 80, at 1063. See also Moser, *supra* note 93; Martha Frisby Rasin, Note, *Charter Home Rule — Cheeks v. Cedlair Corp.*, 11 U. BALT. L. REV. 158 (1981).

98. Challenging the Dillon Rule, *supra* notes 89-92, Judge Thomas M. Cooley articulated his theory in favor of the right of local self-government. Cooley saw local government as a matter of "absolute right." Frug, *supra* note 80, at 1113. Also opposing Dillon, Eugene McQuillin wrote an extensive multi-volume treatise which argued in favor of local self-government. See Frug, *supra* note 80, at 1113-15. See also EUGENE MCQUILLIN, THE LAW ON MUNICIPAL CORPORATIONS (3d ed. 1949).

99. See *supra* note 89 and accompanying text.

100. See MD. CONST. art. XI-A, § 2 (1981). See also MD. ANN. CODE art. 25A, § 4 (1990).

101. MD. CONST. art. XI, § 2 (1981).

102. See Moser, *supra* note 93, at 332-38. There are basically three forms of home rule in Maryland — municipal home rule, charter home rule, and code home rule. Municipal home rule applies to municipal corporations in the state. See MD. CONST. art. XI-E (1981 and Supp. 1990). Baltimore City operates under a charter

on the implications of foreign trade activities by local governments with home rule.¹⁰³ With respect to home rule jurisdictions, local government has the constitutional authority to enact "local laws" in accordance with those express powers granted by the General Assembly.¹⁰⁴ A crucial part of this statutory grant of authority, often referred to as the general welfare clause,¹⁰⁵ is the authority to enact laws in order to maintain the health and welfare of the locality.¹⁰⁶ Hence, the question

home rule form of government. See MD. CONST. art. XI and XI-A (1981 and Supp. 1990). Counties may choose either charter home rule (MD. CONST. art. XI-A (1981 and Supp. 1990)), like Baltimore City, or code home rule. MD. CONST. art. XI-F (1981 and Supp. 1990). Charter home rule is not self-executing and relies on the Express Powers Act for an enumeration of local government power and authority. See MD. CONST. art. XI-A, § 2 (1981); MD. CODE ANN. art. 25A (1990). Counties that do not choose charter or code home rule are afforded limited powers under MD. CODE ANN. art. 25 (1990). For the differences between charter home rule and code home rule, see Moser, *supra* note 93, at 332-38.

103. The following counties and Baltimore City have adopted home rule: Allegany, Anne Arundel, Baltimore, Caroline, Harford, Howard, Kent, Montgomery, Prince George's, Talbot, Wicomico and Worcester. See MARYLAND MANUAL 1991-1992: A GUIDE TO MARYLAND GOVERNMENT (Diane P. Frese ed., 1991).

Non-home rule local governments may still engage in foreign trade activities; however, their discretion is virtually entirely a function of the state legislature. They are indeed dependent on the state for all grants of power and authority. Only in the home rule jurisdictions do local governments exercise any measure of real discretion.

This comment will also not attempt to delineate the many differences between the municipal, charter and code home rule jurisdictions. For an extensive discussion of those differences, see Moser, *supra* note 93, at 332-38.

104. "[T]he Mayor of Baltimore and City Council of the City of Baltimore or the County Council of said County, subject to the Constitution and Public General Laws of this State, shall have full power to enact *local laws* of said City or County. . . ." MD. CONST. art. XI-A, § 3 (1981) (emphasis added). "[A] code county may enact, amend, or repeal a *public local law* of that county. . . ." MD. CONST. art. XI-F, § 3 (1981) (emphasis added). "Any such municipal corporation . . . shall have the power and authority . . . to amend or repeal an existing charter or *local laws* relating to the incorporation, organization, government, or affairs of said municipal corporation. . . ." MD. CONST. art. XI-E, § 3 (1981). See also MD. CODE ANN. art. 25A, § 4(a) (1990); MD. CODE ANN. art. 25B, § 13 (1990).

105. See *Montgomery Citizens League v. Greenhalgh*, 252 A.2d 242, 247 (Md. 1968).

106. The county council of a charter county has the power . . . to pass all ordinances, resolutions or bylaws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any powers enumerated in this . . . article, as well as such ordinances as may be deemed expedient in *maintaining the peace, good government, health and welfare of the county*.

