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The Florida International Affairs Act: A Model for State Activism in Foreign Affairs Comment

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COMMENTS

THE FLORIDA INTERNATIONAL AFFAIRS ACT: A MODEL FOR STATE ACTIVISM IN FOREIGN AFFAIRS

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"The states are unknown to foreign nations . . . ."[1]

I. FLORIDA'S INCREASING ROLE IN FOREIGN AFFAIRS

STATE governments are taking a new approach to gain a competitive edge in the global economy by actively participating in foreign affairs.[2] For example, states are establishing sister city and sister state programs,[3] adopting non-binding resolutions on foreign affairs, enacting divestment legislation, and sending trade missions to other countries.[4] Recently, the Florida Legislature took such a progressive step by giving Florida a unitary voice to participate in foreign affairs through the enactment of the Florida International Affairs Act (Act).[5] The purpose of the Act is "to articulate a clear policy for international economic development and policy formation in Florida by means of a strategic plan for the coordination and advancement of public and private trade promotion programs and related educational activities."[6] The Act establishes a central mechanism to implement and coordinate the international economic policy for the state:[7] the Florida Interna-

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1. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 228 (1824) (Johnson, J., concurring).

2. Richard B. Bilder, *The Role of the States and Cities in Foreign Relations, in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 115 (Louis Henkin et al. eds., 1990).

3. These programs began after World War II as a proposal by President Dwight D. Eisenhower to deliver foreign aid and to involve ordinary citizens in foreign relations. Jeffrey L. Pasley, *Twisted Sisters: Foreign Policy for Fun and Profit,* NEW REPUBLIC, June 22, 1987, at 14. As of 1987, Sister Cities International recognized 1,282 sister city arrangements with 86 countries. *Id.* Sister state programs with Latin America are sponsored by Partners of the Americas, an organization supported by the Agency For International Development to sponsor agricultural projects and shipments of medicines. *Id.* at 16.

4. *Id.* One author has found more than 1,000 state and local governments participate in foreign affairs by conducting programs in education, research, lobbying, contracting, and investment. Michael H. Shuman, *Dateline Main Street: Local Foreign Policies,* FOREIGN POL'Y, No. 65 Winter 1986-87, at 154.

5. 1991 Fla. Laws ch. 91-5 (codified at FLA. STAT. §§ 288.801-826(1991)). While the Act is not specifically named the "Florida International Affairs Act," it is commonly referred as such. *E.g.,* Andrew J. Markus, *International Activism,* INT'L L.Q. (Fla. Bar), Dec. 1991, at 1.

6. FLA. STAT. § 288.801 (1991).

7. § 288.801; FLA. STAT. § 288.803 (1991).

tional Affairs Commission (FIAC).[8] The creation of FIAC is a sweeping effort on the part of Florida to establish a clear policy regarding international affairs. The Act directs all such efforts to be concentrated on FIAC and its supporting councils. As such, FIAC's activities will inevitably have a substantial impact on Florida's ability to compete and interact in the international arena. In carrying out its duties of improving Florida's international posture, however, FIAC must remain within the federalism limitations of the U.S. Constitution.[9]

This Comment takes an in-depth look into the structure and objectives of FIAC as a model for state activism in foreign affairs. Additionally, the Comment discusses the constitutional restraints on Florida's ability to engage in foreign affairs and offers recommendations on activities that seek to improve the state's economic posture and influence in world affairs, without violating the U.S. Constitution.

A. History of the Florida International Affairs Act

In 1990, the Florida Legislature responded to independent reports from the private and public sector evaluating Florida's present position in the global economy, by enacting the Comprehensive Development Act.[10] The Florida Chamber of Commerce conducted research and published *Project Cornerstone*, a report evaluating Florida's world-

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8. § 288.803. The Act was modeled after the California State World Trade Commission, which was created by the California legislature to accomplish similar goals as those of FIAC. CAL. GOV'T CODE §§ 15364.2-15365.20 (West 1992). Other states have enacted similar laws establishing commissions or councils that are responsible for creating and implementing areas of international affairs policy for the state. *E.g.*, ARIZ. REV. STAT. ANN. § 41-151-5 (1992) (focusing on tourism and trade economics); ILL. REV. STAT., ch. 127, ¶¶ 2401-2601 (1991) (focusing on export trade only); KY. REV. STAT. ANN. §§ 154.750, 154.755 (Michie/Bobbs-Merrill 1984) (focusing on trade export only); N.J. STAT. ANN. §§ 52:27H-22.3 to -27 (West 1986) (emphasis on international trade); TENN. CODE ANN. §§ 13-27-101 to 13-27-114 (1987 & Supp. 1991) (setting up a "corporation" with a board of directors, mainly to encourage state exportation of goods).

Prior to the creation of FIAC, the Department of Commerce was Florida's governmental center for the stimulation of international economic activity in the state. FLA. STAT. § 288.025 (1991). Within the Department of Commerce is the Division of International Trade and Development, whose specific duties include the promotion (via advertisement, conventions, and trade delegations) of Florida's international commerce and export trade, as well as education of international affairs. *Id.* This Division also facilitates the availability of financing to encourage the exportation of Florida-origin products and operates various offices in foreign countries to promote Florida's economy. *Id.*; FLA. STAT. § 288.012 (1991). The Department's activities in this area, however, will soon be transferred to FIAC's functional jurisdiction. FLA. STAT. § 288.825 (1991). Similarly, other states have adopted clear goals and objectives to be administered within their departments of commerce, without creating a separate entity. *E.g.*, MICH. COMP. LAWS ANN. §§ 447.101-447.103, 447.151-44.168 (West 1989 & Supp. 1991); N.Y. ECONOMIC DEVELOPMENT LAW §§ 221-223 (McKinney 1988 & Supp. 1992); TEX. COMMERCE & INDUSTRIAL DEVELOPMENT CODE ANN. §§ 481.042-481.059 (Vernon 1990 & Supp. 1992).

9. *See infra* text accompanying notes 142-147.

10. 1990 Fla. Laws ch. 90-201.

wide competitive position.[11] *Project Cornerstone* emphasized the need to create a favorable business climate in Florida to compete both nationally and internationally.[12] Meanwhile, the Florida Economic Growth and International Development Commission[13] published a report recommending the creation of a commission representing the public and the private sector[14] that would provide "leadership and oversight to promote economic and international development."[15] Following the recommendations of both reports, the Legislature, through the Comprehensive Development Act, created the Florida International Affairs Commission (FIAC).[16] The Florida Supreme Court, however, held that the Comprehensive Development Act was unconstitutional on the grounds that the Act encompassed more than one distinct subject,[17] thus temporarily abolishing the commission. Before the Florida Supreme Court had even ruled on this issue, however, the Legislature, in special session, reenacted the Comprehensive Development Act by passing the Florida International Affairs Act, hence insuring the viability of FIAC.

B. Duties of the Florida International Affairs Commission (FIAC)

The Act specifies that FIAC's central objective will be to establish a uniform international policy for the state regarding trade, investment, tourism, and education.[18] Towards that goal, FIAC will have various specific tasks, the more salient of which are discussed here. First, FIAC will undertake the ambitious task of submitting to the majority and minority leaders of both legislative chambers a "strategic plan for

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11. THE FLORIDA CHAMBER OF COMMERCE, SUMMARY: CORNERSTONE FOUNDATIONS FOR ECONOMIC LEADERSHIP (April 1989) [hereinafter CORNERSTONE].

12. *Id.* at 4.

