STATE OF MICHIGAN

IN THE SUPREME COURT

INTERNATIONAL BUSINESS MACHINES CORPORATION, Plaintiff/Appellant, v DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN, Defendant/Appellee.	Supreme Court No. 146440 Court of Appeals No. 306618 Court of Claims No. 11-033-MT

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF DEFENDANT/APPELLEE DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Multistate Tax Commission respectfully submits this brief in support of the Michigan Department of Treasury.[1] In its order of July 3, 2013, this Court identified four questions for the parties to address. Our brief addresses the third of those four questions: "whether the Multistate Tax Compact constitutes a contract that cannot be unilaterally altered or amended by a member state." The answer is that the Compact is not a contract, and that it may be unilaterally altered or amended. To the extent Michigan's adoption of a mandatory single sales factor apportionment formula[2] implicates the Compact at all, it is not prohibited by the Compact.[3] This is because the Multistate Tax Compact is an advisory compact which accords its members the flexibility to vary — directly or indirectly — with respect to the model uniform apportionment provisions contained in Articles III.1 and IV.

Our brief does not address the Court's first, second, or fourth questions. Specifically, for purposes of this brief, the Commission takes no position on the question of whether Article IV of the Compact applies to the taxes at issue in this case and, if so, to what extent. It is not necessary for this Court to reach the third question unless the Court finds that Article IV does apply to at least some of the taxes at issue in this case. In that event, the Commission submits this brief to inform the Court of its views regarding

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any member state.

[2] Section 303 of the Michigan Business Tax Act, MCL 208.1303(1).

[3] 1969 PA 343, eff. July 1, 1970; Model Multistate Tax Compact, *available at* http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf (last visited Oct. 20, 2013).

the third question.

The Commission is the administrative agency for the Compact, which became effective in 1967 when the required minimum number of states had enacted it. The United States Supreme Court upheld the validity of the Compact in *U.S. Steel Corp.* v *Multistate Tax Comm'n*, 434 US 452; 98 S Ct 799 (1978), and today forty-seven states and the District of Columbia participate in the Commission's activities. Seventeen of those jurisdictions, including Michigan, adopt the Compact by statutory enactment. Six jurisdictions are sovereignty members. Another twenty-five are associate members.[4]

The stated purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation.[5]

These purposes are central to the Compact, which was an effort by states to improve state taxation of interstate commerce at a time when Congress appeared poised to impose reform through federal legislation that would preempt important aspects of

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[4] *Compact Members*: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, Minnesota, New Jersey, and West Virginia. *Associate Members*: Arizona, California, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming.

[5] Multistate Tax Compact, Art. I.

state taxation.[6] Preserving state tax sovereignty under our vibrant federalism remains a key focus of the Compact and the Commission.

The Commission's interest in this case arises from the Compact's goals of promoting uniformity and preserving member states' sovereign authority to effectuate their own tax policies. Our interest is particularly acute because the achievement of those goals is being challenged, perversely, on the basis of the Compact itself. As the administrative agency for the Compact, the Commission is uniquely situated to inform the Court regarding the Compact's proper interpretation and the course of performance of its members. *We interpret the Compact to allow member states flexibility with respect to Articles III.1 and IV.*

This is so because the Compact is not a binding interstate compact, the terms of which cannot be unilaterally modified. Rather, it is an advisory compact under which its members have flexibility to vary — directly or indirectly — with respect to the model uniform apportionment provisions contained in Articles III.1 and IV. Even if the Compact were characterized as a binding interstate compact rather than an advisory compact, the terms of the enabling statute and the Compact itself allow members the flexibility to vary from Articles III.1 and IV. It is the compact members themselves who determine any limitations on that flexibility, consistent with the purposes of the Compact.

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[6] *See* H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1143 (1965) and *Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the Judiciary*, 89th Cong., 2d Sess. (1966), illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax.

And the members have indicated by their course of performance that the Michigan legislation is compatible with those purposes. This course of performance is consistent with the purposes of the Compact, the holdings of the United States Supreme Court, and compact jurisprudence from other federal and state courts. To hold otherwise would have the contrary effect of frustrating the very purposes that the Compact is intended to promote.

INTRODUCTION

In 2008, when the Michigan Legislature first required taxpayers to apportion their tax bases using a single sales factor apportionment formula, Michigan joined a nation-wide transition away from an equal-weighting of the property, payroll, and sales factors and toward an emphasis on the sales factor in state tax base apportionment formulas. Today, thirty-eight of forty-seven states with an apportioned tax base at least double-weight the sales factor.[7] The question we address is whether the Multistate Tax Compact adopted by Michigan affords its legislature the flexibility to participate as it has in this nation-wide trend, consistent with the Compact purposes of preserving state sovereignty and promoting uniformity. The answer is that it does.