MD. CODE ANN. art. 25A, § 5(S) (1990) (emphasis added). Municipal corporations likewise have general welfare powers. See, MD. CODE ANN. Art. 23A, § 2(a) (1990).

of whether local government has authority to engage in foreign trade depends on the interpretation given to "local laws" enacted in accordance with the statutory grant of power and on the scope of the general welfare clause.

a. "Local Laws"

Maryland's state constitution permits local governments to enact, amend and repeal public local laws.¹⁰⁷ A public local law is a "law, in subject matter and substance, [that is] confined in its operation to prescribed territorial limits and [is] equally applicable to all persons within such limits."¹⁰⁸ For example, laws regulating residential and commercial zoning are public local laws. A public general law, on the other hand, is a law "which deals with . . . a subject which is of significant interest not just to any one county, but rather to more than one geographical subdivision, or even to the entire state."¹⁰⁹

A law regarding foreign trade may be classified as a public general law. Foreign trade is "a subject which is of significant interest not just to any one county . . ."¹¹⁰ Foreign trade activities of Maryland cities and counties are of significant interest to the involved foreign country as well as to other Maryland counties and the state itself. Such a conclusion, however, should take into consideration the case law coming out of the Court of Appeals of Maryland.

While the Court of Appeals has not had the opportunity to hear a case on this particular point, its holdings in other cases may be instructive in assessing whether the Court would view foreign trade activity as within the purview of a public local law. In *Dasch v. Jackson*,¹¹¹ for example, the Court was asked to determine whether a Baltimore City law, which required the licensing and regulation of paperhangers, was in violation of the home rule amendment. Acknowledging the difficulty of distinguishing between local and general laws, the Court noted that the home rule amendment "leaves that question [of whether a law is local or general] to be determined by the application of settled legal

Code counties, however, have been explicitly denied this general welfare power. MD. CODE ANN. art. 25B, § 13 (1990).

107. *Supra* note 104. In contrast, the Maryland General Assembly is expressly prohibited from enacting any "public local law . . . on any subject covered by the express powers" granted to local governments. MD. CONST. art. XI-A, § 4 (1981). For a similar prohibition with respect to code counties, see MD. CONST. XI-F, § 4 (1981).

108. *Steimel v. Bd. of Election Supervisors*, 357 A.2d 386, 388 (Md. 1975).

109. *Steimel*, 357 A.2d at 388 (citations omitted).

110. *Id.*

111. 183 A. 534 (Md. 1936).

principles to the facts of the particular cases in which the distinction may be involved."¹¹² In ruling that the paperhanger law was not a local law, but rather a general law, the Court first considered the "extent [that the law in question] affects to some extent the people of the whole State."¹¹³ The Court further examined whether the law "affects the right of persons not residing within the city."¹¹⁴ Interestingly, the Court concluded that the paperhangers law affected "to some extent the people of the whole State"¹¹⁵ because it affected the general revenues of the State.¹¹⁶

In a later case, the Court of Appeals approved a local law whose purpose was to attract new industry to the locality.¹¹⁷ The law allowed the City of Frostburg to issue municipal bonds to finance the construction of a building to be used by a private manufacturer.¹¹⁸ The law, noted the Court, would benefit the residents of Frostburg by creating employment and increasing the city's revenues and "without this authority . . . , the city [would] not be able to compete with other localities to obtain manufacturing sites for employment for its residents" ¹¹⁹ Emphasizing the benefits to localities of increased employment opportunities and financial well-being, the Court appears to have sanctioned local government efforts to attract new industry. Just as efforts to attract new industry offer benefits to localities, so too may local government participation in foreign trade.

112. *Dasch*, 183 A. at 538. While unclear as to what a local law is, the Maryland Constitution explicitly provides that "[a]ny law so drawn as to apply to two or more of the geographical subdivisions of this State shall not be deemed a Local Law." MD. CONST. art. XI-A, § 4 (1981). See also MD. CONST. art. XI-F, § 1 (1981) (" 'public local law' . . . does not include . . . laws which apply to more than one county . . . ")

113. *Dasch*, 183 A. at 534.