13. The Florida Economic Development Act, 1988 Fla. Laws ch. ch. 88-201, § 2.

14. THE FLORIDA ECONOMIC GROWTH & INTERNATIONAL DEVELOPMENT COMMISSION, FINAL REPORT iv (February 1990) [hereinafter FINAL REPORT].

15. *Id.*

16. 1990 Fla. Laws. ch. 90-201, § 61.

17. Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991). The Comprehensive Development Act addressed two distinct subjects: one concerning international development and the other concerning workers' compensation. The Professional Fire Fighters of Florida, Inc., and several individuals and organizations filed suit to enjoin enforcement of the Act, claiming that the Act violated the single subject requirement of the Florida Constitution. FLA. CONST. art. III, § 6. The single subject requirement specifies that "[e]very law should embrace but one subject and matter properly connected therewith." *Id.* The court held that the act violated this provision requirement because the two subjects that the Act covered were too dissimilar to be "properly connected therewith." *Id.*; *Martinez*, 582 So.2d at 1172.

18. FLA. STAT. § 288.804 (1991). This section provides that FIAC "shall serve as the primary state entity responsible for the oversight and coordination of policies and activities relating to international affairs for the state. The commission shall have authority to make policy for the state relating to international affairs." *Id.*

the international economic development for the state."[19] The strategic plan must establish qualitative and quantitative goals for economic growth in the state via the stimulation and coordination of international trade, education,[20] tourism, and investment.[21] Further, the plan must establish qualitative and quantitative goals for the removal of present counterproductive trade barriers and tax policies that inhibit international trade and commerce.[22] Additionally, the plan should provide methods for coordinating existing efforts from federal and state agencies, and the private sector, to avoid a duplication of services.[23] In setting forth these objectives, FIAC is required to look for guidance to, inter alia, recommendations and reports from the Florida Chamber of Commerce,[24] the Florida Economic Growth and International Development Commission,[25] and the International Banking and Trade Study Commission.[26]

Second, FIAC will produce "biennial reports" for presentation to the Governor and the majority and minority leaders of both legislative chambers,[27] to evaluate FIAC's activities to date, including progress on the strategic plan's implementation, and to set forth an agenda for FIAC's course of action for the next two years.[28] Furthermore, the biennial reports will discuss issues affecting economic growth, education, and the inhibition of trade barriers that may impede growth.[29]

Third, FIAC is responsible for establishing "international affairs offices" both inside the state and in foreign countries.[30] The foreign of-

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19. § 288.804(1). Once the plan is adopted by the Legislature, FIAC is responsible for overseeing its implementation. FLA. STAT. § 288.805(6) (1991). When the Legislature reenacted the Act, it failed to change the deadlines for the strategic plan. FIAC, however, has imposed its own deadline. The tentative deadline for the plan is now November 2, 1992. Interview with Gerald F. Wilson, International Representative of the Bureau of International Trade and Development, the Florida Department of Commerce, in Tallahassee, Fla. (Feb. 3, 1992) [hereinafter Interview].

20. The plan must contain "[p]rocedures to ensure that education programs are adequate for understanding, communication in, and active participation in the global marketplace." § 288.805(2)(f).

21. § 288.805(1), (2)(a).

22. § 288.805(2)(b).

23. § 288.805(2), (3). The Governor has the veto power to exclude from FIAC's proposals any "course of action by the commission which he deems likely to lead to duplication of programs or an excessive division between domestic and international programs of the Department of Commerce or an unwarranted intrusion on the jurisdiction of the Department of Commerce, as requested by the Secretary of Commerce in writing." FLA. STAT. § 288.824 (1991). The Act allows FIAC to eventually assume the international affairs activities presently held by the Department of Commerce, thus further avoiding a duplication of services. FLA. STAT. § 288.825 (1991).

24. CORNERSTONE, *supra* note 11.

25. FINAL REPORT, *supra* note 14.

26. FLA. STAT. § 288.805(3)(d) (1991).

27. FLA. STAT. § 288.807 (1991).

28. § 288.807(1), (4).

29. § 288.807(3).

30. FLA. STAT. § 288.804(2), (3) (1991). To date, FIAC has established in-state offices in

fices will be established by FIAC to promote tourism, trade, investment, education, and cultural exchange in Florida.[31] Through the foreign offices, FIAC will represent the state and will provide "promotional and other assistance to agencies and political subdivisions of the state."[32] FIAC's in-state offices will serve "regional needs" and maintain FIAC focused on a "statewide perspective."[33] To supplement FIAC's in-state offices, private and/or local government organizations, which meet criteria modeled by FIAC, will receive "promotion grants" to aid in the development of international economic activity in those regions.[34] These small-scaled "FIAC clones" will thus work with FIAC to further both state and local objectives.[35]

Fourth, FIAC will assume the role of lobbyist and promoter of Florida's interests at both the national and international levels.[36] FIAC will be Florida's main representative "in foreign market transactions through trade delegations, missions, seminars, and additional appropriate promotional tools."[37] FIAC will also work to "influence state, federal, and international trade policies that affect Florida's ability to compete in world markets," and "[r]epresent Florida's interest in the enforcement of national and international trade laws."[38]

Lastly, FIAC will assume the role of quasi-legal counsel to the Legislature regarding the state's ability to enact laws that affect international affairs.[39] One area of legal consultation will be Florida's ability to impose bans, restrictions, or sanctions on foreign countries or companies.[40] FIAC is also called upon to study and make recommenda-

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Miami and Tallahassee. FIAC has not yet established its foreign affairs offices. The foreign offices now under control of the Department of Commerce, however, will likely come under the FIAC's functional jurisdiction. *See,* FLA. STAT. § 288.825 (1991). The Department of Commerce currently has foreign offices in the following foreign cities: Brussels, Belg.; London, Eng.; Sao Paulo, Braz.; Seoul, Korea; Taipei, Taiwan; Tokyo, Japan; and Toronto, Can. *Interview, supra* note 19.

31. FLA. STAT. § 288.822 (1991).

32. § 288.822(3).

33. FLA. STAT. § 288.804(2) (1991).

34. FLA. STAT. § 288.806(1) (1991). FIAC will receive its recommendations from the Florida International Trade and Investment Council (FITIC), *infra* note 65, and then submit to the Legislature a prioritized list of organizations they recommend should receive grants. *Id.*; FLA. STAT. § 288.804(19) (1991); FLA. STAT. § 288.811(5)(f) (1991). Funding for these grants will be appropriated to FIAC as a lump sum from the Legislature. FLA. STAT. § 288.8041(5) (1991).

35. FLA. STAT. § 288.806(2) (1991). FIAC is given absolute discretion in their determination of which organizations meet the modeled criteria. *Id.*

36. FLA. STAT. § 288.804(6), (7) (1991).

37. § 288.804(5).

38. § 288.804(6), (7).

39. § 288.804(10)-(13).

40. § 288.804(10), (11). In its examination of Florida's legal alternatives to impose these restrictions, FIAC will have to consider limits placed on Florida by the Constitution (i.e., federalism and preemption). *See infra* text accompanying notes 142-47.

tions on the "state's policy concerns related to immigration, criminal justice, human rights, drugs, and other internationally related issues."[41]

C. *The Structure of FIAC*[42]

FIAC is comprised of twenty-six members from both the private and the public sector.[43] The Governor is chairman of FIAC and the "principal international affairs officer of the state."[44] The Governor plays a substantial role in FIAC's composition by appointing, subject to senate approval, sixteen of its members.[45] FIAC's members must meet a complex, three-dimensional scheme that includes geographic, functional, and minority representation.[46] Geographic representation in FIAC is attempted by grouping the Florida counties into six regions, each of which must be represented by at least one member on the commission.[47] The functional dimension requires members to represent specific international interests, industries, and areas of expertise.[48] The Act, however, is not specific with respect to achieving minority representation within FIAC.

