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Jesse J. Atkins III

Stephen J. Doyle

Walter D. Schwidetzky

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JESSE J. ATKINS III*
STEPHEN J. DOYLE**
WALTER D. SCHWIDETZKY***

I. INTRODUCTION

This article proposes to address the topics of sub-zones, state taxation, and state legislation as they relate to foreign-trade zones. Before embarking upon a detailed treatment of these topics, however, it may be appropriate to discuss briefly certain general characteristics of foreign-trade zones.

Foreign-trade zones are facilities created under the Foreign-Trade Zones Act[1] (hereinafter referred to as the Act) for the purpose of expediting and encouraging foreign commerce. The Act provides for the creation of a Foreign-Trade Zones Board[2] consisting of the Secretary of Commerce, the Secretary of the Treasury, and the Secretary of War.[3] The Board is authorized, *inter alia,* to grant to qualified applicants[4] "the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States."[5]

Perhaps the most frequently cited definition of a foreign-trade zone is that contained in the regulations[6] promulgated by the Foreign-Trade Zones Board:

> It [a foreign-trade zone] is an isolated, enclosed, and policed area, operated as a public utility, in or adjacent to a port of entry,

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* B.A., 1971, University of California, Berkeley; J.D., 1978, University of Denver; M.B.A. Candidate, 1979, University of Denver.

** A.B., 1975, Georgetown University; M.B.A., J.D., 1978 University of Denver; Member of Colorado Bar.

*** B.A., 1974, University of Denver; M.B.A., J.D., 1978, University of Denver.

1. Foreign-Trade Zones Act of 1934, ch. 590, 48 Stat. 998-1003 (1934), *as amended,* 19 U.S.C. §§ 81a-u (1976).

2. *Id.* § 81a(b).

3. *Id.* The Secretary of the Army is now the third member of the Foreign-Trade Zones Board replacing the now defunct office of the Secretary of War. 15 C.F.R. § 400.103 (1977).

4. *Id.* § 81a(g).

5. *Id.* § 81b(a).

6. 15 C.F.R. §§ 400.100-.1406 (1977).

> furnished with facilities for lading, unlading, handling, storing, mainipulating [sic], manufacturing, and exhibiting goods, and for reshipping them by land, water, or air. Any foreign and domestic merchandise, except such as is prohibited by law or such as the Board may order to be excluded as detrimental to the public interest, health, or safety may be brought into a zone without being subject to the customs laws of the United States governing the entry of goods or the payment of duty thereon; and such merchandise permitted in a zone may be stored, exhibited, manufactured, mixed or manipulated in any manner, except as provided in the act and other applicable laws or regulations. The merchandise may be exported, destroyed, or sent into customs territory from the zone, in the original package or otherwise. It is subject to customs duties if sent into customs territory, but not if reshipped to foreign points.[7]

As this definition suggests, "The ability to defer or eliminate payment of customs duties is the traditional incentive for sending goods to a foreign trade zone for storage or manufacture."[8]

The foreign-trade zone is one component of the temporary entry system established under Title 19 of the United States Code.[9] The drawback, the bonded warehouse, and the temporary importation bond, constitute the other three components of the system.[10] Like the foreign-trade zone, each of the three offers some relief from payment of customs duties.

The drawback permits a merchant to "drawback," (that is, to reacquire) up to ninety-nine percent of the duties paid on imported goods, if the goods imported are later exported.[11] The drawback procedure is helpful principally in those cases in which a merchant imports goods for use in the manufacture of a product for export. The chief disadvantages of the drawback are the initial capital outlay for payment of duties on the items imported, the quite burdensome paperwork necessary to implement the drawback procedure, and the delay in collection of the drawback payments.

Bonded warehouses for storage and for manufacture are also available to importers.[12] Duties are not assessed on goods

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7. *Id.* § 400.101 (1977).

8. Landy & McGinnis, *Foreign Trade Zones in Florida: Legal Considerations for Foreign Business Interests*, 10 LAW. AM. 141, 142 (1978).

9. *See* note, *Foreign Trade Zones: Hole in the Tariff Wall or Incentives for Development?*, 2 LAW & POL'Y INT'L BUS. 190, 191 (1970).

10. *Id.*

11. 19 U.S.C. § 1313 (1976).

12. *Id.* § 1311.

in a bonded warehouse until they leave the bonded warehouse and enter United States Customs Territory.[13] However, a bond must be paid both for the warehouse facility, and for the individual goods imported.[14] A bonded warehouse has an advantage over the drawback system in that the duty on an imported product is never levied if the product is reexported. However, the problem of the initial capital outlay is not solved in its entirety, since payment of bond is required. Additionally, the bonded warehouse procedure, like the drawback procedure, involves burdensome paperwork and, moreover, constant Customs supervision is required.[15] A final disadvantage is the three-year time limit after which goods may no longer remain in the bonded warehouse.[16]

Temporary importation bonds permit a manufacturer to import goods without paying customs duties, provided that the goods are repaired, altered, or processed and then exported.[17] The advantage of this procedure is that manufacturing can take place outside a bonded warehouse without payment of full customs duties as required by the drawback procedure. The disadvantages of the temporary importation bond are strict Customs supervision, the time limit in which the final product must be exported,[18] and the required bond.[19]

In an attempt to alleviate some of the administrative and financial burdens of the drawback, the bonded warehouse, and the temporary importation bond, Congress created the foreign-trade zone. The zone, although operated under constant U. S. Customs Service supervision, does not require immediate payment of customs duties or initial expenditures for bonds. In addition, the administrative procedures associated with zone use are far simpler than those required for the utilization of the other components of the temporary entry system.

II. SUB-ZONES

In 1952 the Foreign-Trade Zones Board amended its regulations to authorize "special-purpose sub-zones" in addition to

13. 19 U.S.C. § 1555 (1976).
14. *Id.*
15. 19 U.S.C. §§ 1311, 1555, 1562 (1976).
16. 19 U.S.C. § 1557(a) (1976).
17. 19 U.S.C. § 1202, subch. 8, pt. 5, subpt. C, item 864.05 (1976).
18. *Id.* at item 862.20.
19. *Id.*

the "general-purpose zones" already authorized by the Act.[20] Businesses which qualify under this provision avoid relocating their export operations to an existing zone. Instead, they simply secure the area of their plant or warehouse which will comprise the sub-zone, and follow the same procedural regulations enacted for the general-purpose zones. The only distinction between the two types of zones is that sub-zones, unlike general-purpose zones, are used by only one firm. They are not accessible to other companies wishing to operate under foreign-trade zone status. In fact, they were specifically designed for companies unable to relocate to, or take advantage of, an existing general-purpose zone.[21]

The importance of the sub-zone provisions has grown as more companies which cannot use existing zones seek the benefits of the Foreign-Trade Zones Act. This section will discuss the problems which may be encountered by companies planning to apply for a grant of sub-zone status.

The application procedure for sub-zones is similar to that for general-purpose zones. A public or private corporation[22] must submit an application detailing the "location and qualifications of the area in which it is proposed to establish a zone."[23] However, in the case of sub-zones, an application cannot be submitted unless either a general-purpose zone application has also been submitted or a general-purpose zone has already been authorized.[24] In addition, the applicant for the sub-zone must

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20. 15 C.F.R. § 400.304 (1977).