114. *Id.*

115. *Id.*

116. *Id.*

117. *City of Frostburg v. Jenkins*, 136 A.2d 852 (Md. 1957).

118. *Id.* at 853-54. This case focused on the constitutionality of the enabling legislation which permitted the city to issue bonds. At the time of this decision, 1957, Allegany County had not adopted code home rule. Allegany County adopted code home rule in 1974. See M. HENRY EPPES, MARYLAND TECHNICAL ADVISORY SERVICE, UNIVERSITY OF MARYLAND, EFFECT OF LOCAL HOME RULE ON STATE LEGISLATION 2 (1979). Because the Court was not interpreting the constitutional grant to home rule counties of the authority to enact local laws, the holding rested on the distinction between the legislation having a public versus a private purpose. *City of Frostburg*, 136 A.2d at 855-57. Perhaps a different result would have followed if the home rule amendment had been at issue. The case is nevertheless useful in providing insight into what the Court feels are appropriate activities for local government.

119. *City of Frostburg*, 136 A.2d at 854.

These attitudes illustrate the difficulty of classifying a particular government action as involving a public local law rather than a public general law. The analysis is further complicated in areas in which the state and local governments have concurrent power to legislate,¹²⁰ such as in the regulation of sureties¹²¹ and in the power to tax savings and loan institutions.¹²² Without any clear guidance from the courts, local government participation in foreign trade may easily fall under either the local or general law rubric depending upon the Court's desired result rather than on any particular policy reason.

From the local law perspective, foreign trade activity by local government is simply another tool to use in stimulating employment and the local economy.¹²³ Despite some minimal effect outside the local government's territory, foreign trade activity primarily benefits the residents of the particular local community. In contrast, foreign trade, from the general law perspective, deals with a subject which is of significant interest to more than one local government jurisdiction.¹²⁴ The benefits of foreign trade undoubtedly spill over into other cities and counties by providing employment and ancillary business opportunities to their residents.

Absent any challenge to their authority, local governments do participate in foreign trade. Perhaps because of the extent and nature of local government involvement, the local versus general law distinction has not been triggered. Much local government involvement in foreign trade entails activity which is generally informal and does not require the enactment of laws. Currently, local governments focus on trade promotion and facilitation of private agreements between local and foreign businesses.¹²⁵ If and when local governments begin to enact trade

120. The Court of Appeals recognizes that certain affairs are exclusively within the state's power. *See, e.g., McCrory Corp. v. Fowler*, 570 A.2d 834, 840 (Md. 1990) (Creating a judicial cause of action between private individuals is not a matter of local concern, but is within the exclusive power of the State). Nevertheless, it has also clarified that "[g]eneral" . . . merely means that the subject is of sufficient statewide effect to give the State authority to legislate. It does not mean that it is not of sufficiently local effect to give the City at least concurrent power to legislate." *City of Baltimore v. Sitnick*, 255 A.2d 376, 381 (Md. 1969) (citations omitted). Without a doubt, however, if there is a conflict between a local and a general law, the general law controls. *Id.* at 379.

121. *Mayor and City Council v. Stuyvesant Ins. Co.*, 174 A.2d 153 (Md. 1960).

122. *Am. Nat'l Bldg. and Loan Ass'n v. Mayor and City Council*, 224 A.2d 883 (Md. 1965).

123. *MacManus*, *supra* note 9, at 34; *Fry*, *supra* note 11, at 118-19.

124. *See supra* note 109 and accompanying text.

125. *Fry*, *supra* note 11, at 118.

and export laws, the question of local versus general law will become more pressing.

b. General Welfare Clause

Even if a plausible argument can be made that foreign trade may come under the guise of a local law, local governments are further limited to enacting local laws that come within their express powers as granted by the General Assembly.¹²⁶ The express powers granted by the General Assembly apply to such areas as livestock, highways and bridges, planning and zoning, and bonds and indebtedness.¹²⁷ The authority to engage in foreign trade is not included in these express powers. However, local governments have been granted power to pass such laws "as may be deemed expedient in maintaining the peace, good government, health and welfare of the County."¹²⁸ The interpretation of this general welfare clause,¹²⁹ like the interpretation of "local law," has also generated a substantial amount of case law. Foreign trade may also be evaluated in terms of whether it contributes to "the peace, good government, health and welfare of the County"¹³⁰ and thus properly falls within the scope of local government authority.