The Governor also chooses FIAC's Executive Director from a list of three nominees submitted by FIAC.[49] The executive director will be a full-time employee of FIAC who has "extensive experience in international affairs, knowledge of government and research techniques, extensive private or public management experience, or other qualifications as the commission deems necessary."[50]

The operation, management, and administrative support services[51] of FIAC are vested within the Office of the Executive Director

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41. § 288.804(13).

42. *See infra,* Appendix A.

43. FLA. STAT. § 288.803 (1991).

44. § 288.803(1)(a); FLA STAT. § 288.802 (1991). Mandatory membership positions from the public sector include: the Governor; the Secretary of State; the Commissioner of Education; the Secretary of Commerce; the Chancellor of the State University System; the Executive Director of the State Community College System; and a member from each legislative chamber to serve as ex officio nonvoting members. FLA. STAT.§ 288.803(1)(b) (1991).

45. § 288.803(1)(b). Initially, the terms of appointment run from one to four years. § 288.803(1)(c). Thereafter, all terms will be for four years. *Id.*

46. § 288.803(1)(b).

47. *Id.*

48. *Id.*

49. § 288.803(2).

50. *Id.* On November 8, Governor Chiles appointed Diego Asencio, a former Ambassador to Colombia and international business consultant, as FIAC's Executive Director.

51. FLA. STAT. § 288.810(1) (1991). Support staff services include hiring FIAC's staff, preparing the budget, and conducting the internal audit. *Id.*

(OED).[52] The OED, at the request of FIAC, will have the responsibility of performing the following tasks, the most salient of which are discussed here. First, the OED must promote Florida products and services in the global market.[53] Second, the OED will be responsible for the international education of the state by serving as liaison between FIAC, the Department of Education, the Board of Regents, and the international business community.[54] It will be the connecting link between federal, state, and governmental entities on issues related to international education.[55] Also, the OED will have the duty of overseeing the progress of the binational linkage institutes,[56] and advising FIAC on education policies and educational funding for international education programs.[57]

Third, the OED will be responsible for intergovernmental relations.[58] All consular relations between Florida and foreign countries doing business in Florida will be monitored by the OED.[59] Moreover, the OED will operate the sister city and sister state programs and any other programs created to enhance cultural exchanges.[60] The OED will coordinate activities to encourage participation in such programs and to maintain their success.[61]

Lastly, the OED is charged with conducting research on issues concerning international economic development.[62] For example, the OED will direct research on issues concerning barriers that inhibit the free flow of international commerce and issues affecting commerce, agriculture, and education in Florida.[63] The OED will function as a center of information to help the private and public sector with their respective international activities and needs.[64]

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52. § 288.810.

53. § 288.810(2).

54. § 288.810(3). The Office will also serve as a liaison between the international business community, the State Board of Community Colleges, and the Postsecondary Education Planning Commission. *Id.*

55. FLA. STAT. § 288.817(1) (1991).

56. § 288.817(2). The linkage institutes were created within the Department of Education to develop stronger socioeconomic ties between Florida and foreign countries. FLA. STAT. § 240.137(1) (1991). Currently, Florida has linkage institutes with Africa, Brazil, Canada, China, the Caribbean, Costa Rica, Israel, Japan, and the U.S.S.R.

57. FLA. STAT. § 288.817(4), (5) (1991).

58. FLA. STAT. § 288.810(5) (1991).

59. FLA. STAT. § 288.816(2) (1991). The Office will ensure that "all federal treaties regarding foreign privileges and immunities are properly observed." *Id.*

60. § 288.816(3).

61. § 288.816(3)(a). Available aid for such programs should be maximized to enhance participation. § 288.816(3)(c).

62. FLA. STAT. § 288.810(4) (1991); FLA. STAT. § 288.815 (1991).

63. § 288.815(4), (5).

64. § 288.815(1)-(3). The OED will compile and publish information relating to international business. § 288.815(3).

The Act created two councils within the OED to assist FIAC.[65] The Act also formed other councils outside the OED to aid FIAC in the performance of its duties.[66] Currently, the OED is the center for performing the duties of FIAC. At any time after January 1, 1992, however, FIAC may implement section 288.8032 which breaks FIAC into five branch offices that will eventually assume the functions of the OED.[67]

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65. The Florida International Trade and Investment Council (FITIC) will advise all state agencies involved in promotional programs and international tourism. FLA. STAT. § 288.811(1) (1991). The duty of FITIC is to inform FIAC on trends in international trade, programs, and policy. § 288.811(5)(b)-(d). This council is composed of twenty-eight Florida residents with experience in international trade or investment including seventeen officials of state agencies and business groups and eleven individuals experienced in international business. § 288.811(1).

The other council assisting FIAC is the International Language Institute Advisory Council (ILIAC). FLA. STAT. § 288.818 (1991). ILIAC will be composed of nine members, including the Commissioner of Education, the Chancellor of the State University System, and the Executive Director of the State Community College System. § 288.818(1). This Council was formed to "assess the need for the creation of a language institute to provide language and related instruction to persons interested in international trade and international affairs," with an emphasis on providing language instruction for the development of international trade. § 288.818(1); § 288.818(4)(a). In carrying out its duties, the institute will work with schools, colleges, and universities in the state to improve foreign language skills. § 288.818(4)(c).

66. The Agricultural Advisory Council will advise FIAC on issues relating to the export of agricultural products and on international issues affecting agriculture. FLA. STAT. § 570.23 (1991); FLA. STAT. § 288.813 (1991). The Florida International Banking Advisory Council (FIBAC), composed of sixteen members, will analyze the current state banking laws to determine if the current laws hinder economic growth and to determine how banking laws can encourage foreign trade activities. FLA. STAT. § 288.819 (1991); § 288.819(5)(a)-(c). Based on such analysis, FIBAC will make suggestions to FIAC on the desirable changes. § 288.819(5)(d). In November 1991, FIBAC submitted its yearly report to FIAC with its recommendations pursuant to section 288.819(6). DEPARTMENT OF BANKING & FINANCE, DIVISION OF BANKING, REPORT ON THE FLORIDA INTERNATIONAL BANKING ADVISORY COUNCIL 5 (Nov. 1991). The report strongly opposes congressional proposals seeking to eliminate Florida's rights to "independently determine which foreign banks may obtain a license to operate an office within the state." *Id.* at 64. The report also opposes congressional proposals giving the federal government veto power over decisions concerning the regulation of international banking in Florida. *Id.* Finally, the report recommends the maintenance of the status quo of the dual banking system which allows creativity and innovation at the state level. *Id.*

The Act also gives FIAC the option to create the Florida International Council (FIC) to assist and advise the commission. FLA. STAT. § 288.814 (1991). This Council will advise "the Governor, the Legislature, and the commission on matters relating to foreign developments which are of importance to the international strategic planning and activities of Florida." § 288.814(5). Initially, FIC will consist of eleven individuals, and the "membership of such council [will] include past and present governmental officials of other noncommunist countries and jurisdictions who can provide invaluable insight and expertise for Florida into foreign markets, trade relations, and international affairs." § 288.814(1).