21. Da Ponte, *Foreign-Trade Zones: An Update*, AM. IMPORT & EXPORT BULL., April, 1977.

22. The applicant is usually a public corporation as defined in 19 U.S.C. § 81a(e) (1976):

> [A] State, political subdivision thereof, a municipality, a public agency of a State, political subdivision thereof, or municipality, or a corporate municipal instrumentality of one or more States.

A private corporation is defined in 19 U.S.C. § 81a(f):

> [A]ny corporation (other than a public corporation) which is organized for the purpose of establishing, operating, and maintaining a foreign-trade zone and which is chartered under special Act enacted after June 18, 1934, of the State or States within which it is to operate such zone.

23. 19 U.S.C. § 81f(a)(1) (1976).

24. The regulation states that sub-zones may be established in "an area separate from an existing zone," 15 C.F.R. § 400.304, thereby necessitating the existence of a general-purpose zone. However, the Board has accepted simultaneous general-purpose zone and sub-zone applications. 42 Fed. Reg. 22,391 (1977).

be the same corporation which applied for, or is the grantee of, the general-purpose zone.[25] A company cannot be the applicant for its own sub-zone but must request the general-purpose zone applicant or grantee to apply for a sub-zone in its behalf.[26]

Once the application is submitted, the Board analyzes the information and holds hearings on the proposal.[27] The Board is authorized to "make the grant"[28] if it "finds that the proposed plans and location are suitable,"[29] the "facilities and appurtenances . . . are sufficient,"[30] and that "existing or authorized zones will not serve adequately the convenience of commerce with respect to the proposed purposes."[31] An additional standard, not appearing in the statute or the regulations, but used by the Board, is whether the applicant can show a "specific public benefit" brought about by establishment of the sub-zone.[32] Companies which are planning to develop a sub-zone should be especially concerned with meeting both the location requirement (as used to insure that the sub-zone lies "in or adjacent to" a customs port of entry)[33] and the public benefit test. Neither criterion is clear in practice, but both must be understood prior to the application process.

The location requirement is implied from the relationship of the sub-zone regulation to the Act. The Foreign-Trade Zones Act authorizes the Foreign-Trade Zones Board "to grant to corporations the privilege of establishing . . . foreign-trade zones *in or adjacent to* ports of entry . . . ."[34] (Emphasis added.) The regulation states that sub-zones may be established "in an area separate from an existing zone."[35] The language in the regulation can be interpreted to extend the bound-

25. Da Ponte, *supra* note 21.

26. *Id.* The restriction is implied since section 400.304, which authorizes sub-zones, does not indicate who may apply, thereby leaving this area to the section of the Act and regulations which specify who may apply for a grant. In addition, sub-zones are considered to be extensions of the general-purpose zone, not independent zones.

27. 15 C.F.R. § 400.605 (1977).

28. 19 U.S.C. § 81g (1976).

29. *Id.*

30. *Id.*

31. 15 C.F.R. § 400.304 (1977).

32. Da Ponte, *supra* note 21.

33. 19 U.S.C. § 81b(a) (1976).

34. *Id.*

35. 15 C.F.R. § 400.304 (1977).

aries of the area in which sub-zones can be located. However, by permitting sub-zones "in an area separate from" the general-purpose zone, the Board was referring to its conception of sub-zones as nonadjacent additions to general-purpose zones. Sub-zones were authorized not to extend the area for site location, but rather to meet the needs of individual companies which were "in or adjacent to" customs ports of entry but were unable to use the general-purpose zone.

Colorado offers an example of the problems encountered in interpreting the definition of "in or adjacent to" the port of entry. The only port of entry in Colorado is Denver.[36] The Denver port of entry is established by statute and roughly corresponds with the city limits of Denver.

The definition of "adjacent to" the customs port of entry is, as yet, unclear. Some commentators have suggested that "adjacent to" allows a general-purpose zone or a sub-zone to be located in any county adjacent to the county within which the port of entry lies. This would supposedly help insure that the U.S. Customs Service would not be prevented from supervising any zone operations because of distance problems. However, in Colorado this interpretation would allow zones to be constructed sixty miles from Denver in Arapahoe County, yet not be constructed in Boulder, only thirty miles away.

The regulations offer support for a different interpretation of "adjacent to," based upon the ability of surrounding areas to sustain a foreign-trade zone. An important consideration of the Board when evaluating applications is whether the proposed zone will "adequately serve the convenience of commerce."[37] In order to serve the "convenience of commerce" a foreign-trade zone must be located in an area with, *inter alia*, an adequate transportation network[38] and a regional economy which can support a foreign-trade zone.[39] The logical sites for establishment of foreign-trade zones, including sub-zones, are large urban areas. "Adjacent to" could be defined to be the

36. 19 U.S.C. § 2, Annex A, Sch. D (1976).

37. 15 C.F.R. § 400.304 (1977).

38. 15 C.F.R. § 400.402(b) (1977) requires proof of adequate warehouse space, transportation connections, and power facilities.

39. The application entails an economic survey of the area in order to: "demonstrate . . . that the anticipated commerce, benefits, and returns, both direct and indirect, will justify its construction to expedite and encourage foreign commerce." 15 C.F.R. § 400.400 (1977).

next adjacent urban area, subject to reasonable distance constraints.[40] The closest urban areas to Denver with over 50,000 in population are Colorado Springs and Boulder. If "adjacent to" were interpreted to mean the "next adjacent urban area" then both cities would qualify as potential sites for additional general-purpose zones or sub-zones.

The Boonville, Missouri application for a general-purpose zone, filed in September of 1978, offers precedent for the "next adjacent urban area" interpretation of "adjacent to" a customs port of entry.[41] Boonville is not in a county adjacent to the Kansas City port of entry. However, as of November 1, 1978, the Boonville zone had not been authorized. Yet, an internal opinion written by counsel in the office of the Foreign-Trade Zones Board supports the Boonville application by arguing for the "next adjacent urban area" interpretation of "adjacent to" the port of entry.[42] If the application is approved, it will do much to liberalize the current standard.

If a firm is reasonably certain that it lies "in or adjacent to" a customs port of entry, it must then determine whether it can show a "public benefit" resulting from sub-zone operations. Sub-zones cannot be authorized solely on the basis of profit to the sub-zone user. Rather the sub-zone must benefit the economy in general, such as through "retention of jobs that would otherwise be overseas."[43]

Actually the public benefit test is no more than proof of a condition presumed to be present in general-purpose zones. The Foreign-Trade Zones Act was enacted to help alleviate problems with bonded warehouses and drawbacks in order "to expedite and encourage foreign commerce."[44] In order to determine whether the Act's purpose would be met, the application requires preparation of an economic survey.[45] This survey must not only determine whether foreign commerce will be encouraged but also take into consideration the effect upon "the U.S. balance of payments." Congress was attempting to prevent the

40. An internal opinion in the office of the Foreign-Trade Zones Board supports this interpretation. Telephone conversation with John J. Da Ponte, Jr., Executive Secretary, Foreign-Trade Zones Board (September 11, 1978).

41. 43 Fed. Reg. 44,876 (1978).

42. Telephone conversation, *supra* note 40.

43. Da Ponte, *supra* note 21.

44. 48 Stat. 998 (1934).

45. 15 C.F.R. § 400.400 (1977).

Foreign-Trade Zones Act from becoming a tool for foreign companies to the detriment of domestic business.