Understanding the historical context in which the Compact was adopted helps explain how Michigan's 2008 Business Tax Act, to the extent it implicates Articles III.1 and IV at all, is consistent with the Compact and its purposes. In the early days of

[7] *State Apportionment of Corporate Income*; Federation of Tax Administrators (*see* Appendix A).

corporate income taxes, a myriad of different apportionment methodologies were in use by the states. The Uniform Law Commission had promulgated the model Uniform Division of Income for Tax Purposes Act (UDITPA), which sets out the equal-weighted formula, in 1957, but states were not rushing to adopt it.[8] Then, in 1959, the United States Supreme Court decided *Northwestern States Portland Cement Co. v Minnesota*, holding that a small sales force and office in a state established a sufficient nexus for the state to impose tax on a share of the corporation's income.[9]

The Court's decision upset multistate taxpayers' expectations. Within seven weeks Congress was holding hearings; and within seven months it had passed Public Law 86-272, Title II, 73 Stat. 555 (1959), which restricted the application of *Northwest States Portland Cement* and created a Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary — the Willis Committee — to study state business taxes.[10] The Willis Committee found that although "each of the state laws contains its own inner logic, the aggregate of these laws — comprising the system confronting the interstate taxpayer — defies reason."[11] To address this concern, the Committee recommended federal legislation that would, among other things, establish a state income tax base (federal adjusted gross income) and a state apportionment formula (equal-weighted two-factor formula based on property and payroll) — both of which are

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[8] Uniform Division of Income for Tax Purposes Act, § 2, 7A ULA 155 (2002).
[9] *Northwestern States Portland Cement Co. v Minnesota*, 358 US 450; 79 S Ct 357 (1959).
[10] The Willis Committee's study was sanctioned by Title II of Pub. L. 86-272, 73 Stat. 555, 556 (1959).
[11] H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1143 (1965).

fundamental aspects of a state tax policy, the federal pre-emption of which would be a significant affront to state sovereignty.[12]

The states responded to stave off federal pre-emption and protect their sovereignty. Many enacted the model UDITPA. Some, including Michigan, enacted the Multistate Tax Compact, Article IV of which incorporates the model UDITPA nearly word for word.[13] And some did both.[14] Michigan did not adopt a tax that could arguably fall under Article IV until it enacted its Michigan Business Tax in 2008.[15]

The Compact's most significant contribution toward greater uniformity was that it provided, for the first time, a dedicated forum for the continuing study of multistate tax issues and development of model state tax laws by its member states.[16] In its 46 years, the Commission has adopted approximately 40 model laws.[17] These model laws are advisory only.[18] They provide a framework for the member states to design their tax systems with a view to making them more uniform.

By 1978, the United States Supreme Court recognized that the UDITPA equal-weighted formula had become "the prevalent practice."[19] But at the same time the Court recognized that "political and economic considerations vary from state to state," and that

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[12] H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1139*ff* (1965).
[13] *See, e.g.,* 1969 PA 343, eff. July 1, 1970.
[14] *See, e.g.,* Cal Stats 1966 ch.2 §7; Cal. Rev. & Tax §§25120-25139; Cal. Rev. & Tax §38006. *et seq.*
[15] MCL 208.1303(1).
[16] Articles VI.3(b) and VII.
[17] For a compilation of the Commission's completed model laws, see: http://www.mtc.gov/Uniformity.aspx?id=524.
[18] Articles VI.3(b) and VII.
[19] *Moorman Mfg Co v Bair,* 437 US 267, 279; 98 S Ct 2340 (1978).

states may constitutionally address those considerations by requiring alternative factor weightings.[20] Over time, the states have done so. And while they have moved away from requiring the equal-weighted formula, they have moved in a decidedly uniform manner — by emphasizing the sales factor.

Today, 38 of the 47 states with a corporate income tax at least double weight the sales factor.[21] Only nine states exclusively require an equal-weighted formula.[22] Among compact members, the movement is the same. Of the 17 compact member states, only six continue to require the equal-weighted apportionment formula.[23] Nine members require at least a double-weighted sales factor.[24] None of these nine permits the apportionment election of Article III.1.[25] Only one compact member explicitly allows the election.[26]

The compact members clearly interpret their compact to allow these adjustments. As explained below, that interpretation is consistent with the laws of statutory and contract construction. And it is consistent with the goals of the Compact, among them

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[20] *Id.*

[21] *State Apportionment of Corporate Income*; Federation of Tax Administrators (*see* Appendix A)

[22] *Id.*

[23] *Id.* Alaska, Hawaii, Kansas, Montana, New Mexico, and North Dakota.