The Court of Appeals of Maryland vacillates on whether to hold to the Dillon Rule¹³¹ of restricted local government authority as opposed to the more liberal rule of fostering local self-government.¹³² The

126. "Such express powers granted to the Counties and . . . to the City of Baltimore . . . shall not be enlarged or extended by any charter formed under the provisions of this Article . . ." MD. CONST. art. XI-A, § 2 (1981). Code counties and municipal corporations actually have a broader grant of power than charter counties. Both code counties and municipal corporations have the authority to enact any public local law relating to the "incorporation, organization, or government" of the home rule jurisdiction. See MD. CONST. art. XI-F, § 1 and Art. XI-E, § 3 (1981). See also *McCrary Corp.*, 570 A.2d at 836 (citations omitted) ("Article XI-A 'does not constitute a grant of absolute autonomy to local governments' but rather is limited to 'enacting 'local laws' on matters covered by the Express Powers Act.'").

127. See, e.g., MD. CODE ANN. art. 25A, § 5 (1990); MD. CODE ANN. art. 25B, § 13 (1990).

128. MD. CODE ANN. art. 25A, § 5(S) (1990). See *supra* note 105.

129. See *Greenhalgh*, 252 A.2d at 247.

130. *Id.*

131. See generally *supra* notes 89-92 and accompanying text.

132. See *Greenhalgh*, 252 A.2d at 247. See also *Frug*, *supra* note 80, at 1113 (McQuillin's rebuttal to Dillon). The view in favor of local self-government is consistent with the purposes of the home rule amendments — to allow "the fullest measure of local self-government . . . [thus] leaving [the General Assembly] more time to consider and pass upon general legislation, and to prevent . . . 'log-rolling' " of legislation. *Steimel*, 357 A.2d at 389 (citations omitted). Compare *E. Diversified Properties, Inc.*

Court has construed the general welfare clause as "a broad grant of power [to local governments] to legislate on matters not specifically enumerated" by the General Assembly.¹³³ Presumably then, even though "to engage in foreign trade" is not an expressly enumerated power of local governments,¹³⁴ it is sanctioned to the extent that it contributes to the general welfare of the community. The argument for local government involvement in foreign trade is further bolstered because foreign trade increases employment opportunities for the residents of the locality, vitalizes the economy of the locality, and increases local revenues.¹³⁵ Each of these benefits of foreign trade contributes directly to the welfare of the community.

In dicta, the Court of Appeals has implied that it believes that foreign trade contributes to the general welfare of the local community. Quoting Eugene McQuillin,¹³⁶ the Court noted that the scope of the general welfare clause includes "promot[ing the community's] welfare in trade, commerce, industry and manufacture."¹³⁷ Furthermore, the general welfare clause "includes the power to regulate private business to the extent necessary to promote the public health, safety, morals, and welfare."¹³⁸ The Court assures local government that this "expansive nature of [their] legislative powers"¹³⁹ will be followed as long as the local law is "not inconsistent with the United States Constitution, treaties and statutes, and the laws and policy of the state."¹⁴⁰

With that last limitation, the question of local government's authority to engage in foreign trade, despite almost express approval by the Court of Appeals, is nevertheless left unanswered. Certainly, the Court of Appeals has favored activities by local jurisdictions that spur economic development in their communities. However, only when the

v. Montgomery County, 570 A.2d 850, 852 (Md. 1990) (citations omitted) ("The exercise of legislative home rule powers by a charter county is thus 'subject at all times to provisions of the Constitution and general law, and is limited to those matters allocated by the express powers which the Legislature has delegated under Article 25A of the Annotated Code.'").

133. *Greenhalgh*, 252 A.2d at 246-47; see also *E. Diversified*, 570 A.2d at 852.

134. The express powers granted to municipal corporations actually include the power "to establish and regulate markets, and to license the sale of marketable commodities therein." MD. CODE ANN. art. 23A, § 2(b)(18) (1990).