The public benefit test for sub-zones fulfills the same function as the economic survey in the application. The test requires the applicant to prove that the sub-zone will encourage foreign commerce and favorably affect the balance of payments. In addition, the test is useful to both applicants and the Board in that it underscores the importance of showing benefits to the public where special arrangements are being made for a particular company.

The most significant challenge to date against the establishment of sub-zones and the Foreign-Trade Zones Act arose in *Armco Steel Corp. v. Stans.*[46] This action was commenced in federal district court by Armco Steel Corporation (Armco) which sought a declaratory judgment to set aside an order by the Foreign-Trade Zones Board authorizing the Board of Commissioners of the Port of New Orleans (New Orleans Board) to operate a sub-zone. The sub-zone was to be located at a shipyard owned by Equitable-Higgins Shipyard, Inc. (Equitable). Equitable intervened in the action, joined by Central Gulf Steamship Corporation (Central Gulf). The district court granted Equitable's and Central Gulf's motion for summary judgment. On appeal the district court's judgment was affirmed.

The events which led to the lawsuit originated with a contract between Equitable and Central Gulf. Under the contract Equitable was to supply Central Gulf with 233 barges.[47] These barges were to be manufactured out of steel plates imported from Japan. Equitable would normally pay duty on the imported steel upon entry of the steel into U.S. customs territory. Since barges entered U.S. customs territory duty-free, Equitable could avoid payment of any duty on the steel by manufacturing under foreign-trade zone status. However, the shipyard was not next to the operating general-purpose zone and could

46. 303 F.Supp. 262 (S.D.N.Y. 1969), *aff'd* 431 F.2d 779 (2d Cir. 1970).

47. The barges were to be used aboard LASH vessels which were high-speed cargo ships equipped with cranes to pick up and carry light barges. The barges could travel inland waterways, pick up cargo, return to the port of entry, and then be transferred onto the LASH ship. These barges would then be transported aboard the LASH vessel to foreign ports of entry, and then unloaded to travel along inland waterways to discharge their goods and pick up new goods.

not be economically moved. The sub-zone provision offered Equitable its only access to the benefits of the Foreign-Trade Zones Act.

Armco's motion for summary judgment rested heavily on three of its five arguments in which it claimed that:

> 1) . . . .
> 2) The Order nullifie[d] the tariff laws and enable[d] Equitable to evade customs duties;
> 3) the sub-zone [could not] be operated as a "public utility," as required by the Act, since it [would] be used solely by a private corporation; [and that]
> 4) the Zones Board's findings of fact [were] insufficient and [were] not based on substantial evidence;[48]
> 5) . . . .

The first of these contentions referred to the concern that the Act would become a "hole in the tariff wall" in that Equitable could avoid duty payment on importation of foreign goods used in the manufacture of the barges. The court deferred to Congressional determination that this was a "consideration of national policy."[49] In this decision, Judge Bonsal, District Judge in the original action, recognized that the Act was designed to alleviate custom obligations in order to promote foreign trade, and that this was typically an executive decision. Armco's argument was premised on the necessity for absolute protection of domestic manufacturers through tariff laws. It failed to acknowledge the contribution the Act provides by permitting domestic companies to lower costs by avoiding certain duties and encouraging foreign companies to utilize American labor and warehousing facilities.

During lengthy debates on the bill which subsequently became the Foreign-Trade Zones Act,[50] the House discussed the possible effects on domestic commerce which later concerned the court in *Armco*. Those opposing the bill feared that foreign-trade zones would permit the lower priced foreign products to be dumped into the United States in competition with domestic commerce. Congressman Cullen, a proponent of the bill, disagreed. Foreign-trade zones would benefit domestic commerce, he stated, not hinder it. In support of his argument,

48. 303 F.Supp. at 268.
49. *Id.*
50. 78 CONG. REC. 9778 (1934).

he quoted from a letter written by the president of the Chamber of Commerce of the United States who wrote:

> [The Chamber of Commerce believes] that . . . American merchants and manufacturers will benefit in a variety of ways from the advantages of a wide American consignment market for foreign products; that the free zones will bring needed improvements in American port and terminal facilities; that the free zones will bring added business to American banks, insurance companies, freight forwarders, and warehousemen; that free zones will bring about a vast improvement of the type of facilities provided at present only by bonded warehouses and drawbacks together with a simplification and saving in the work of customs administration.[51]

The public benefit test responds to the concern in *Armco* and in the House debates that the Act may damage domestic commerce in its attempt to "expedite and encourage foreign trade."[52] The test requires the Board to assess the overall impact on the economy which would result from the operation of a proposed sub-zone. It prohibits the Board from granting a sub-zone if, for example, jobs would be lost to foreign countries with no offsetting benefit to the domestic economy.

Armco's second argument questioned the ability of the sub-zone operator to manage the sub-zone as a public utility, as required by the Act.[53] A profit-seeking company could not fall within the definition of a public utility under Armco's interpretation of the statute. The court dispensed with this contention by addressing the issue of whether other firms were denied the same ability to operate as a sub-zone. The court assumed that the public utility requirement was satisfied through compliance with customs regulations. Quoting the Foreign-Trade Zones Board regulations, the court held that the New Orleans Board was obligated to provide sub-zone status under like conditions.[54] The important factor was whether the Board or the grantee could discriminate between companies asking for sub-zone status. If so, the Act could be used against portions of domestic industry instead of as a tool to encourage foreign trade. Since the court read in a requirement of impar-

51. 78 CONG. REC. 9768 (1934).

52. *See* 303 F.Supp. at 268.

53. 19 U.S.C. § 81n requires: "[E]ach zone [to be] operated as a public utility, and all rates and charges for all services or privileges within the zone [to] be fair and reasonable."

54. 303 F.Supp. at 270.

tiality in permitting sub-zone grants, access to the Act's benefits was open to all qualifed companies.

The third challenge to the Equitable sub-zone claimed that the Board's findings were insufficient. In order to grant a sub-zone the Board must find that "existing or authorized zones will not serve adequately the convenience of commerce with respect to the proposed purposes."[55] However, the Board found enough evidence to satisfy this criterion since employment would increase, more goods would be shipped through the Port of New Orleans, and the sub-zone would help reduce the balance of payments deficit.[56]

On appeal the Second Circuit upheld the lower court, discussing the impact of the sub-zone on domestic industry and on the balance of payments.[57] The court recognized that United States steel producers would lose the competitive protection afforded by tariffs if the sub-zone were established. However, the overall effect on American steel producers would be negligible since the shipbuilding industry consumed only one percent of domestic steel. As for the balance of payments, there would be a flow of cash out of the country if Central Gulf decided to contract with foreign shipbuilders.[58] The sub-zone benefits would encourage construction within the United States, and only the steel would be purchased on a foreign market.

The public benefit test addresses the same issues which concerned the courts in *Armco*. Both *Armco* and the test focus on the economic effect of a sub-zone. The Act was designed to bolster trade. If the sub-zone's benefits are limited to the operators of the sub-zone, it contradicts the Act's intent. However, if the applicant shows that domestic employment will increase or that the balance of trade will improve, then the Board might be more disposed to order the grant.