[24] *Id.* Alabama, Arkansas, Colorado, Dist. of Columbia, Idaho, Michigan, Oregon, Texas, and Utah. The Texas franchise tax is not imposed on net income. In 2013, Utah, Oregon, and the District of Columbia each repealed the Compact and enacted a version without Articles III.1 and IV. 2013 Utah Laws, c. 462; 2013 Oregon Laws Ch. 407 (SB 307); 2013 District of Columbia Laws Act. 20-130. The remaining provisions of the Utah Multistate Tax Compact are to be repealed June 30, 2014.

[25] *Id.*

[26] Missouri Rev. Statutes 32.200. *Note,* Colorado recognized the election until passage of H.B. 08-1380, signed May 20, 2008, effective for tax years commencing on or after Jan. 1, 2009.

promoting uniformity and preserving state sovereignty, including uniformity and sovereignty with respect to apportionment policy choices such as factor weighting and elections. This interpretation is also consistent with the conclusions of the United States Supreme Court in *U.S. Steel Corp v Multistate Tax Comm'n,* 434 US 452; 98 S Ct 799 (1978).

To the extent there may be limitations on the exercise of this flexibility, it is the members of the Compact themselves who make that evaluation. The cornerstone being that, when viewed as a whole, a state's enactment remains supportive of the Compact's purposes. Ensuring that the purposes are met ensures that the benefits the members expected when adopting the Compact will continue to be received. And, in the case of Michigan's 2008 legislation, the members have long indicated by their course of performance that the Compact's purposes continue to be met, and their expected benefits continue to be received.

ARGUMENT

I. Michigan May Vary from Compact Articles III.1 and IV Because the Multistate Tax Compact is Not a Binding Interstate Compact; Rather it is an Advisory Compact, Articles III.1 and IV of Which Are More in the Nature of a Model Uniform Law

There are different forms of compacts. Many are binding interstate compacts. But some are advisory compacts. The fact that an act is titled a "compact" does not tell us what type of compact it is. Nor is the mere presence of similar language in multiple state statutes necessarily indicative of a binding interstate compact. The language could be the

enactment of an advisory compact, which is more akin to an administrative agreement, or it could be the enactment of a model uniform law.[27] Neither constitutes a contract among the states that have enacted it. And both may be unilaterally modified.[28]

IBM argues that the state legislature's 2008 mandate of single sales factor apportionment[29] was a unilateral modification of the Multistate Tax Compact in violation of the United States and Michigan constitutions' prohibition against impairment of contracts.[30] In order to reach such a holding, this Court would first have to find that the Multistate Tax Compact is a binding compact, and thus a contract, among its member states.[31]

To determine whether the Multistate Tax Compact is a binding compact, rather than an advisory compact or a model uniform law, the Court should follow the United States Supreme Court's analysis in *Northeast Bancorp v Bd of Governors,* 472 US 159; 105 S Ct 2545 (1985), as interpreted by the 9th Circuit Court of Appeals in *Seattle Master Builders Ass'n v Pacific Northwest Electric Power and Conservation Planning Council,* 786 F2d 1359; 54 USLW 2543 (9th Cir. 1986), together with the United States Supreme Court's recognition of the Multistate Tax Compact in *U.S. Steel, supra.*

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[27] Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts*, pp. 12, 14 (2006).
[28] *Id.*, p. 17.
[29] Section 303 of the Michigan Business Tax Act, MCL 208.1303(1).
[30] U.S. Const., art. I, §10, Const. 1963, art 1, §10.
[31] *Interstate Compacts vs. Uniform Laws*; Council on State Governments –National Center for Interstate Compacts, available at: http://www.cglg.org/projects/water/CompactEducation/Compacts_vs_Uniform_laws--CSGNCIC.pdf

In *Northeast Bancorp,* the United States Supreme Court identified three "classic indicia" of a binding compact, which were slightly restated in *Seattle Master Builders* as:

(1) the establishment of a joint regulatory body,

(2) the requirement of reciprocal action in order to be effective, and

(3) the prohibition of unilateral modification or repeal.[32]

The Multistate Tax Compact exhibits none of these indicia. Rather, the Compact is an advisory compact, Articles III.1 and IV of which are more in the nature of a model uniform law.

A. The Multistate Tax Compact Does Not Exhibit Any Indicia of a Binding Interstate Compact

(1) The Compact does not establish a joint regulatory body.