135. See *supra* note 119. See also *U.S. Governors*, *supra* note 13.

136. See *supra* note 98.

137. *Greenhalgh*, 252 A.2d at 247.

138. *E. Diversified*, 570 A.2d at 853 (citations omitted). See also *Prince George's County v. Chillum-Adelphi Volunteer Fire Dep't, Inc.*, 340 A.2d 265, 270 (Md. 1974).

139. *Montgomery County v. Investors Funding Corp.*, 312 A.2d 225, 232 (Md. 1973) (relying on *Greenhalgh*, 252 A.2d 247).

140. *Greenhalgh*, 252 A.2d at 247 (citations omitted).

precise issue of local government involvement in foreign trade presents itself for review will the Court of Appeals be forced to "determin[e] . . . the application of settled legal principles to the facts of particular cases."¹⁴¹

II. LOCAL GOVERNMENT PARTICIPATION IN FOREIGN TRADE

As mentioned earlier, the participation of local governments in foreign trade has increased noticeably during the last few years. Apart from the volume of foreign trade activities, local governments are engaged in varied and innovative foreign trade activities, which are all aimed at strengthening their economic and financial bases. Establishing foreign export zones, creating export trade financing programs and expanding their sister city relationships to include foreign trade opportunities are among the many foreign trade activities employed by local governments.¹⁴² The remainder of this comment will briefly explore these three activities, focusing on the State of Maryland and the City of Baltimore.

A. Foreign Trade Zones

Created by Congress in 1934, foreign trade zones are enclosed, policed areas within or adjacent to a port of entry.¹⁴³ They exist outside the customs jurisdiction of the United States. Therefore, foreign goods within their zone are not subject to the usual customs procedures and duties.¹⁴⁴ Essentially, foreign trade zones allow United States companies to receive foreign goods and materials and to store, process, or manufacture items prior to formal customs entry.¹⁴⁵ State and local governments, as well as public or private corporations, may operate foreign trade zones.¹⁴⁶

Over the past decade, foreign trade zones have become a favorite area of local government involvement in foreign trade.¹⁴⁷ As intended by Congress, they stimulate local economy by creating jobs in the man-

141. *Dasch*, 183 A. at 537-38 (citations omitted).

142. Fry, *supra* note 11, at 122-24.

143. Foreign Trade Zone Act of 1934, June 18, 1934, 19 U.S.C. §§ 81a-81u (1978 and Supp. 1990); 15 C.F.R. § 400.101 (1990).

144. DAVID SERKO, *IMPORT PRACTICE - CUSTOMS AND INTERNATIONAL TRADE LAW* 125 (1985) [hereinafter SERKO].

145. *Id.*

146. 15 C.F.R. §400.101 (1990).

147. *Import Administration*, BUS. AM., Aug. 15, 1988, at 2.

ufacturing, processing, and repackaging of foreign goods.¹⁴⁸ Furthermore, they encourage importer companies to utilize the zone in order to delay the payment of customs duties and certain tariffs.¹⁴⁹

In 1988, the United States had 141 foreign trade zones, with two of them located in the Baltimore metropolitan area.¹⁵⁰ The Baltimore Freeport Centre, located outside the Dundalk Marine Terminal, is a foreign trade zone which was established in 1983 at the request of Baltimore City.¹⁵¹ It is currently managed by the Atlantic Trading Company.¹⁵² In addition to the Dundalk foreign trade zone, the State, through the Maryland Aviation Administration, has another zone located at the Baltimore-Washington International Airport.¹⁵³ Companies operating within these zones avoid tariffs that would otherwise apply to imported goods and thus are able to manufacture and eventually export goods at lower costs.¹⁵⁴

B. Export Trade Financing Programs

Export financing often poses barriers to businesses participating in foreign trade.¹⁵⁵ Because they deal in relatively smaller volumes, small- and medium-sized businesses have fewer credit options and higher transaction costs than large businesses. Coupled with high interest rates, these financing barriers can be especially burdensome for many export businesses.¹⁵⁶ Furthermore, commercial banks are often reluctant to finance exporting operations because of the risks in dealing on an international level.¹⁵⁷

As a clear example of the federal government's approval of local government participation in foreign trade, Congress in 1982 passed the

148. SERKO, *supra* note 144, at 126-27.

149. *Id.* at 126, 130. See also Mary Ruoff, *Foreign Trade Zones Offer All the Comforts of Home*, BALTIMORE BUS. J., Apr. 11, 1988, at 7B [hereinafter *Comforts of Home*].