67. FLA STAT. § 288.820 (1991). The five offices are: the OED; the Office of International Promotion; the Liaison Office for International Education; the Office of International Research; and the Office of Intergovernmental Relations. FLA. STAT. § 288.8032 (1991). FIAC may recommend the implementation of section 288.8032 establishing the separate offices, and the Governor may implement such recommendation by executive order. FLA. STAT. § 288.820 (1991). Upon the

II. ANALYSIS

The Florida International Affairs Act is comprehensive. Of the states that have created similar entities, Florida's is the largest in size and broadest in scope.[68] FIAC's central membership is large, but its complete structure, including FIAC's peripheral councils, is massive.[69] The Act allows FIAC's structure to eventually include seven councils that did not exist prior to the Act and that will add more than one-hundred and twenty individuals to FIAC's complete composition.[70] No other state has engaged in such a comprehensive scheme in the area of international affairs. Considering FIAC's fundamental task of centralizing Florida's foreign policy,[71] however, FIAC must guard against losing the ability to act swiftly and effectively, thus becoming a bureaucratic monster. To avoid ineffective bureaucracy, FIAC would be well advised to exercise conservatively its statutory "powers" of creating additional councils[72] and of breaking up the OED into five separate functional branches.[73] Potential bureaucracy could also be curtailed if FIAC acts quickly to avoid duplication of services by assuming the internationally related activities now vested in the Department of Commerce and other state agencies.[74]

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creation of such offices, FIAC may recommend, pursuant to section 288.820, the creation of the Florida Council of International Economic Advisors (FCIEA) and the Florida International Tourism Promotion Council (FITPC). FLA. STAT. § 288.823 (1991); FLA. STAT. § 288.821 (1991). Section 288.823 does not require the creation of the five offices as a prerequisite to the formation of the FCIEA. However, it would be unnecessary to create FCIEA without the Office of International Research because the main duty of the FCIEA is to advise that Office. FCIEA will eventually work in conjunction with the Office of International Research. § 288.823(1). The Council will be composed of eleven members from the public and private sector with knowledge of international economics. *Id.* The main task of FCIEA is to advise the Legislature, the Governor, and the Office of International Research on economic trends with possible impacts in Florida. § 288.823(6).

The Florida International Tourism Promotion Council (FITPC) will help attract tourists to Florida by working with the Office of International Promotion. FLA. STAT. § 288.821(1) (1991); § 288.821(5)(a). The Council will also advise the Office on international tourism policies. § 288.821(5)(b). This Council will be composed of twenty members who have engaged in some aspect of international tourism. § 288.821(1) Until FITPC is established, the Florida Tourism Commission will advise FIAC on matters relating to international tourism. FLA. STAT. § 288.121 (1991); FLA. STAT. § 288.812 (1991).

68. While FIAC has twenty-six members, similar entities in other states have smaller memberships. *E.g.*, ARIZ. REV. STAT. ANN. § 41-151-5 (fifteen members); CAL. GOV'T CODE § 15364.2 (fifteen members); ILL. REV. STAT. ANN., ch. 127, ¶ 20402 (nineteen members); KY. REV. STAT. ANN. § 154.750 (nineteen members); N.J. STAT. ANN. § 52:27H-22.3 (sixteen members).

69. *See infra,* Appendix B.

70. *See supra* notes 42-67.

71. FLA. STAT. § 288.801 (1991).

72. FIAC has the statutory authority to "create additional advisory councils as it deems necessary." FLA. STAT. § 288.804(20) (1991); *see supra* note 67 *and accompanying text.*

73. FLA. STAT. § 288.8032 (1991).

74. FLA. STAT. § 288.825 (1991); *see supra* note 8.

Additionally, FIAC's duties are comparatively broad. While the scope of similar entities in other states is limited to stimulation of trade and/or tourism,[75] FIAC's responsibilities include cultivating international education in the state[76] and advising the Legislature on establishing a clear foreign affairs policy.[77] FIAC's foreign affairs functions, including recommendations on Florida's ability to impose bans and restriction on foreign nations and corporations,[78] warrants a discussion of the restraints placed on states that seek to play an active role in foreign affairs.

A. Limitations of the Foreign Affairs Powers of States

States participating in foreign affairs are limited by express constitutional limitations, the doctrine of preemption, the dormant foreign affairs power, and the foreign commerce power. Florida must ensure that its new activism in foreign affairs, through FIAC and its supporting councils, remains within constitutional limitations on state actions affecting foreign affairs.[79] In shaping Florida's foreign policy, FIAC will thus have to consider the following limitations.

1. Express Constitutional Limitations

The U.S. Constitution specifically prohibits the states from participating in several areas related to foreign affairs. The Constitution specifies that "[n]o State shall enter into any Treaty."[80] Nor shall a state enter into any agreement or compact with a foreign power without the consent of Congress.[81] What constitutes an agreement or compact with a foreign nation, however, is not clear.[82] In *Holmes v. Jennison*,[83] the Supreme Court addressed the power of a state to enter into agreements with foreign nations. The Governor of Vermont signed a warrant, alleged to be the agreement, for the arrest and extra-

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75. *See supra* note 8.

76. *See supra* text and accompanying notes 54-57.

77. FLA. STAT. § 288.801 (1991); FLA. STAT. § 288.804 (1991).

78. § 288.804(9)-(13).

79. Bilder, *supra* note 2, at 125.

80. U.S. CONST. art. I, § 10, cl. 1.

81. U.S. CONST. art. I, § 10, cl. 3. In addition, "[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." U.S. CONST. art. I, § 10, cl. 2. Nor shall a state, "without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.*

82. For the purposes of this Comment, "agreements" will be used interchangeably with "compacts."

83. 39 U.S. (14 Pet.) 540 (1840).

dition to Canada of Holmes, a Canadian resident.[84] Justice Taney[85] adopted a restrictive view of a state's ability to enter into compacts with foreign nations by defining a compact broadly. Justice Taney defined a compact as "every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."[86] Four Justices agreed the warrant was an extradition agreement, and, therefore, it was unconstitutional unless Congress consented.[87] *Holmes* is the only case interpreting agreements or compacts with foreign nations.[88] Because the same constitutional language applies to state compacts,[89] however, the determination of what constitutes an interstate compact or agreement applies to state compacts with foreign nations.[90]

Interstate compacts require congressional approval only when they relate "to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[91] The determination focuses on the impact of the compact on

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84. *Id.* at 540-41.

85. The eight members of the Court were divided, and, therefore, no opinion was delivered as the opinion of the Court. However, Justice Story, M'Lean, and Wayne concurred entirely with Justice Taney. *Id.* at 561.

86. *Id.* at 572. The framers of the Constitution, according to Justice Taney, regarded an intercourse between a state and a nation as a danger to the sovereignty of the United States. *Id.* at 574-75. Justice Taney, therefore, concluded that by using the terms treaty, agreement, and compact in Article I, Section 10 of the Constitution, the intent of the framers was to apply the broadest meaning, and thus restrict states in their intercourse with foreign nations. *Id.* at 572. The broad definition adopted by Justice Taney was subsequently adopted in Virginia v. Tennessee, 148 U.S. 503, 517-518 (1893).

The terms "agreement" or "compact" taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control. *See generally* United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 454-68 (1978).

87. *Holmes*, 39 U.S. (14 Pet.) at 578-579.

88. The Court in *Holmes* was faced with a situation where the agreement or compact was in an area clearly a subject of national concern: extradition.