The Compact established the Multistate Tax Commission, but the Commission is *not* a regulatory body. It has *no* regulatory authority over the member states. In joining the Compact, the members did *not* surrender any aspect of state sovereignty. Indeed, that was one of the primary reasons the United States Supreme Court ruled that the Compact did not require Congressional approval under the Compact Clause.

> This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. ***Nor is there any delegation of sovereign power to the Commission***; each State retains complete freedom to adopt or reject the rules and regulations of the Commission.[33]

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[32] *Northeast Bancorp., supra,* 472 US at 175. *Accord, Seattle Master Builders, supra,* 786 F2d at 1363.

[33] *U.S. Steel,* 434 US at 473 (emphasis added).

Further,

> [I]ndividual member States retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due.[34]

The members exercise sovereign control over their tax laws precisely as they would in the Compact's absence. The Commission's powers are strictly limited to an advisory and informational role.[35] In no way can the Commission be considered a joint regulatory organization or body with the power to administer or regulate state tax laws within the member states. The Commission is therefore distinguishable from a joint regulatory organization or body.

By contrast, the commissions and interstate agencies created by the compacts at issue in the case law cited by IBM had significant regulatory authority. For one example, in *Alabama v North Carolina,* 560 US 330; 130 S Ct 2295 (2010), the Southeast Interstate Low-Level Radioactive Waste Management Compact created a commission with the power to designate a member state as the host for a low-level radioactive waste disposal facility.

IBM cites to *Alabama v North Carolina* repeatedly throughout its Brief. But IBM

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[34] *Id.* at 457. Given the Court's description of the Compact as in no way limiting state sovereignty, IBM's assertion, at pages 25 and 31 of its Brief, that the Court held the Compact to be a binding contract is absolutely without any support in *U.S. Steel.* The holding of the Court in *U.S. Steel* was simply that the Compact did not require congressional approval. The case presented no occasion for the Court to affirmatively decide what type of compact the Compact *is* and the Court did not do so.

[35] In *U.S. Steel,* the U.S. Supreme Court described the powers of the Commission at 456-457. *See also* pp. 19-20, *supra.*

fails to acknowledge that the Radioactive Waste Management Compact at issue in that case differs from the Multistate Tax Compact in two fundamental ways. First, the Radioactive Waste Management Compact is a congressionally approved compact. Congressionally approved compacts essentially become federal law, and in all cases require congressional approval to be modified.[36] Second, the Radioactive Waste Management Compact, unlike the Multistate Tax Compact, creates a regulatory agency with the authority to administer a detailed regulatory scheme. It is in the context of compacts that create regulatory schemes or are congressionally approved that a rule barring unilateral modification or repeal evolved. Allowing one state to modify such a compact would render the regulatory scheme ineffective. Such a rule would serve no purpose as applied to the Multistate Tax Compact, under which the member states continue to exercise *all* aspects of state tax sovereignty and the Commission lacks authority to regulate its members in any way.

(2) The Compact does not require reciprocal action to be effective.

Nothing in the Compact requires one member state to take any particular action in order to meet any obligation to another member state, as the Compact creates no reciprocal obligations. The apportionment provisions of Articles III.1 and IV are no exception. Each state administers its tax laws wholly without reference to the laws and practices of any other member state.[37] In applying the Article III.1 election, a state that

[36] *Cuyler v Adams,* 449 US 433, 440; 101 S Ct 703 (1981).
[37] *Moorman Mfg Co. v Bair,* 437 US 267; 98 S Ct 2340 (1978).

has retained that election is indifferent to whether or not another member has repealed or disabled the election. This is because each state's calculation of the correct amount of tax due to that state is entirely unaffected by another state's calculation of tax or even whether the second state imposes an income tax at all.[38]

In contrast, examples of compacts that do impose reciprocal obligations are:

- The Interstate Compact on the Placement of Children, MCL 3.711 *et seq.* Requires the compacting states to adhere to uniform practices and procedures regarding the interstate placement of children.
- The Interstate Compact on Adoption and Medical Assistance, MCL 400.115(r), (s). Requires compacting states to adhere to uniform practices and procedures regarding payment for services to adoptees having special needs and for medical assistance whenever one state has the legal obligation to provide the services and the services are provided in another state.
- The Interstate Compact on Mental Health, MCL 330.1920 *et seq.* Requires the compacting states to adhere to uniform practices and procedures in providing care and treatment of the mentally ill regardless of the individual's state of residence or citizenship.
- The Multistate Highway Reciprocal Act, MCL 3.161 *et seq.* Requires the

[38] Indeed, at least three states — South Dakota, Texas, and Washington — joined the Compact even though they do not generally impose a corporate net-income based tax (South Dakota does impose an income tax on financial institutions; but financials are excluded from Article IV, and thus Article III.1, under the Compact.)

compacting states to grant equal driving privileges and exemptions to vehicles registered in another state.