150. *Comforts of Home*, *supra* note 149, at 7B.

151. *Id.*

152. *Id.*

153. *Id.*

154. SERKO, *supra* note 144, at 125-26.

155. For discussion of the financial and other obstacles facing U.S. trading companies, see H.R. REP. No. 637, 97th Cong., 2d Sess., pt. 1, at 11 (1982).

156. H.R. REP. No. 1036, 98th Cong., 2d Sess. 15 (1984).

157. Norman Sisisky, *Small Business: Obstacles to Exporting*, BUS. AM., May 8, 1989, at 5. Some of the risks involved in doing business in the international arena include those risks associated with fluctuating market economies, the increased chances of misunderstandings due to language and cultural differences, and having to rely on unpredictable transport and communication systems. *Id.* See also *supra* note 155.

Export Trading Company Act¹⁵⁸ whose purpose is, in part, to "reduc[e] restrictions on trade financing provided by financial institutions."¹⁵⁹ Essentially, this act reduces restrictions by relaxing the applicability of certain federal antitrust laws on banking institutions involved in trade financing, thus encouraging more banking institutions to become involved in trade financing.¹⁶⁰ This act also encourages banking entities and other companies to develop export trading companies in order to provide export services.¹⁶¹ Export trade services include such activities as advertising, marketing, financing and legal assistance.¹⁶² According to a report of the House of Representatives, "[s]tates and cities are in a superb position to form their own ETCs [export trading companies]."¹⁶³

Recognizing that "[b]usinesses need greater access to capital markets,"¹⁶⁴ Maryland offers export financing through the Maryland Industrial Development Financing Authority ("MIDFA").¹⁶⁵ Created in 1985, the export financing program of MIDFA assists businesses interested in exporting to obtain financing.¹⁶⁶ It issues and guarantees loans in order to provide financing to companies interested in entering national and other markets.¹⁶⁷ In 1988-89, MIDFA guaranteed loans totaling over 1.5 million dollars.¹⁶⁸ These loans represented an "investment" by the State in exports valued over 6 million dollars.¹⁶⁹ Maryland is also taking advantage of federal financing for export trade through the Export-Import Bank of the United States.¹⁷⁰ Maryland companies that engage in export activities thus have access to a larger

158. Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233, 15 U.S.C. §§ 4001-53 (1990).

159. 15 U.S.C. § 4001(b) (Supp. 1991).

160. *Id.* See also Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1990).

161. INTERNATIONAL TRADE, *supra* note 5, at 191.

162. 15 U.S.C. §§ 4002(a)(2) and (a)(3) (Supp. 1991).

163. H.R. REP. 1036, *supra* note 156, at 14. For an analysis of a city developing an export trading company, see Jeffrey Fleischhauer, Comment, *Should the City of Tulsa Develop an Export Trading Company*, 21 TULSA L. J. 664 (1986).

164. MD. FIN. INST. CODE ANN. § 13-102(a)(6) (1986).

165. MD. FIN. INST. CODE ANN. §§ 13-101 to 13-141 (1986 and Supp. 1990).

166. *Maryland Puts Resources into Trade*, *supra* note 14, at 4C.