Sub-zone 33A offers an example of the procedure a company must undertake in order to obtain a grant from the Board.[59] In April of 1977 the Regional Industrial Development Corporation of Southwestern Pennsylvania (RIDC) submitted

55. 15 C.F.R. § 400.304 (1977).
56. 303 F.Supp. at 270.
57. 431 F.2d 779 (1970).
58. *Id.* at 785.
59. 42 Fed. Reg. 22,391 (1977).

an application requesting a grant authorizing it to establish a general-purpose zone in Allegheny County and a special-purpose sub-zone in Westmoreland County. The Pittsburgh customs port of entry was located primarily in Allegheny County, but extended into Westmoreland County, thereby allowing both zones to meet the requirement that they be "in or adjacent to" a customs port of entry.

The sub-zone was to encompass a portion of an automobile assembly and manufacturing plant owned by Volkswagen Manufacturing Corporation of America (Volkswagen). Since RIDC was the applicant for the general-purpose zone, it was necessary for it to apply for the sub-zone on behalf of Volkswagen.

Volkswagen had negotiated for sub-zone status for its plant because it had determined that it would be paying duties at a rate of 3% within the sub-zone, as opposed to 4.2% without the sub-zone. However, the benefits of the sub-zone were not limited to Volkswagen. Once operations started, Volkswagen planned to employ up to 5,000 people, and it estimated a secondary impact of 20,000 additional jobs in the region. Volkswagen also indicated that it might not operate a United States plant without foreign-trade zone status. The public benefit test was satisfied since the sub-zone would significantly increase employment.

III. STATE AND LOCAL TAXATION OF FOREIGN-TRADE ZONES

While the Foreign-Trade Zones Act exempts goods in foreign-trade zones from customs duties, it does not specifically exempt such goods from state and local taxation. Whether state and local taxes[60] apply is of obvious importance to businesses in determining whether they should move the goods they import and export through foreign-trade zones.

Export/Import Clause

Under the Export/Import Clause of the United States Constitution, a state may not impose "imposts" or "duties" on

60. Henceforth referred to simply as "state taxation." For example, it is at present unclear whether such state taxes as sales taxes (COLO. REV. STAT. § 39-26-101 to 126), and use taxes (COLO. REV. STAT. § 39-26-201 to 211), or such local taxes as sales taxes (DENVER, COLO., REV. MUNICIPAL CODE § 166), and use taxes (DENVER, COLO., REV. MUNICIPAL CODE 166A), would apply to goods within a zone located in Colorado.

exports or imports.[61] However, as a result of *Michelin Tire Corp. v. Wages*[62] the clause almost certainly does not prohibit a state from taxing goods held in a foreign-trade zone. In *Michelin* the Supreme Court held that a nondiscriminatory ad valorem property tax "is not the type of state exaction which the Framers of the Constitution . . . had in mind as being an 'impost' or 'duty' under the Export/Import Clause.[63] Therefore, as long as the state tax on items in a foreign-trade zone is nondiscriminatory, meaning goods outside the zone are taxed on the same basis as goods in the zone, the Export/Import Clause does not present an impediment to the state taxation of products stored or processed in a foreign-trade zone.

However, it might be argued that if the goods in the foreign-trade zone are intended for export, then a nondiscriminatory state tax is in the nature of an impost or duty. The tires in the *Michelin* case (upon which the state tax levies were permitted) were no longer in transit, a fact specifically acknowledged by the Supreme Court.[64] As discussed below, courts will frequently make reference to whether goods are or are not intended to come to rest in the United States, without stating precisely how that affects the decision.

Commerce Clause

The Commerce Clause gives Congress plenary authority over both interstate and foreign commerce.[65] States may not discriminate against foreign commerce,[66] or infringe upon the federal regulation of foreign commerce.[67] Therefore, if the state taxation of goods in a foreign-trade zone is held to be discriminatory with respect to foreign commerce, or is held to be an intrusion upon the federal government's regulation of that commerce, it will be disallowed.

Foreign Commerce/Relevant Cases

Neither the Foreign-Trade Zones Act, nor the regulations thereunder, states that goods in foreign-trade zones are in for-

61. U.S. CONST. art. 1, § 10, cl. 2.

62. 423 U.S. 276 (1976).

63. *Id.* at 283.

64. *Id.* at 302.

65. U.S. CONST. art. 1, § 8, cl. 3, as interpreted in California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

66. *See* Nippert v. City of Richmond, 327 U.S. 416 (1946).

67. *See* McGoldrick v. Gulf Oil, 309 U.S. 414 (1940).

eign commerce. However, since goods in a zone are exempt from United States customs duties,[68] and since goods in a foreign-trade zone are intimately connected with foreign commerce, and further since Congress desired to encourage foreign commerce by the passage of the Foreign-Trade Zones Act,[69] there would seem to be no fundamental difference between goods in a zone and goods in foreign commerce. In *McGoldrick v. Gulf Oil*[70] the Supreme Court indicated it might support such a view. This case involved an attempt by the state of New York to tax oil located in a bonded warehouse. The oil in the bonded warehouse had been imported and was intended, after processing, for export. The court pointed out that the Congressional exemption of the oil from United States taxation was a valid exercise of Congress' power to regulate foreign commerce and that the state tax on the oil would be an "infringement of the Congressional regulation of the commerce."[71] Since, as previously pointed out, a foreign-trade zone is in part intended to have a similar function to that of a bonded warehouse, it could be argued that goods in a foreign-trade zone, but which are intended for export, should be exempt from state taxation under *McGoldrick*.

During v. Valente,[72] while not a tax case, contains reasoning similar to that of *McGoldrick*. In *During* the defendant hired the plaintiff to obtain purchasers for foreign liquor stored in the New York foreign-trade zone. The plaintiff alleged that the defendant breached his contract, and it was maintained in defense that the plaintiff had no cause of action because he had not received a permit to sell liquor as required by New York law. The New York court held that "[the] zone was created under the power of Congress to *regulate commerce with foreign nations*" which "power is exclusive and plenary."[73] (Emphasis added.) The court went on to state that the mere "geographical location of the goods within the state of New York did not constitute an import into the state," citing *McGoldrick*.[74] The court added that the imposition of the licensing requirement

68. 19 U.S.C. § 81c (1976).

69. Purpose Clause to the Foreign-Trade Zones Act, 48 Stat. 998 (1934) [hereinafter cited as Purpose Clause].

70. 309 U.S. 414 (1940).

71. *Id.* at 429.

72. 267 App. Div. 383, 46 N.Y.S.2d 835 (1944).

73. *Id.* at 387.

74. *Id.*

would be a burden on foreign commerce and interfere with Congress' exclusive control over such commerce. However, the court also pointed out that the complaint contained no allegation that the sale involved the importation of liquor *into* the state of New York, thereby maintaining the distinction between goods in a zone intended for export and goods in a zone intended for entry into United States customs territory.

In *American Smelting & Refining Co. v. County of Contra Costa,*[75] a California appellate court permitted the state to impose a nondiscriminatory tax on metal inventories in a bonded warehouse. The case is, however, of dubious explanatory value with respect to the state taxation of goods in a foreign-trade zone. The California court emphasized the special nature and background of smelting and refining warehouses,[76] and specifically held that the law covering foreign-trade zones was not controlling,[77] and suggested that the Foreign-Trade Zones Act may be a "broader statute" than the statute authorizing bonded warehouses.[78] The court, however, also stated that the inventories in the bonded warehouse in question were not irrevocably destined for foreign commerce.[79] Thus, here too the destination of the good is emphasized.