- The Interstate Compact for Adult Offender Supervision, MCL 3.1011 *et seq.* Provides for the supervision of adult parolees and probationers convicted in one compacting state who are eligible to serve their parole or probation in another compacting state.

A single state member of any of these compacts could not unilaterally repeal or disable a provision of the compact without destroying the effectiveness of the compact. These compacts create mutual obligations across state lines and therefore must require mutual action to revise or repeal those obligations. IBM cites to all of these compacts in its Brief.[39] As with the Radioactive Waste Management Compact, IBM fails to note the key distinction between these compacts and the Multistate Tax Compact — these compacts create mutual obligations.

Because the Compact does not involve the exchange of mutual obligations, there is no foundation for IBM's central argument — that the Compact creates a mutual obligation for each state to retain the election, absent a repeal of the entire Compact. In *Moorman Manufacturing Co. v. Bair*, the United States Supreme Court upheld "the basic principle that the States have wide latitude in the selection of apportionment formulas."[40] As the United States Supreme Court recognized, the determination of the division of

[39] IBM Brief, p. 30.
[40] 437 US 267, 274 (1978).

income is "based on political and economic considerations that vary from State to State."[41] Nothing in the history or language of the Compact supports the argument that, unless they choose to repeal the Compact, the states are locked into an apportionment election that time and changing political and economic considerations have rendered obsolete. IBM asserts that the states intended to surrender their long-standing "wide latitude in the selection of apportionment formulas" based solely on the fact that the election was included in the Compact in 1967. But this claim ignores the unique political and economic considerations in each state that guided the Court's decision in *Moorman.* Consistent with *Moorman,* each state remains free to compute the proper amount of tax due under its laws (including the application of its own apportionment formulas and elections) within broad constitutional parameters; a computation wholly unaffected by the computations of any other state.

The cases which hold that the compacts at issue could not be unilaterally altered, including compacts that do not require federal approval, turned on the fact that the parties to those compacts undertook mutual obligations to each other that were *critical* for the proper function of the compact across state lines.[42] For example, interstate compacts that provide for the supervision of parolees or the placement of children across state lines cannot function if one state could unilaterally change the terms under which it will

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[41] *Id.* at 279.

[42] *See, for example, McComb v Wambaugh,* 934 F2d 474; 60 USLW 2015 (3d Cir 1991), *Doe v Ward,* 124 F Supp 2d 900 (WD Pa. 2000).

perform its compact obligations.[43] A further example is the compact creating the Port Authority of New York and New Jersey.[44] The Port Authority simply could not maintain bridges and tunnels that connect those two states if one state could unilaterally decide that it will change the rules by which the bridges and tunnels operate. The compact creating the Port Authority, therefore, specifically requires the legislatures of both states to concur in or authorize rules and regulations promulgated by the Port Authority for those rules and regulations to be binding and effective upon all persons affected thereby.[45]

In contrast, the Multistate Tax Compact allows each member to fully exercise its sovereign power to tax independent of any requirement of concurrence by the other members and with no delegation of power to the Commission to bind the members.[46] The United States Supreme Court has recognized that the rights and obligations of state tax law apply entirely within the jurisdiction of the taxing state, irrespective of the taxpayer's obligations in another.[47] No compact member state has a reliance interest in another state's retaining the Article IV mandatory apportionment formula or the Article III.1 election, which in no way impacts the function of the Compact in another state.

(3) The Compact does not prohibit unilateral modification or repeal.

The Multistate Tax Compact explicitly allows for unilateral repeal.[48] And whether

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[43] *Id.*
[44] N.J.S.A. 32:1-19.
[45] *Id.*
[46] *U.S. Steel Corp. v Multistate Tax Comm'n,* 434 US 452, 473 (1978).
[47] *Moorman Mfg. Co. v Bair,* 437 US 267, 279 (1978).
[48] Compact Article X.

or not members can also unilaterally modify is the issue in this case. IBM's argument that members cannot vary from the model Compact relies on compact cases that are not germane to the Multistate Tax Compact.[49] The majority of the cases on which IBM relies concern congressionally approved compacts. Because a congressionally approved compact becomes federal law, it is axiomatic that no state can modify its terms unilaterally – modification requires congressional approval.[50] The Multistate Tax Compact does not require, and has not received, congressional approval.[51]