167. MARYLAND MANUAL 1989-1990: A GUIDE TO MARYLAND GOVERNMENT 197 (Diane P. Frese ed., 1989).

168. *Id.*

169. *Id.*

170. Paul Dykewicz, *State Signs \$10 Million in Loans through Exim Bank*, BALTIMORE BUS. J., Jan. 16, 1989, at 9. For a discussion of the Export-Import Bank, see H.R. REP. 1036, *supra* note 156, at 16-17.

pool of money which is guaranteed through the joint financing program of the State and federal government.¹⁷¹

While export trade financing programs have become a popular route for states to pursue, local governments are also developing finance assistance programs on a smaller scale. Finding a "critical need in the City for venture capital to assist in the establishment and growth of enterprises in order to promote the expansion . . . of the City's industrial and commercial base,"¹⁷² the General Assembly passed legislation enabling Baltimore to establish a financing program to attract businesses.¹⁷³ Thus, with the express support and approval of the State, Baltimore in 1984 passed a local ordinance establishing the Enterprise Development Program, which is designed to

assist in the establishment and growth of enterprises in order to promote the expansion, stability, and diversification of the City's industrial and commercial base and the expansion of employment opportunities in the City.¹⁷⁴

Through this program, the City has established the Enterprise Development Fund, which provides equity investment, loans and loan guarantees to eligible enterprises.¹⁷⁵ While this ordinance does not specify that the Enterprise Development Fund may assist enterprises in foreign trade activities, it only requires that the enterprise use the financing to:

1. provide working capital to the enterprise or to be used by the enterprise to purchase machinery or equipment and
2. assist in the establishment or growth of an enterprise and likely result in the establishment or expansion of manufacturing, office, research or related activities in the City.¹⁷⁶

These local efforts, coupled with state activity in export financing, make it easier for small- and medium-sized companies to enter the export trade market.

171. See Dykewicz, *supra* note 170, at 9; Scouton, *supra* note 13, at 7.

172. Ch. 745, 1984 Md. Laws 3475.

173. *Id.* at 3475-80; BALTIMORE, MD. CODE OF PUB. LOCAL LAWS, subtit. 27 (Supp. 1990).

174. BALTIMORE, MD., CODE OF PUB. LOCAL LAWS § 27-2(a) (Supp. 1990).

175. BALTIMORE, MD., CODE OF PUB. LOCAL LAWS § 27-6 (Supp. 1990).

176. BALTIMORE, MD., CODE OF PUB. LOCAL LAWS § 27-7(a) (Supp. 1990).

C. *Sister Cities and Expanded Foreign Trade Opportunities*

With its earliest beginnings in the years immediately following World War II, the Sister Cities Program succeeded in securing federal approval through President Eisenhower in 1956.¹⁷⁷ The Sister Cities Program links cities in the United States with cities in foreign countries as a means of fostering cultural and educational exchange.¹⁷⁸ Illustrating the tenuous but increasing claim of local government to participate in foreign affairs, including foreign trade, this program has grown dramatically over the years. In 1990, there were more than 868 United States cities involved in the Sister Cities Program with relationships with over 1,300 cities in 90 foreign countries.¹⁷⁹ As promoted by President Eisenhower, "none can be more effective than direct, close and abiding communications between cities, where indeed most of our people now live."¹⁸⁰

Originally envisioned as the cultural links between United States cities and cities in foreign countries,¹⁸¹ sister city relationships have evolved over the years to include much broader objectives.¹⁸² Among these objectives is the fairly recent entry of sister cities into the foreign trade arena.¹⁸³ In addition to promoting and facilitating private business arrangements between cities, sister city relationships may also be instrumental in enabling local governments to form bilateral agreements with their foreign counterparts in areas such as foreign trade.¹⁸⁴ The experience of Baltimore illustrates the foreign trade benefits af-

177. Jeffrey Pasley, *Twisted Sisters; Foreign Policy for Fun and Profit; "Sister City" Movement*, NEW REPUBLIC, Jun. 27, 1987, at 14; *Why Bother with a "Sister City"?*, 9 CURRENT MUN. PROBS. 235 (1982) [hereinafter *Why Bother?*]

178. Karen Bruno, *Cities Program Stressing Trade*, CRAIN'S N.Y. BUS., Nov. 12, 1990, at 30. Sister Cities International was founded in 1967 to supervise the Eisenhower-created program. As a private foundation, it facilitates and monitors the relationships between U.S. cities and foreign cities. *Id.*

179. SISTER CITIES INTERNATIONAL, 1990 DIRECTORY OF SISTER CITIES, COUNTIES, AND STATES BY STATE AND COUNTRY (1990) [hereinafter 1990 DIRECTORY].

180. *Why Bother?*, *supra* note 177, at 236.