The Final Destination

Whether goods in a foreign-trade zone should be treated differently for state taxation purposes may depend upon whether the goods will be exported or enter United States customs territory. An argument may be made for the proposition that the goods should not receive different treatment, and thus state taxes should not apply in either case. It should be recalled that "persuasive reasons" are required before federal regulation of a field of commerce will be deemed preemptive of state regulatory power.[80]

As stated earlier, Congress felt foreign commerce would be encouraged by exempting goods stored in a zone from custom

75. 271 Cal.2d 437, 77 Cal. Rptr. 570 (1969), *cert. denied*, 396 U.S. 273 (1970).

76. 77 Cal. Rptr. at 592-97.

77. *Id.* at 599.

78. *Id.* Bonded warehouses are authorized by 19 U.S.C. § 1555 (1976).

79. 77 Cal. Rep. at 596. This issue of state taxation of goods in a foreign-trade zone is now being litigated in California. *See* Lilli-Ann Corp. v. City & County of San Francisco, No. 726-271 (Super. Ct. of San Francisco County filed July 29, 1977).

80. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

duties.[81] Congress, in passing the Foreign-Trade Zones Act, made no distinction between goods destined for the United States and those destined for other countries. Congress could have done so. The fact that Congress did not could arguably mean that it felt foreign commerce would be fostered by the use of a foreign-trade zone regardless of the destination of the goods in the zone. If states are permitted to levy taxes on items in a zone, many of the cost benefits foreign-trade zones offer to exporters and importers will be decreased.

In addition, foreign commerce will be encouraged if state taxes are not permitted to be levied on goods in a foreign-trade zone, even if those goods are destined for United States customs territory. Potential importers and exporters of goods will have a further inducement to engage in foreign commerce if they know a place exists where goods can be stored or processed without the imposition of duties or taxes. Since state taxes would increase a zone user's costs, even where the goods never enter U.S. customs territory, they too discourage foreign commerce, thus conflicting with the congressional mandate demonstrated by the Foreign-Trade Zones Act.[82] Such taxes thwart the primary purpose of a foreign-trade zone.

Also, state taxation of the zones interferes with the desire Congress had to simplify matters when it passed the Foreign-Trade Zones Act, bonded warehouses and drawbacks frequently being more complex solutions.[83] State taxation introduces a complicating element, particularly since some states will have the tax and others will not, presenting the anomaly that foreign-trade zones will be more beneficial to exporters and importers in some areas than others. "Persuasive reasons" thus exist for exempting foreign-trade zones from state taxation.

Federal Taxation

Apart from customs duties, foreign-trade zones are not exempt from federal taxation. The Foreign-Trade Zones Act makes no mention of exempting goods in a zone from anything other than customs duties. The sponsor of the Act, Congressman Emmanuel Celler stated: "[Foreign-trade zones are] . . .

81. *See* Purpose Clause, note 69 *supra*.
82. *Id. See also* related discussion.
83. *See* introductory discussion *supra*.

subject to all the laws relating to . . . everything except the customs."[84] Additionally, the Internal Revenue Service is of the opinion that federal income taxes do apply to income derived from foreign-trade zones, although goals are exempt from the manufacturer's excise tax.[85]

Some would argue[86] that since nonexempted federal revenue laws apply to zones, state laws should similarly apply. A possible fallacy in this line of reasoning is that the federal authority over foreign commerce is plenary. The federal government can reshape its policies as expressed by the Foreign-Trade Zones Act.[87] The Federal Constitution does not give the states such powers.

IV. STATE LEGISLATION

One facet of the study of foreign-trade zones which has received scant attention from commentators is that of state legislation engendered by the Foreign-Trade Zones Act.[88] This section proposes, first, to ascertain the necessity (if any) for such legislation under the Act and, second, to discuss ways in which such state enactments, whether required or not by the Act, can contribute to the efficient establishment, operation, and maintenance of foreign-trade zones.

Statements may be found in the literature of foreign-trade zones suggesting that enabling or authorizing legislation enacted by the state in which the zone is to be located is a prerequisite to any application for or grant of the privilege to establish, operate, and maintain such a zone.[89] If such statements are construed to mean that the Act requires state enabling legislation prior to *any* application or grant, they may not be wholly accurate. Close scrutiny of the provisions of the Act indicates that, under certain circumstances, application for a

84. 78 CONG. REC. 9853 (1934).

85. Rev. Rul. 76-161, 1976-1 C.B. 193; Rev. Rul. 59-318, 1959-2 C.B. 310.

86. *See* Letter from Legislative Council of California to Senator Alquist (February 4, 1976).

87. *See* California v. Zook, 336 U.S. 725 (1949).

88. 19 U.S.C. §§ 81a-u (1976).

89. "Before either a public or private corporation may apply to the Foreign-Trade Zones Board for operating authority, however, the state in which the zone is to be established must pass authorizing legislation." Davison, *Foreign-Trade Zones—An Aid to Those Doing Business Abroad*, 17 BUS. LAW. 960, 965 (1962). "An application for a zone may be made by either a public or private corporation, but only after an enabling statute has been enacted by the state where the zone is to be located." Note, *Foreign-Trade Zone Manufacturing: The Emergence of a Free Trade Instrument*, 9 VA. J. INT'L L. 444, 450 (1969) (footnotes omitted).

grant by a "public corporation," as therein defined,[90] need not be preceded by an authorizing enactment of the state in which the zone is to be established.

Applicants

A brief discussion of the nature of eligible applicants may be useful in determining when state enabling legislation is or is not a prerequisite to application. According to the terms of the Act, an "applicant"[91] for (and "grantee"[92] of) the privilege of establishing, operating, and maintaining a zone must be a "corporation,"[93] as therein defined. A "corporation," in turn, may be either a "public corporation"[94] or a "private corporation."[95] The definition of a "public corporation" encompasses a rather extensive hierarchy of governmental entities: "The term 'public corporation' means a State, political subdivision thereof, a municipality, a public agency of a State, political subdivision thereof, or municipality, or a corporate municipal instrumentality of one or more States."[96] A "private corporation," on the other hand, is defined as: "[A]ny corporation (other than a public corporation) which is organized for the purpose of establishing, operating, and maintaining a foreign-trade zone and which is chartered under special Act enacted after June 18, 1934, of the State or States within which it is to operate such zone."[97]

Private Corporations and the Special Act

Limitation of the definition of a "private corporation" to one which "is chartered under special Act . . . of the State or States within which it is to operate such zone" quite obviously envisions the existence of such "special Act" and has the effect of making such "special Act" a prerequisite under the Foreign-Trade Zones Act to application by (and grant to) a "private corporation." Regulations promulgated by the Foreign-Trade Zones Board are not entirely unambiguous on this point, but do appear to confirm the interpretation that an authorizing enactment of the State is necessary prior to a grant of the