89. "No State shall without the Consent of Congress . . . enter into any Agreement or Compact with another State, or a foreign power." U.S. CONST. art. I, § 10, cl. 3.

90. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 233 (1972); *see* Shuman, *supra* note 4, at 168.

91. *Virginia*, 148 U.S. at 519. The Court held that preliminary arrangements between two states to settle a boundary dispute is not an agreement nor a compact, and thus it does not require congressional consent. *Id.* at 520-521. However, the Court noted the final agreement accepting the boundaries required consent because it increased the political power of the state. *Id.* Similarly, the Supreme Court in New Hampshire v. Maine, 426 U.S. 363, 369-70 (1976), held that a proposed settlement for a boundary dispute was not an agreement or a compact.

the federal structure.[92] The "inquiry is one of potential, rather than actual, impact upon federal supremacy."[93] Applying the interstate compact test to compacts with foreign nations leads to the following conclusion. Congressional approval for compacts or agreements with foreign nations is required for any agreement or compact, whether written or verbal, formal or informal, positive or implied, only if such agreement relates "to the increase of political power in the States, which [could potentially] . . . encroach upon or interfere"[94] with the central government's power to deal with foreign affairs issues.

2. *Federal Preemption Limitations*

The doctrine of preemption[95] also limits state action in foreign affairs. Article VI of the U.S. Constitution states that the laws and treaties of the United States are the "supreme Law of the Land," and, therefore, they preempt state law.[96] In *Hines v. Davidowitz*,[97] the Supreme Court held the Pennsylvania Alien Registration Act of 1939 unconstitutional because Congress demonstrated an intent to occupy the immigration law field by enacting the Federal Alien Registration Act of 1940.[98] The Court, recognizing the federal government's exclusive power over immigration,[99] held that the Pennsylvania act was preempted by federal law.[100] The Court reaffirmed the rule that a state law

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92. *United States Steel Corp.*, 434 U.S. at 471. The Court recognized that the compact did not encroach upon the national government because the compact did "not purport to authorize the member States to exercise any powers they could not exercise in its absence." *Id.* at 473. The Court held that the multilateral nature of the Multistate Tax compact and the establishment of an administrative body did not present potential conflict with the Compact Clause's underlying principles. *Id.* at 472.

93. *Id.* at 472.

94. Cuyler v. Adams, 449 U.S. 433, 440 (1981); *United States Steel Corp.*, 434 U.S. at 471; *Virginia*, 148 U.S. at 519.

95. The doctrine of preemption arises when the subject matter of the state law falls under the national and state authority. *See* Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, *in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 126 (Louis Henkin et al. eds., 1990).

96. The national law prevails because the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

97. 312 U.S. 52 (1941).

98. *Id.* at 66-67.

99. *Id.* at 62. *Cf.* De Canas v. Bica, 424 U.S. 351 (1976). In *De Canas*, the California Labor Code prohibited an employer from knowingly employing an alien not entitled to lawful permanent residency if the employment would have an adverse effect on lawful resident workers. *Id.* at 355. The Court held that the statute was not unconstitutional because the subject matter of the law, regulation or employment market, was of appropriate state concern. *Id.* at 356. Had the Court characterized the subject matter of the law as immigration, the result would have been the same as *Hines*.

100. *Hines*, 312 U.S. at 66.

will be preempted if it "stands as an obstacle[101] to the accomplishment and execution of the full purposes and objectives of Congress."[102]

In *Pennsylvania v. Nelson*,[103] the Court developed a three prong test to determine when federal law preempts state law. Preemption occurs when (1) "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it";[104] (2) the subject matter is one which requires national uniformity;[105] (3) and the "enforcement of the state law would create "a serious danger of conflict with the administration of the federal program."[106] Conflicts of federal preemption in foreign affairs, however, do not arise often because the federal government has exclusive power over foreign affairs,[107] and thus, the states lack concurrent power in the area of foreign affairs.[108] Preemption in foreign affairs applies only when the state and the federal government have concurrent powers, and the state regulation indirectly affects foreign policy.[109] Other approaches have been suggested to determine whether state laws are preempted by the exclusive foreign affairs power of the national government.[110]

3. *Dormant Foreign Affairs Power Limitations*

Although the Constitution expressly prohibits the states from participating in certain activities dealing with foreign affairs,[111] the Constitu-

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101. The following terms have also been used : "conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." *Id.* at 67.

102. *Id.* The court recognized that in this area there could not be a rigid formula because in each situation, congressional intent must be determined. *Id.*

103. 350 U.S. 497, 502-05 (1956).

104. *Id.* at 502 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

105. *Id.* at 504.

106. *Id.* at 505.

107. Zschernig v. Miller, 389 U.S. 429, 432 (1968).

108. Glenn S. McRoberts, *Federalism and Foreign Affairs: Toward a Dormant Foreign Affairs Doctrine*, 11 LOY. L.A. INT'L & COMP. L.J. 639, 646 (1989).

109. *Id.* One example is *Hines*, where the Court suggested that states had concurrent (but not equal) power to regulate the registration of aliens. 312 U.S. at 68. The registration of aliens affected foreign policy. However, the Court instead of holding that the states had no power to regulate such area, held that federal law preempted the state regulations. *Id. See also supra* note 99.

110. It has been suggested that the following questions should be asked:

> (1) [W]hether the state law falls within the realm of acceptable state authority; (2) . . . whether the state act in question touches on matters relating to foreign affairs; and (3) . . . [whether] the value of achieving a nationally uniform position . . . [outweighs] the value of giving effect to local decision making on the question involved, to arrive at a decision that accurately reflects the appropriate roles of the states and the nation in regulating the subject matter concerned.

Maier, *supra* note 95, at 128.

111. *See supra* notes 80-81 and accompanying text.

tion does not expressly grant such powers to the federal government. However, from the intent of the framers,[112] and the interpretation of the Supreme Court cases, it is clear that the national government has exclusive power over foreign affairs.[113] In *Zschernig v. Miller*, the Supreme Court reviewed an Oregon statute which refused to let a resident alien inherit property because the alien's home country barred U.S. residents from inheriting property.[114] The Court held that the Oregon law as applied exceeded the limits of state power because the law interfered with the national government's exclusive power over foreign affairs.[115] The Court had earlier, in *Clark v. Allen*,[116] upheld a similar California reciprocal inheritance statute. In *Clark*, the Court focused on the fact that the California statute would have only "some incidental or indirect effect in foreign countries."[117] Nevertheless, in *Zschernig*, the latest pronouncement in the area, the Supreme Court held that to be unconstitutional, the state action must have more than "some incidental or indirect effect on foreign countries,"[118] and the action must pose a "great potential for disruption or embarrassment"[119] to the national unity.

4. *The Foreign Commerce Clause Limitations*

The U.S. Constitution grants Congress the power to regulate both interstate and foreign commerce.[120] In *Pike v. Bruce Church Inc.*,[121] the

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112. James Madison wrote "[i]f we are to be one nation . . . it clearly ought to be in respect to other nations." THE FEDERALIST No. 42, at 264 (J. Madison) (Mentor ed., 1961). In United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936), the Court suggested that even though the Constitution did not expressly grant the federal government with exclusive power over foreign affairs, these powers were crucial to national unity. The powers were not granted to the states, and therefore should be implied to be powers of the federal government. *Id.*; *See also supra* note 86.