181. President Eisenhower saw the Sister Cities Program as an opportunity to help "build the solid structure of world peace." *Id.*

182. Steve Weinstein, *Sister Cities Nurturing Trade, Exchanges*, CRAIN'S N.Y. BUS., Nov. 6, 1989, at 37. In addition to cultural and educational objectives, the Sister Cities Program is involved in activities which include port development, hotel building, information exchanges regarding municipal administration, etc. *Id.*

183. See Bruno, *supra* note 178, at 30; *Sister Cities Program Begins to Focus on International Trade*, BUS. AM., Mar. 14, 1988, at 8. [hereinafter *Focus on International Trade*]; Weinstein, *supra* note 182, at 37.

184. Fry, *supra* note 11, at 122-23. See also Michael H. Shuman, *Dateline Main Street: Local Foreign Policies*, FOREIGN POL'Y, Winter 1986-87, at 161-62.

forded by sister city relationships.

Baltimore, along with Xiamen, its sister city in the People's Republic of China, has promoted foreign trade opportunities between the cities' business communities since 1988.¹⁸⁵ Baltimore and Xiamen successfully fostered a joint venture between Baltimore's Curtis Engine and Equipment Company and the Atlantic Trading Company and Xiamen's Xiamen Construction and Development Corporation. As part of the joint venture, the Baltimore companies sold engines to the Chinese company for manufacturing excavation equipment and forklift machines.¹⁸⁶ As with Xiamen, Baltimore has actively pursued foreign trade opportunities with its other eight sister cities.¹⁸⁷ In April of 1990, Baltimore sponsored a conference with its sister city, Odessa in the Soviet Union, to explore the trade opportunities between the two cities and their respective countries.¹⁸⁸ These activities illustrate the diversity of foreign trade activities being fostered by established sister city relationships.

III. CONCLUSION

Cities and counties over the last decade have embraced foreign trade as another means by which to provide increased employment and economic development opportunities to their citizens and local businesses. Foreign markets and foreign investments in local markets are ripe avenues for increased fiscal growth and stability of local communities. To maximize their opportunities, local governments engage in trade promotion activities, facilitate private business ventures between local and foreign companies, and provide guaranteed financing for export activities.

While local governments aggressively pursue foreign trade initiatives, the authority with which they engage in these activities is tentative. As they participate in foreign trade, local governments are confronted with the strong sentiment that foreign relations, including foreign trade, are activities within the exclusive control of the federal government. Consequently, local governments take the risk that the federal government will limit their foreign trade activities.

185. *Focus on International Trade*, *supra* note 183, at 8.

186. *Id.*

187. *Id.* Baltimore has sister city relationships with Rotterdam, Netherlands; Kawasaki, Japan; Genoa, Italy; Luxor, Egypt; Cadiz, Spain; Odessa, Soviet Union; Gbarnga, Liberia; and Piraeus, Greece. 1990 DIRECTORY, *supra* note 179, at 4.

188. Kurt Kleiner, *Local Firms Learn Lessons of Perestroika from Sister City*, BALTIMORE BUS. J., Apr. 2, 1990, at 5.

The increased involvement of cities and counties will undoubtedly cause repercussions in territories beyond local boundaries. As a result, local governments will eventually need to justify their foreign trade involvement in terms of their legal relationship with the state in which they are located. Home rule forms of government give local governments discretion over their local affairs. However, local governments, like those in Maryland, may be limited in the nature and extent to which they can engage in foreign trade, even under home rule.

Crucial to the success of these local initiatives is their integration or coordination with state and federal efforts. As county and municipal budgets become increasingly stretched to cover programs that used to enjoy federal funding, local governments will be forced to compete with other local governments to secure revenues.¹⁸⁹ Without some national perspective under which local governments may operate, competition between local jurisdictions is only one undesirable consequence of this increased foreign trade activity. Other consequences may include inconsistent and even contradictory relations with foreign countries which may lead to a perceived lack of national unity and direction.

The question of local government involvement in foreign trade is one that cannot be answered easily. It has not and probably will not receive significant attention until some particular foreign trade activity by a local government directly conflicts with a federal or state initiative.

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189. Fry, *supra* note 11, at 122.