90. 19 U.S.C. § 81a(e) (1976); *see also* 15 C.F.R. § 400.105(a) (1977).
91. 19 U.S.C. § 81a(g) (1976); *see also* 15 C.F.R. § 400.106 (1977).
92. 19 U.S.C. § 81a(h) (1976); *see also* 15 C.F.R. § 400.107 (1977).
93. 19 U.S.C. § 81a(d) (1976); *see also* 15 C.F.R. § 400.105 (1977).
94. 19 U.S.C. § 81a(e) (1976); *see also* 15 C.F.R. § 400.105(a) (1977).
95. 19 U.S.C. § 81a(f) (1976); *see also* 15 C.F.R. § 400.105(b) (1977).
96. 19 U.S.C. § 81a(e) (1976); *see also* 15 C.F.R. § 400.105(a) (1977).
97. 19 U.S.C. § 81a(f) (1976); *see also* 15 C.F.R. § 400.105(b) (1977).

privilege to a "private corporation": "Grants to private corporations will not be approved by the Board unless such corporations have been authorized by an act of the State legislature (enacted after June 18, 1934)."[98]

Additional support, if any were needed, for the proposition that state enabling legislation constitutes a precondition to application for (and grant of) the privilege to a "private corporation" may be garnered from the legislative history of House Bill H.R. 9322, which (with certain amendments not here pertinent) subsequently became the Foreign-Trade Zones Act.[99]

The term "special Act" is not further defined in either the Act or the regulations[100] of the Foreign-Trade Zones Board promulgated thereunder. It is not surprising, therefore, that the individual states, left to their own devices, have formulated a variety of legislative responses to the "special Act" requirement. These range from blanket authorization[101] by the state of any "private corporation" wishing to apply for the privilege, to the pointed omission[102] of any reference to "private corporations" from state legislation pertaining to foreign-trade zones. Less extreme positions are represented by state statutes such as those which authorize applications by any "private corporation" organized under the laws of the enacting state for the purposes of establishing, operating, and maintaining a foreign-trade zone in accordance with the Act,[103] or by any non-public "not-for-profit corporation authorized to do business" in the

98. 15 C.F.R. § 400.502 (1977).

99. "It is to be noted that the only private corporations which are eligible for the operation of foreign-trade zones are ones specially chartered by the State or States in which the zone is to be established." H.R. REP. No. 1521, 73d Cong., 2d Sess. 4 (1934). "The House bill limited the organizations (other than public corporations) which might operate zones to corporations chartered under special act enacted after the date of this act of the State or States within which the zone was to be operated. The Senate amendment broadens the class of operators to include partnerships and associations and removes the requirement with respect to special charter in the case of corporations. The Senate amendment also includes organizations existing under or authorized by the laws of the United States. The conference agreement adopts the House provision." H.R. REP. No. 1884, 73d Cong., 2d Sess. 2 (1934). "Private corporations are authorized to establish such zones only in the case such zones are not established by the States or other public agencies, with a further limitation that they must be chartered by the State legislature." 78 CONG. REC. 9768 (1934) (remarks of Rep. Cullen).

100. 15 C.F.R. §§ 400.100-.1406 (1977).

101. *See, e.g.*, ALA. CODE § 33-1-30 (Supp. 1977).

102. *See, e.g.*, HAWAII REV. STAT. §§ 212-1 to -10.

103. *See, e.g.*, CAL. GOV'T CODE § 6306 (West).

state,[104] or by a "private corporation" identified by name.[105]

It is important to note, before turning to a consideration of public corporations, that the Act mandates that preference be given to the application of a "public corporation" over that of a "private corporation": "In granting applications preference shall be given to public corporations."[106] The strength of this preference may be gauged by the historical fact that, as of the time of this writing, few private corporations have received a grant of the privilege of foreign-trade zone establishment, operation, and maintenance.[107] Thus, even assuming the prior enactment of appropriate legislation by the state in which the zone would be located, application by a "private corporation" could prove unsuccessful.

Public Corporations

Although mention of any "special Act"[108] is conspicuously absent from the definition of the term "public corporation,"[109] it is not to be presumed that state legislation is not a prerequisite to application by or grant to a public corporation in every case. As to those states in which the circumstances described in section 81b(d) of the Act exist, "an Act of the legislature of such State" is required prior to grant of the privilege:

> In case of any State in which harbor facilities of any port of entry are owned and controlled by the State and in which State harbor facilities of any other port of entry are owned and controlled by a municipality, the Board shall not grant an application by any public corporation for the establishment of any zone in such State, unless such application has been authorized by an Act of the legislature of such State (enacted after June 18, 1934.)[110]

This provision was evidently intended to deny to states wishing to apply for a grant an advantage not possessed by municipalities which were similarly inclined. While a state could make application for a zone in its port of entry at once, a municipality might be obliged to make a time-consuming approach to the state legislature for authority to issue bonds to

104. KAN. STAT. § 12-825h.

105. TEX. REV. CIV. STAT. ANN. art. 1446.7 (Vernon).

106. 19 U.S.C. § 81b(c) (1976); 15 C.F.R. § 400.503 (1977).

107. Telephone conversation with John J. Da Ponte, Jr., Executive Secretary, Foreign-Trade Zones Board (November 16, 1978).

108. 19 U.S.C. § 81a(f) (1976); 15 C.F.R. § 400.105(b) (1977).

109. 19 U.S.C. § 81b(e) (1976); 15 C.F.R. § 400.105(a) (1977).

110. 19 U.S.C. § 81b(d) (1976); 19 C.F.R. 400.501 (1977).

raise funds needed for establishing a zone in its port of entry.[111]

Except as provided in section 81b(d), the Act does not require that the application of a "public corporation" have been previously authorized by an act of the legislative body of the state in which the zone is to be located. It may be concluded, therefore, that, for the purposes of the Foreign-Trade Zones Act, the necessity of prior state legislative authorization of an application by a "public corporation" is determined by the applicability of the provisions of section 81b(d) to the state in question. In other words, a state to which section 81b(d) applies, by virtue of the existence within such state of the circumstances set out in that section, must give prior legislative authorization to an application by any of its "public corporations." Conversely, a state to which section 81b(d) is inapplicable, for whatever reason, is *not* obliged by the Act to give prior legislative authorization to any application by any of its "public corporations."

That section 81b(d) does not apply to all states seems plain. By its terms, its applicability to a given state is dependent upon the existence of at least two United States Customs ports of entry within the state. Hence, it cannot apply to a state in which there is only one such port of entry.[112] The state of

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111. The committee had in mind that in some States there are ports in which the State owns the water front or where the city owns it; and the committee was confronted with the situation where the State could immediately establish a foreign trade zone in its State-owned port, whereas the city-owned port would have to go to the legislature for authority to issue bonds to raise the necessary money to establish the foreign-trade zone. The committee felt that it was not fair to give this advantage to the State; that both should start on a par; that both should have the same opportunity.

78 CONG. REC. 9976 (1934) (remarks of Mr. McCormack).

112. Mr. McDUFFIE. I think the committee has been eminently fair in meeting the situation; but I refer to the case of a port in which not only does the State own facilities but the municipality also owns facilities.

I think New Orleans, La., occupies this position and I know the port of Mobile, in my district, in Alabama, is in a similar position. I was fearful there might be some delay in those cities taking advantage of this legislation which I heartily approved.

Mr. VINSON of Kentucky. If I understand the gentlemen from Alabama, the case which he presents is where both State and cities own harbor facilities, of course, at the same place.

Mr. McDUFFIE. At the same place.

Mr. VINSON of Kentucky. It is my understanding that in that character of case subsection (d) would not apply.

Mr. McCORMACK. That is my opinion.