113. United States v. Pink, 315 U.S. 203, 233 (1942) (recognizing limitations on state sovereignty and holding that the national government had exclusive power over external affairs); United States v. Belmont, 301 U.S. 324, 331 (1937) (holding that the states cannot interfere in international affairs because such power is exclusively vested in the national government); *Curtiss-Wright*, 299 U.S. at 319-320 (confirming the President's exclusive power to conduct relations with foreign nations).

114. 389 U.S. at 430-431.

115. *Id.* at 432.

116. 331 U.S. 503, 516-517 (1947).

117. *Id.* at 517.

118. *Id.* Recently, the Third Circuit Court of Appeals in Trojan Technologies, Inc. v. Commonwealth of Pennsylvania, 916 F.2d 903, 913 (3rd. Cir. 1990), *cert. denied*, 111 S. Ct. 2814 (1991), followed *Zschernig*, by holding a state buy-American statute constitutional because it did not interfere with the national government's exercise of its exclusive foreign affairs power.

119. *Zschernig*, 389 U.S. at 434-435.

120. U.S. CONST. art. 1, § 8, cl. 3.

121. 397 U.S. 137, 142 (1970).

Supreme Court announced a balancing test to determine the validity of state statutes regulating interstate commerce:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.[122]

The Supreme Court has clearly indicated, however, that state intervention in foreign commerce requires a qualitatively different, albeit stricter, scrutiny.[123] In *Japan Line, Ltd. v. County of Los Angeles*, California levied property taxes on a Japanese shipping company's cargo containers.[124] The Court found that the tax undercut "federal uniformity" by allowing other states to impose similar taxes at different rates.[125] The Court also recognized that the tax disturbed the symmetry between the state and the foreign nation: California's cargo containers were not likewise taxed in Japan.[126] This asymmetry made it impossible for the United States to speak with one voice and caused grave "risk of retaliation by Japan."[127]

In *Container Corp. of America v. Franchise Tax Board*, the Court reviewed California's unitary tax system as it applied to a Delaware corporation with subsidiaries in foreign countries.[128] The Court applied *Japan Line*'s high level of scrutiny,[129] but in this case found only an attenuated "risk of retaliation" because the tax system was fair.[130] Fur-

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122. *Id.* (citations omitted).

123. *See* Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 7-8 (1986); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984) ("It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny."); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979).

124. 441 U.S. at 436.

125. *Id.* at 453.

126. *Id.*

127. *Id.*

128. 463 U.S. at 162-163.

129. *Id.* at 194.

130. *Id.* at 194-195.

ther, because the corporation expected to be taxed regardless of the system used by the state, the tax did not result in the asymmetry contemplated in *Japan Line*.[131] Additionally, the Court reasoned that, even though the corporation had foreign subsidiaries, the corporation was domestic and was thus not levied against a foreign entity.[132] Thus, while *Japan Line* was found factually distinguishable, *Container Corp.* clearly confirms a high level of scrutiny in cases involving a state's interference with foreign commerce.

Japan Line's higher level of scrutiny, however, may not be applicable if the state is a "market participant."[133] A state is a market participant when the state government, and not the private sector under mandate of state law, adopts selective or restrictive trading or investment policies regarding interstate commerce.[134] In this situation, there is only "a single inquiry: whether the challenged 'program constituted direct state participation in the market.'"[135] If so, the restraints of the Commerce Clause do not apply.[136] The Supreme Court has expressly reserved the question of whether this rationale applies to the Foreign Commerce Clause.[137] Nevertheless, in *Trojan Technologies v. Commonwealth of Pennsylvania*, the Third Circuit applied the market participant rationale to the Foreign Commerce Clause.[138] In that case, a Canadian corporation challenged, under the Foreign Commerce Clause, a Pennsylvania statute requiring all public works construction projects by agencies of the Commonwealth to use only American Steel.[139] The court held that the market participant logic precluded a Foreign Commerce Clause analysis.[140] In so holding, the court found that "the commerce clause's underlying purposes [do not] require a broad prohibition against state regulation of local municipal purchases."[141] This analysis seems consistent with Supreme Court case law

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131. *Id.*

132. *Id.*

133. *See* White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 207-08 (1983); *Trojan Technologies*, 916 F.2d at 909-913.

134. *See also White*, 460 U.S. at 208; Reeves, Inc. v. Stake, 447 U.S. 429, 436-37 (1980) ("the Commerce Clause responds principally to state taxes and regulatory measures impending free private trade in the national marketplace . . . [t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.") (citations omitted).

135. *White*, 460 U.S. at 208 (citing *Reeves*, 447 U.S. at 436 n.7).

136. *Id.*

137. *Reeves*, 447 U.S. at 437 n.9.

138. 916 F.2d at 910.

139. *Id.* at 904-905.

140. *Id.* at 910-911 (relying on *White*, 460 U.S. at 208-210). Even so, however, the court found the statute survived the severe scrutiny of *Japan Line*. *Id.* at 912.

141. *Id.*

applying the market participant theory and will likely be followed by other courts.

In sum, a Foreign Commerce Clause analysis requires a threshold determination of whether a state is a market participant when it engages in restrictive or selective practices in foreign commerce. If the state is a market participant, the Foreign Commerce Clause restrictions do not apply. If the state is not a market participant, the state's activity will be subject to *Japan Line*'s high level of scrutiny. Lastly, if the Court's concerns in *Japan Line* are not present, the state's activity will still be subject to the *Pike* balancing test.

B. *Constitutional Limitations on State Actions in Foreign Affairs: A Proposed Test and its Application*

State actions in international affairs must withstand all of the constitutional limitations delineated above. Thus, it is proposed that states wishing to engage in foreign affairs must consider the following issues:

> (1) Whether the state action is expressly prohibited by Article I, Section 10 of the U.S. Constitution.[142]
> (2) Whether the subject matter is one which requires uniformity and one which congressional legislation leaves no room for state regulation.[143]
> (3) Whether the state action has a direct and deliberate effect on a foreign nation with the potential for disrupting the United State's ability to speak with one voice.[144]
> (4) (a) Whether the state is a market participant.[145] If not, (b) whether the state's practices result in undercutting national unity in the eyes of foreign nations or result in asymmetry between the state and the foreign entity.[146] If (b) does not apply, whether the state's legitimate interests could be served by less intrusive means.[147]

Generally, states participate in foreign affairs by engaging in three levels of activities: consciousness-raising activities, unilateral initiatives, and bilateral agreements with foreign entities.[148]

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142. *See supra* notes 80-94 and accompanying text.
143. *See supra* notes 95-110 and accompanying text.
144. *See supra* notes 111-119 and accompanying text.
145. If it is, the Foreign Commerce Clause is inapplicable. *See supra* notes 133-141 and accompanying text.
146. If so, the state practice fails constitutional muster under *Japan Line*. *See supra* notes 124-133 and accompanying text.
147. *See Pike*, 397 U.S. at 142.
148. *See* Shuman, *supra* note 4, at 159.