Furthermore, while *Northeast Bancorp* and its progeny often state that binding interstate compacts cannot be unilaterally modified or repealed, a close examination of the case law as cited herein and in IBM's Brief reveals that courts rarely base the holdings in these cases on a finding that a state has or has not attempted to unilaterally modify or repeal a compact.[52] Rather, a close reading of these cases reveals that in most such cases the parties differ as to *the meaning* of the compact in question.[53] The courts apply interpretative tools, including course of performance, to determine that meaning. Consequently, there is a dearth of decided cases that provide context or meaning to the

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[49] IBM Brief, pp. 26-30.
[50] *Cuyler v Adams,* 443 US 433, 440 (1981).
[51] *U.S. Steel Corp. v Multistate Tax Commission,* 434 US 452 (1978).
[52] IBM Brief, pp. 27-30.
[53] An exception is *In re O.M.,* 565 A 2d 573 (D.C. Ct. App. 1989). In *In re O.M.,* the court ruled that the District of Columbia could not override the Interstate Compact on Juveniles by enacting a subsequent contrary statute. But IBM's reliance on cases construing the Juvenile Compact and other compacts at pages 27-30 of its Brief is misplaced. Those compacts are regulatory compacts which satisfy the three classic indicia of a compact as articulated in *Northeast Bancorp.* The Multistate Tax Compact is purely an advisory compact which contains the Article III election as a model apportionment law.

purported bar on unilateral modification or repeal.

The requirement that a compact does not allow for unilateral modification or repeal derives from the first two classic indicia of a compact. If the compact creates a regulatory agency, requires reciprocal action, or both, it necessarily follows that it cannot be unilaterally modified or repealed. For example, the Red River Compact, considered by the United States Supreme Court in June of this year, established a detailed regulatory scheme for use of water from the Red River and therefore bars any member state from taking or diverting water from within another state's borders.[54] Similarly, the Compact of 1905 governing riparian rights on the Delaware River bars any member from exercising exclusive jurisdiction over those rights.[55] But where no regulatory organization exists and no reciprocal action is required to make a compact effective — as is true of the Multistate Tax Compact — it would be completely illogical to bar unilateral modification or repeal. No purpose would be served by requiring mutual consent to repeal or modify a compact provision if the compact does not require mutual action and regulation *without* amendment or repeal. Such a strained interpretation of the Compact must be avoided, whether the Compact is analyzed as a contract or as a statute.[56]

B. The Multistate Tax Compact is an Advisory Compact, Articles III.1 and IV of which Are More in the Nature of a Uniform Law

When viewed as a whole, the Multistate Tax Compact is best described as an

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[54] *Tarrant Regional Water District v Herrman,* 133 S Ct 2120 (2013).
[55] *New Jersey v Delaware,* 552 US 597; 128 S Ct 1410 (2008).
[56] *Gross v General Motors Corp*, 448 Mich 147, 160; 528 NW 2d 707 (Mich 1995)(statute); *SSC Assoc. Limited Partnership v General Retirement System of the City of Detroit*, 210 Mich App 449, 452; 534 NW 2d 160 (1995)(contract).

advisory compact, Articles IV and III.1 of which contain apportionment provisions that are more in the nature of uniform laws. The view that we express to this Court today is the same that we expressed to the United States Supreme Court thirty-six years ago:

> [The Compact] consists solely of uniform laws, an advisory mechanism for the uniform interpretation and application of those laws, and an advisory mechanism for otherwise developing uniformity and compatibility in state and local taxation of multistate businesses.[57]

Advisory compacts are characterized as "lack[ing] formal enforcement mechanisms and are designed not to actually resolve an interstate matter, but simply to study such matters."[58] In *The Evolving Use and the Changing Role of Interstate Compacts*, the authors explain that "[b]y their very terms, advisory compacts cede no state sovereignty nor delegate any governing authority to a compact-created agency."[59] This is precisely how the United States Supreme Court characterized the Multistate Tax Compact in *U.S. Steel.* The Court recognized that the Compact delegates no state sovereignty to the Commission and that the Commission has no regulatory authority over the states.[60] The Court describes the powers of the Commission which are set out in Section 3 of Art. VI:

> (i) to ***study*** state and local tax systems; (ii) to ***develop and recommend*** proposals for an increase in uniformity and compatibility of state and local tax laws in order to encourage simplicity and improvement in state and local tax law and administration; (iii) to ***compile and publish*** information that may assist member States in implementing the Compact and taxpayers