Mr. McDUFFIE. *Subsection (d) is made to apply to 2 ports and 2 cities in the same State.*

Colorado, for example, within its single United States Customs port of entry at Denver,[113] would seem not to come within the scope of section 81b(d). Consequently, the Foreign-Trade Zones Act does not appear to require that the application of a Colorado "public corporation" have been previously authorized by an Act of the State's legislature.

Although worded somewhat differently[114] than section 81b(d) of the Act, section 400.501 of the regulations of the Foreign-Trade Zones Board seems to be identical in effect and is thus susceptible to the same analysis as is section 81b(d). However, section 400.603(k)[115] of the regulations, which deals with an exhibit that must accompany an application for grant, may create some confusion in determining whether the application of a public corporation must have been authorized by the state legislature. This section, in pertinent part, states:

> (1) If the applicant is a State, the application for a grant shall be accompanied, as evidence of the applicant's qualifications to make application, by a copy of the law or laws under authority of which the application is made, duly certified by the Governor or secretary of state of the State under seal, and three uncertified copies of such law or laws (enacted after June 18, 1934).
> (2) If the applicant is a public corporation, other than a State, as defined in section 1(e) of the Act, the application for a grant shall be accompanied by evidence of the applicant's qualifications to make the application as follows:
>
> (i) A copy of its charter or other organization papers duly certified by the secretary of state of the State in which it is located, or by the officer having legal custody of the record of municipal and other public corporations (one copy only);
>
> (ii) A statement under seal of the secretary of state of the State or other officer charged by State laws with supervision of harbor facilities, setting forth whether the State owns and controls harbor facilities of any port of entry and whether harbor facilities of any other port of entry in the State are owned and

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Mr. VINSON of Kentucky. *Yes.*"

78 CONG. REC. 9776 (1934) (remarks of Messrs. McDuffie, Vinson and McCormack) (emphasis added).

113. 19 U.S.C. § 2 (1976); *see also* 19 C.F.R. § 1.2 (1977).

114. Where harbor facilities of any port of entry in the State are owned and controlled by the State, and where habor facilities of any other port of entry in the State are owned and controlled by a municipality, grants to public corporations will not be approved by the Board unless such applications have been authorized by an act of the State legislature enacted after June 18, 1934.

15 C.F.R. § 400.501 (1977).

115. 15 C.F.R. § 400.603(k) (1977).

> controlled by a municipality with three uncertified copies of such statement.[116]

The language in subsection (1) of section 400.603(k) referring to "the law or laws under authority of which the application is made . . . (enacted after June 18, 1934)" could conceivably be interpreted to impliedly require *in every case* authorizing state legislation prior to application by a state itself—an interpretation which appears at odds with the Act in general and section 81b(d) in particular. Moreover, subsection (2) of section 400.603(k), which applies to "a public corporation other than a state" (a distinction not made in the Act) does not refer to state legislation authorizing application for grant, despite the fact that such legislation would presumably have been a prerequisite to such application if the circumstances within the state rendered section 81b(d) applicable. In short, section 400.603(k)(1) can be read as requiring as an exhibit to any application by a state a copy of a law whose existence *is not* mandated by the Act, while section 400.603(k)(2) can be read as *not* requiring as an exhibit to any application by a "public corporation other than a state" a copy of a law or laws whose existence *is,* under certain conditions, expressly mandated by section 81b(d) of the Act.

The present Executive Secretary of the Foreign-Trade Zones Board has informally indicated that, while as a general matter applications are most often authorized by a state enactment, section 400.603(k)(1) is not to be regarded as an indirect requirement of state authorizing legislation in cases where such legislation is not otherwise mandatory under the Act. With respect to a state which believes itself to be outside the applicability of section 81b(d), an option may exist in the case of an application by a "public corporation." The state may enact authorizing legislation which, though not technically required under the Act, could prove useful in other ways. Alternatively, a "public corporation" could meet the requirements of section 400.603(k) by including as Exhibit 11 to its application (a) an opinion of the state's attorney general (or other official performing the function of legal counsel and advisor to the state) setting out the grounds upon which the provisions of section 81b(d) of the Act are deemed to be inapplicable to the state and (b) documentation such as state constitutional or statutory provisions or organizational charters which set out the legal

116. 15 C.F.R. § 400.603(k)(1)-(2) (1977).

basis for the establishment and existence of the particular "public corporation" applicant.[117]

Contributions of State Legislation

As indicated in the preceding discussion, one function of state legislation is compliance with the Foreign-Trade Zones Act in those cases in which an application for grant must have received prior authorization of the state legislature. State legislation may, however, serve a somewhat broader, more positive purpose in contributing to the efficient establishment, operation, and maintenance of foreign-trade zones. Even in those states in which an application by a public corporation need not be legislatively authorized, state legislation may be a means of clarifying a state's position with respect to zones within its borders, as well as a way of obviating difficulties which have plagued zones in other jurisdictions.

The discussion which follows identifies a limited number of the potentially great range of issues relating to foreign-trade zones which may be susceptible to resolution through state legislation; additionally, certain examples drawn from existing state statutes serve to illustrate some of the ways in which these "foreign-trade zone-related" issues have been addressed legislatively by the individual states.

A threshold issue in the establishment of a zone in any state relates to the designation of applicants for grant of the privilege. Designation of appropriate applicants is, of course, an integral part of legislation authorizing an application when such is required under the Act.[118] However, where such prior authorization is not mandatory under the Act, a state enactment setting out those organizations deemed to be appropriate applicants may nevertheless clarify a potentially murky aspect of foreign-trade zone establishment.

State statutory designations of appropriate "public corporation" applicants range from those which are nearly as broad as the definition of a "public corporation"[119] under the Act to those which are as narrow as the meaning of a single specific governmental entity. A definitional provision of the California statute exemplifies the former category: " '[P]ublic corporation' means the State, any political subdivision thereof, any incorporated municipality therein, any public agency of the State, or any political subdivision thereof, or of any municipal-

117. Telephone conversation with John J. Da Ponte, Jr., Executive Secretary, Foreign-Trade Zones Board (September 22, 1978).

118. *See* notes 91-107 *supra* and accompanying text.

119. 19 U.S.C. § 81a(e) (1976).

ity therein, or any corporate municipal instrumentality of this State or of this State and one or more States."[120] Typical of the latter category is the Illinois foreign-trade zone statute, which states in part: "*The Port District* has power to apply to proper authorities of the United States of America pursuant to appropriate law for the right to establish, operate, maintain, and lease foreign-trade zones."[121] (Emphasis added.) In some instances, state statutes have combined relatively broad designations of applicants of the "public corporation" type with somewhat more specific references or criteria intended, presumably, to facilitate a determination of which governmental entities come within the sweep of the more general language. The Florida statute concludes its definition of the term "governmental agency"—the functional equivalent of "public corporation" under the Foreign-Trade Zones Act—with the statement that: "Specifically included [in the definition] are airports, port authorities, and industrial authorities."[122] An alternative approach to specific reference appears in the Michigan statute which employs the presence or absence of public funds in the financing of the organization in question as the criterion for determining which governmental entities may apply for a grant: " 'Public corporation' means the state, or any county, township, city or village within the state, or any state or municipal authority or similar organization *financed in whole or in part by public funds.*"[123] (Emphasis added.)