1. Consciousness-raising activities

First, states often engage in raising public consciousness on foreign affairs by conducting educational, research, and cultural programs. For example, Florida, through FIAC, will supervise the sister city and sister state programs.[149] FIAC will also conduct research on issues concerning international economic development.[150] Additionally, FIAC will establish offices both within the state and in foreign countries to promote tourism, education, and cultural exchange.[151] These activities should not raise constitutional questions because they are merely designed to increase the political and international consciousness of Floridians and do not impinge upon any express or implied federal mandates.[152]

Similarly, FIAC's duties of lobbying Florida's interests at the national level and promoting Florida's industry abroad (via trade missions, seminars, and promotional tools)[153] should not give rise to constitutional scrutiny. Promoting the State of Florida and guarding its interests are not activities having a direct and deliberate effect on foreign nations with the potential for disrupting the unity of the United States.[154]

2. Unilateral initiatives

States also engage in unilateral initiatives that include non-binding resolutions, protectionist measures such as buy-American statutes, and trade sanctions. Florida, for example, has enacted non-binding resolutions urging the U.S. government to denounce human rights violations in Cuba, and supporting the human rights and the right of emigration of Jews in the Soviet Union.[155] These non-binding resolutions are mere unenforceable expressions of the state's policy concerns aimed at establishing a more representative voice at the national level. Because they foster unity at the national level, non-binding resolutions do not pose constitutional problems.[156] FIAC may thus, without constitutional limitations, recommend to the Legislature to express specific foreign policy concerns via non-binding resolutions regarding immigration, human rights, criminal justice, and drugs.[157]

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149. FLA. STAT. § 288.816(3) (1991).
150. FLA. STAT. § 288.815(4) (1991).
151. *See supra* note 30-35 and accompanying text.
152. *See* Bilder, *supra* note 2, at 120.
153. FLA. STAT. § 288.804(5) (1991).
154. *See supra* notes 118-119 and accompanying text.
155. FLA. S. JOUR. 344 (10th Org. Sess. 1986); FLA. H.R. JOUR. 514 (91st Reg. Sess. 1989).
156. *See* Shuman, *supra* note 4, at 160; Spiro, *infra* note 164, at 193.
157. FLA. STAT. § 288.804(13) (1991).

Additionally, more than half of the states have taken unilateral steps by launching "buy-American" statutes that require state government agencies to purchase only domestic-origin products.[158] This trend will likely become more popular as the world-market becomes more competitive and the American market becomes less predictable. The latest pronouncement by a federal court indicates that buy-American statutes are constitutional when the state is a market participant.[159] A substantial number of states have enacted statutes that prohibit state governmental agencies from buying products outside the state.[160] The same market-participant logic that applies to buy-American statutes should apply to "buy-Local" statutes, thus rendering them unsusceptible to constitutional scrutiny.[161] Thus, Florida may permissibly encourage its industries and products through statutes that restrict its government agencies to invest only in Florida-origin products or services. However, if other states engage in similar activities it could potentially lead to asymmetry between the state and foreign nations, and to a disturbance of the United States' ability to speak with one voice.[162]

Furthermore, states have unilaterally imposed bans, restrictions, or sanctions on foreign entities to express their political views.[163] In the late 1980's, some states began expressing their protest against the South African government and against corporations investing in South Africa by enacting divestment statutes.[164] These statutes not only pro-

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158. *See* J. Allen Miller, *Foreign Commerce and State Power: The Constitutionality of State Buy American Statutes*, 12 CORNELL INT'L L.J. 109, 109 (1979).

159. *Trojan Technologies*, 916 F.2d at 909-12.

160. *See* Miller, *supra* note 158, at 111. Florida, for example, previously mandated that all state printing be done within the state. FLA. STAT. § 283.03 (1975). This legislation was replaced by a new statute only requiring preferential treatment to local printers as long as the quality and expense of the service is comparable to out-of-state printing services. FLA. STAT. § 283.35 (1991); FLA. STAT. § 283.69 (1991). Similarly, Florida requires "official board[s] in the state, whether of the state, a county or a municipality" charged with constructing or erecting public buildings to give preferential treatment to Florida-origin products and to employ Florida services. FLA. STAT. § 255.04 (1991). Some statutes also provide preferential treatment to the lowest bidder for personal property purchases by political subdivisions of the state. FLA. STAT. § 287.084 (1991). If the lowest bidder is an out-of-state competitor, Florida will grant preferential treatment to an in-state competitor only if the foreign state grants preferential treatment to its in-state competitors. *Id.* Thus, Florida protects its industries where they may be disadvantaged outside the state.

161. Jose D.L. Marquez, *California Buy American Act Unconstitutionally Interferes with Federal Government's Exclusive Power over Foreign Affairs*, 6 TEX. INT'L L.F. 134, 135-36 (1970).

162. *See supra* notes 118-119 and accompanying text.

163. FIAC has the responsibility of determining Florida's ability and appropriateness to take such action. FLA. STAT. § 288.804(10), (11) (1991).

164. *See e.g.*, ARK. CODE ANN. § 24-3-416 (Michie 1987); CAL. GOV'T CODE §§ 16641, 16642 (West 1991); CONN. GEN. STAT. ANN. § 3-13-H (West 1991); ILL. ANN. STAT. ch. 108 1/2, ¶¶ 1-110, 132.6-5 (1991); LA. REV. STAT. ANN. § 858 (West 1991); MICH. COMP. LAWS § 38.1133b (1991); MO. ANN. STAT. § 105.686 (Vernon 1992); N.C. GEN. STAT. § 115C-49 (1991); OR. REV.

hibit state governments or agencies from investing in South Africa, but place economic pressures on the South African government by discouraging entities engaging in business activity with that country. Because these statutes merely prohibit local government from investing in South African-related entities, these sanctions fall squarely under the market participant theory of foreign commerce, thus precluding a Foreign Commerce Clause analysis.[165]

3. *Bilateral agreements with foreign entities*

Finally, states participate in foreign affairs by entering into bilateral informal agreements with foreign nations.[166] While FIAC is not given specific directives to analyze Florida's ability to engage in this level of activity, entering into such agreements may be instrumental in achieving the objectives of the Florida International Affairs Act.[167] Congressional approval will not be required as long as such agreements do not increase Florida's political power or encroach upon or interfere with the national government.[168]

III. CONCLUSION

Florida has taken a step in the right direction by creating FIAC to implement and coordinate the international policy of the state. FIAC

STAT. §§ 293.835, 293.850 (1989); R.I. GEN. LAWS §§ 35-10-12, 37-2-57 (1990). For an in depth analysis on divestment legislation, see Peter J. Spiro, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813 (1986); McRoberts, *supra* note 108, at 650 (concluding that California's divestment legislation fails to meet the unity test).

165. *See supra* notes 133-41 and accompanying text. In 1986, Congress passed the Comprehensive Anti-Apartheid Act of 1986 (Anti-Apartheid Act). Pub. L. No. 99-440, 100 Stat. 1096 (codified as amended at 22 U.S.C. §§ 5001-5117 (1990)). The Anti-Apartheid Act restricts trade of, inter alia, computer exports, nuclear trade, importation agricultural products, textiles and several minerals with South Africa. 22 U.S.C. §§ 5054, 5057, 5059, 5069 (1990). In addition, the Anti-Apartheid Act prohibits new investment in South Africa as well as loans to its government. 22 U.S.C. §§ 5055, 5060 (1990). This congressional activity is comprehensive and thus necessarily raises preemption questions. The Comprehensive Anti-Apartheid Act, by its very name, implies that there is no room for state legislation in an area that requires national uniformity. Interestingly, however, while state divestment statutes have a direct and deliberate effect on a foreign nation, the states are not disturbing the United States' ability to speak with one voice, but are in fact acting in concert with the goals and policies of Congress. *See Zschernig*, 389 U.S. at 434-35. Thus, while state divestment statutes withstand the Foreign Commerce Clause and the Dormant Foreign Affairs Clause, they appear to be preempted by the Anti-Apartheid Act. This analysis should be instructive when Florida, through FIAC, considers its ability and appropriateness of imposing bans, restrictions, or sanctions on foreign entities.