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[57] *Brief of Multistate Tax Commission in United States Steel Corporation v Multistate Tax Commission,* United States Supreme Court No. 76-635, 1977 WL 189138, p. 12.
[58] Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts*, p. 13 (2006).
[59] *Id.* p. 14.
[60] *U.S. Steel,* 434 US at 457, 473. *See also* pp. 10-11, *supra.*

> in complying with the tax laws; and (iv) to do all things necessary and incidental to the administration of its functions pursuant to the Compact.[61]

The Court in *U.S. Steel* also discusses Articles VII and VIII, which detail more specific responsibilities of the Commission, recognizing that these responsibilities are advisory only:

> Under Art. VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. ***These regulations are advisory only***. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in accordance with its own law. Article VIII applies only in those States that specifically adopt it by statute. It authorizes any member State or its subdivision to request that the Commission perform an audit on its behalf. The Commission, as the State's auditing agent, may seek compulsory process in aid of its auditing power in the courts of any State that has adopted Art. VIII. Information obtained by the audit may be disclosed only in accordance with the laws of the requesting State.[62]

The advisory nature of the Multistate Tax Compact is not unique. For example, the Compact for Education, MCL 388.1301 cited by IBM[63] appears to be very similar to the Multistate Tax Compact in that the Education Compact appears to merely establish an Educational Commission of the States whose purpose and function is simply to serve as a clearinghouse to exchange information on best educational practices, to conduct research

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[61] *U.S. Steel,* 434 US at 456-457, *citing to* Compact Art. VI (emphasis added).

[62] *Id.* at 457 (emphasis added). Note that "perform[ing] an audit" is not the same as issuing an assessment – the Commission's audit results are recommendatory only. While the Commission conducts the audit on behalf of the auditing states, the commission has no authority to and does not issue assessments. Each state individually decides whether to accept, in whole or part, the audit recommendations and to issue an assessment or refund.

[63] IBM Brief, p. 30.

into improving those practices and to recommend educational policies to further those best practices. The Multistate Tax Compact similarly established the Multistate Tax Commission to facilitate joint action by its members to promote uniformity in taxation by developing proposed uniformity recommendations. In both cases, the respective Commissions would have no power or authority to implement their recommendations where the states retain the individual sovereign authority to administer their respective tax and educational systems. In neither case does the compact establish a joint regulatory body or require reciprocal action to be effective.

There is no basis for IBM's assertion that a decision in favor of the Department "would jeopardize Michigan's ability to rely on other states adhering to the commitments in other vital interstate compacts." [64] This case presents no occasion for this Court to effect a "radical departure from interstate compact law" as IBM contends.[65] All this Court is called upon to do is recognize that the Compact is an advisory compact and not a regulatory compact and therefore does not prohibit unilateral modification or repeal. It is hardly a "radical departure" from law to recognize that material differences in fact, context, and purpose often compel different legal results.

The members of the Multistate Tax Compact may unilaterally modify its provisions because it is and was intended to be an advisory compact. As Broun notes, advisory compacts "are more akin to administrative agreements between states,"[66] which

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[64] IBM Brief, p. 3.
[65] *Id.*
[66] Broun, p. 14.

"are clearly subject to unilateral change" by individual members.[67] And this is especially true here, where Michigan's continued membership in the Compact supports the Compact's purposes, as determined by the Compact's members, notwithstanding its adoption of a mandatory single sales factor formula.

Moreover, member states' enactments of Article IV are enactments of a model uniform apportionment law: UDITPA.[68] Article III.1 is simply an extension of UDITPA in that it creates a model uniform apportionment election within the model Compact. This has been the Commission's understanding since its beginning, more than forty years ago. The Commission's early annual reports regularly included a list of the states in which "the Multistate Tax Compact has been enacted *as a uniform law* ..."[69] And as far

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[67] *Id.* p. 17

[68] Uniform Division of Income for Tax Purposes Act, § 2, 7A U.L.A. 155 (2002). The model UDITPA was developed by the Uniform Law Commission. http://www.uniformlaws.org/Act.aspx?title=Division%20of%20Income%20for%20Tax%20Purposes

[69] *See* MTC Annual Report, FY 67-68, p. 12, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY67-68.pdf (last visited 10/19/13)
MTC Annual Report, FY 68-69, p. 25, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY68-69.pdf (last visited 10/19/13)
MTC Annual Report, FY 70-71, p. 13, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY70-71.pdf (last visited 10/20/13)
MTC Annual Report, FY 71-72, p. 14, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY71-72.pdf (last visited 10/20/13)
MTC Annual Report, FY 72-73, p. 8, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY72-73.pdf (last visited 10/20/13)

back as thirty-six years ago, in *U.S. Steel,* the Commission informed the United States Supreme Court that both Article IV and Article III.1 are essentially uniform acts that "could be adopted by any state independently of any compact ...."[70]