With respect to "private corporations," state statutes, as mentioned previously,[124] have run a gamut from omitting reference to such corporations altogether to embracing any such corporation as an applicant. In view of the preference for grants to public corporations expressed by the Act[125] and substantiated by historical fact, the omission of the designation of private corporations as appropriate applicants—an approach taken in Hawaii's statute[126]—may be quite realistic.

However, if the state elects to designate what it considers to be suitable applicants of the "private corporation" type,

120. CAL. GOV'T CODE § 6300 (West).
121. ILL. ANN. STAT. ch. 19, § 159.1 (Smith-Hurd).
122. FLA. STAT. ANN. § 288.35(2) (West).
123. MICH. COMP. LAWS ANN. § 447.1(b).
124. *See* notes 101-105 *supra* and accompanying text.
125. 19 U.S.C. § 81b(c).
126. HAWAII REV. STAT. §§ 212-2 to -3.

some legislative formulae seem more serviceable than others. To illustrate, the Alabama statute authorizes "*any . . . private corporation . . .* to establish at all ports of entry within this state foreign trade zones."[127] (Emphasis added.) Conceivably, this provision could be construed to authorize any private corporation, whether or not incorporated or otherwise qualified to do business in Alabama, to apply for and receive a grant. The possibility of an unqualified foreign corporation establishing, operating, and maintaining a foreign-trade zone within the state may be an undesirable contingency from the state's perspective. On the other hand, a provision such as that in the Texas statutes designating, along with certain other "public corporations," a single "private corporation incorporated under the laws of the state"[128] may be susceptible to challenge as unfair to another private corporation which might be desirous of establishing a foreign-trade zone. A legislative formula which avoids the foregoing criticisms may be found in the Georgia statute:

> Any private corporation hereafter organized under the laws of this state for the purpose of establishing, operating and maintaining a foreign-trade zone in accordance with [the Foreign-Trade Zones Act] is likewise hereby authorized to make application for the privilege of establishing, operating and maintaining a foreign-trade zone in accordance with the said [Foreign-Trade Zones Act].[129]

State legislation may also prove useful in propounding state policy with respect to operation of an established foreign-trade zone by a "private corporation" which is not the grantee. It is likely, for reasons discussed previously,[130] that recipients of future grants of the privilege will be "public corporations." Such a grantee would be, by definition, a governmental entity and, if it were to operate and maintain the zone itself, would presumably expend public funds and employ public servants for that purpose. Conceivably this arrangement could bring about unsatisfactory consequences, as, for example, competition between a foreign-trade zone and a school system (or other public institutions) for monies and personnel. To reduce the possibility of such costly and inefficient rivalries, the state

127. *See* note 101 *supra*.

128. *See* note 105 *supra*.

129. GA. CODE ANN. § 98-303.

130. *See* notes 106-107 *supra* and accompanying text.

could by statute expressly countenance contractual relations between the "public corporation" grantee and a "private corporation" whereby the latter, at its own expense, would undertake to operate and maintain the zone as a public utility[131] on behalf of the grantee. Neither the Act nor the regulations of the Foreign-Trade Zones Board addresses the propriety of this arrangement directly. While a "grant shall not be sold, conveyed, transferred, set over, or assigned,"[132] there is an acknowledgment in the early case of *American Dry Dock v. City of New York* to the effect that the Foreign-Trade Zones Board does not consider a contract between a "public corporation" grantee and a "private corporation" for operation of a zone violative of this prohibition.[133] Moreover, a review of the most recent annual report of the Foreign-Trade Zones Board reveals several instances in which such contractual arrangements for zone operation exist.[134]

The statutes of the state of Washington contain an example of one technique which may be used to give express legislative approval to zone operation by nongrantee "private corporations":

> A city or town, as zone sponsor, may apply to the United States for permission to establish, operate, and maintain foreign trade zones: *Provided,* that nothing herein shall be construed to prevent these zones from being operated and financed by a private corporation(s) on behalf of a city or town acting as zone sponsor.[135]

Questions regarding zone location may also be an appropriate object of state legislation. As discussed in a previous section, the Foreign-Trade Zones Act requires in effect that zones shall be "in or adjacent to ports of entry" but does not define the term "adjacent."[136] Not surprisingly, therefore, state legislative responses to the "in or adjacent" language vary from general references to ports of entry within the state to rather precise descriptions of the area in which a zone may be established. More precision rather than less in setting forth appro-

131. 19 U.S.C. § 81(n) (1976).

132. 19 U.S.C. § 81(g) (1976).

133. American Dock Co. v. City of New York, 21 N.Y.S.2d 943, 949, 174 Misc. 813 (1940), *aff'd* 26 N.Y.S.2d 704, 261 App. Div. 1063, *aff'd* 36 N.E.2d 696, 286 N.Y. 658.

134. FOREIGN-TRADE ZONES BOARD, 38TH ANNUAL REPORT (1976).

135. REV. CODE WASH. ANN. § 35.21.805 (1977 Supp.); *See also* §§ 24.46.020, 36.01.125.

136. *See* notes 34-42 *supra* and accompanying text.

priate areas for zone establishment may be desirable, since a very broad description (or no description at all) of such an area may give rise to unrealistic expectations of zone establishment nearby, based upon the mistaken notion that there are few or no restrictions on zone location. By way of illustration, the Illinois statute requires that any zone be "within the limits of the Chicago Regional Port District."[137]

A related consideration which may be addressed by state legislation is that of *who* may select specific zone sites within the designated areas. One logical choice is, of course, the applicant for grant of the privilege, and certain states have, in fact, enabled applicants to select and describe zone sites: "Any corporation or government agency may select and describe the location of the foreign-trade zones or foreign-trade subzones for which an application is made."[138]

Perhaps the most substantial contribution state legislation may make to efficient establishment and operation of foreign-trade zones is the clarification of state and local taxing policies with respect to zones. The California statute, for example, makes no reference to state and local taxes as they may apply to foreign-trade zones within the state.[139] The fact that litigation of this issue is underway in California at the time of this writing may serve to underscore the seriousness of the statutory omission.[140]

In a few instances, states have dealt with the question of state and local taxes in legislation pertaining to foreign-trade zones. Hawaii provides an exemption from certain taxes for sales of specified products in a zone to specified purchasers.[141] Massachusetts spells out the incidence of real property taxes upon land within a foreign-trade zone.[142] Oregon exempts personal property "in transit" through the state from certain state taxes.[143] These measures do not, however, seem to represent as complete a treatment of the state and local taxation issues as may be desirable in light of the possibility of litigation.

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137. *See* note 121 *supra.*

138. FLA. STAT. ANN. § 288.37 (West).

139. CAL. GOV'T CODE § 6300-6305 (West).

140. Lilli-Ann Corp. v. City & County of San Francisco, No. 726-271 (Super. Ct. of San Francisco County, filed July 29, 1977).

141. HAWAII REV. STAT. § 212-8.

142. MASS. GEN. LAWS ANN. ch. 91 App. § 1-3(g) (1978 Supp.)

143. OR. REV. STAT. § 307.810.

IV. CONCLUSION

The principal purpose of the Foreign-Trade Zones Act is to expedite and encourage foreign commerce. Whether this purpose will be fulfilled in a particular case is in some measure determined by the availability of sub-zones, by state and local taxing policies with respect to zones, and by state legislation relating to zones. As the foregoing discussion has sought to demonstrate each of these matters has a potentially significant impact upon the establishment and operation of any foreign-trade zone.