166. *See generally* Raymond S. Rodgers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INT'L L. 1021 (1967).

167. FLA. STAT. § 288.804 (1991).

168. *See supra* note 94 and accompanying text.

should recognize, however, that its success depends upon its ability to act quickly in implementing the state's policy. Thus, to maintain its credibility, FIAC must meet its deadline on the strategic plan so the Legislature has a chance to implement FIAC's recommendations. Moreover, FIAC should restrain from exercising its statutory power to create additional councils or further compound its structure to avoid bureaucracy.

In times when the federal government is allocating more economic responsibility on the states through a policy of devolution, Florida's model of state activism should be followed by other states. Because states have the responsibility to ensure that their actions remain within constitutional bounds, they should avoid constitutional problems that could invalidate their efforts, by adhering to the above constitutional analysis. To remain within these bounds, states should engage in consciousness-raising activities, such as lobbying state interests and conducting educational or cultural programs. Similarly, states should engage in unilateral activities by enacting non-binding resolutions and imposing market-participant trade sanctions, to influence the national government. Buy-Local regulations are also constitutionally permissible so long as the state is a market participant. On the other hand, bilateral trade agreements between states and foreign nations will require congressional approval if the states' political powers are expanded by such agreements.

A key consideration in the constitutional analysis of a state's foreign affairs activity is the states' interference with the federal government's ability to speak with one voice. Growing state involvement in foreign affairs is a reflection of the states' willingness to protect their interests without necessarily creating national disunity. The states' new activism in foreign affairs, exemplified by Florida's International Affairs Act, will go far in disclaiming Justice Johnson's narrow view of the states' involvement in the international arena.[169] Increasingly, states *are* becoming known to foreign nations.

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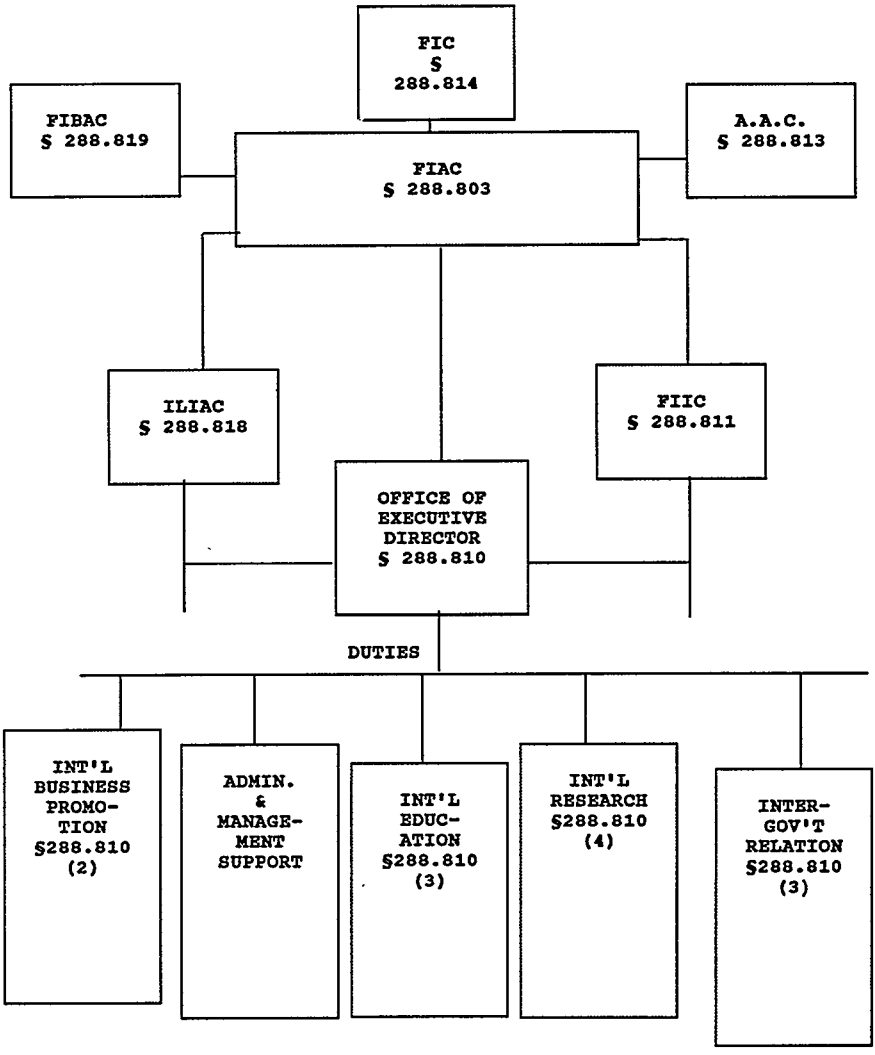
169. *See supra* note 1.

APPENDIX A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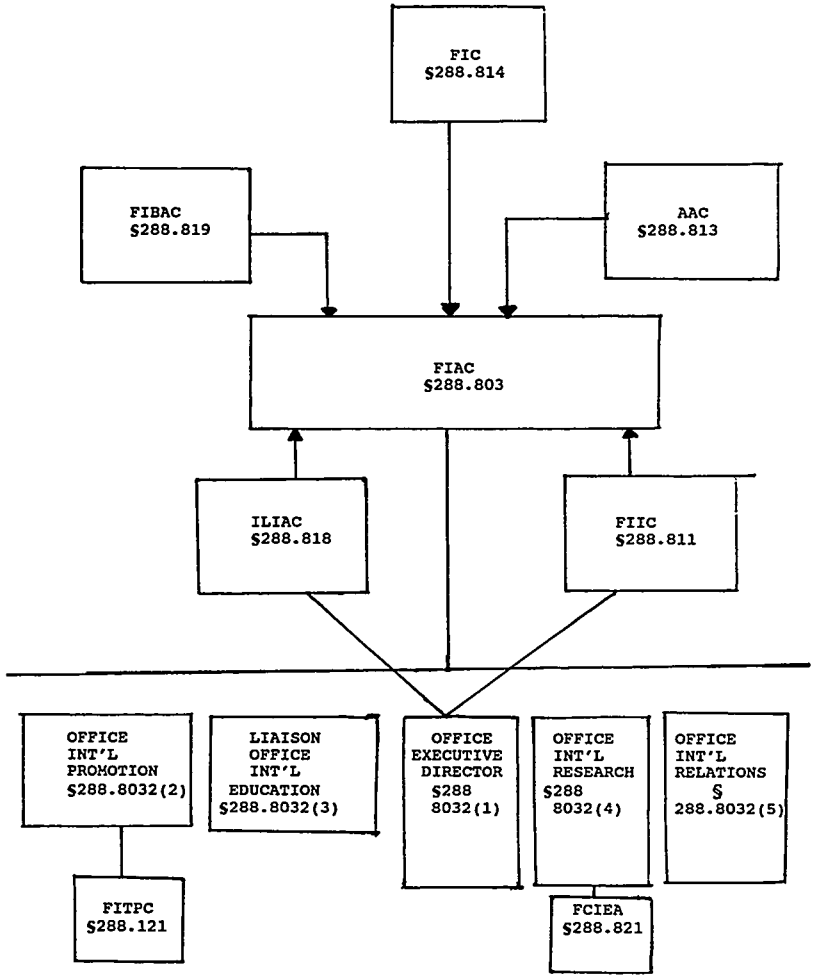
APPENDIX B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