Uniform laws may be unilaterally modified. As the Broun treatise on compacts explains, model uniform laws do not constitute a contract between the states and thus, unlike contracts, are not binding:

> Although legislatures are urged to adopt model uniform laws as written, they are not required to do so and may make changes to fit individual state needs. ***Uniform acts do not constitute a contract between the states***, even if adopted by all states in the same form, and thus, unlike contracts, ***are not binding*** upon or enforceable against the states. Each state retains complete authority to unilaterally amend or change such codes to meet its unique circumstances. There is no prohibition in uniform acts limiting the ability of state legislatures to alter particular provisions as times change or to address the peculiar domestic political circumstances in a state."[71]

IBM itself accepts that the Compact is a model law but asserts that it is such only for associate members.[72] But the Compact is clearly *no* law, model or otherwise, in an associate member state because those states have never enacted the Compact as *any* law. By acknowledging that the Compact could be a model law in at least some settings, IBM has acknowledged that the Compact has characteristics of a model law. The fundamental nature of Articles III.1 and IV is that they are model uniform laws. Their nature is in no way altered by their incorporation in the advisory Multistate Tax Compact.

MTC Annual Report, FY 73-74, p. 26, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY73-74.pdf (last visited 10/20/13) (emphasis added).

[70] MTC *U.S. Steel* Brief, pp. 8 and 12.

[71] Broun, p. 16 (emphasis added).

[72] IBM Brief, p. 39.

II. If the Compact is Characterized Instead as an Interstate Contract, Michigan May Vary from Articles III.1 and IV Because the Compact May Be and Has Been Interpreted by Its Members to Allow for Variations in the Enactment of Articles III.1 and IV

A. The Compact May Be Interpreted to Allow for Variations in the Enactment of Articles III.1 and IV

The Multistate Tax Compact is best characterized as an advisory interstate compact, not a binding interstate compact. But even if it were determined to be a binding compact, it should still be interpreted to allow states the flexibility to vary with respect to Articles III.1 and IV. The first step of this interpretation begins in the same place an interpretation of any other statute begins – the language of the enacted Compact and its enabling act.[73] Importantly, the language contains no explicit prohibition against unilateral modification of the apportionment provisions. And both the enabling act and the Compact itself contain language that anticipates and supports flexibility in the adoption of the Compact's apportionment provisions.

Section 1 of both the Michigan enabling act and the model Compact suggested enabling acts contains ample evidence of this intended flexibility by declaring that "[t]he 'Multistate Tax Compact' is hereby enacted into law and entered into with all jurisdictions legally joining therein, in the form *substantially* as follows …"[74] [emphasis

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[73] The statute's plain meaning controls the court's interpretation unless its words are ambiguous. *Klida v Braman*, 278 Mich App 60, 64; 748 N.W.2d 244 (Mich App 2008); *Rosner v Michigan Mut. Ins. Co.*, 189 Mich App 229, 232; 471 NW 2d 923 (Mich App 1991).

[74] The Multistate Tax Compact Suggested Legislation and Enabling Act is available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf (last visited October 18, 2013). The Michigan Enabling Act is codified at MCL 205.581, Sec. 1.

added]. This language does not require member states enacted compacts to match verbatim, or even "nearly verbatim." The relevant criterion is merely that the enacted compacts be in *substantially* similar form.

Moreover, Michigan's similarity to the model Compact is not the relevant comparison. The relevant comparison, according to the enabling act, is whether Michigan's enactment is substantially similar to the *other states'* enactments. When the relevant comparisons are made, Michigan's treatment of Articles III.1 and IV is hardly a variation at all. Rather, it is in line with the majority of Compact members. Nine other compact members have enacted a version of the Multistate Tax Compact that — one way or another, directly or indirectly — emphasizes the sales factor and does not recognize an Article III.1 election. Three Compact members eliminated or limited the election directly.[75] Three amended Article IV to be consistent with their statutory apportionment formula that emphasizes the sales factor.[76] And four indicated by separate statute or other guidance that the Compact election does not apply to factor-weighting.[77] Only one

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[75] Colorado (Colo. Rev. Stat. §§ 39-22-303.5 and 39-22-303.7), Michigan (as applied to the Michigan Business Tax after January 1, 2008; MCL 205.581; *see also* H.B. 4479 (2011)), Minnesota (Minn. Statutes § 290.171). Minnesota repealed its version of the compact entirely in 2013. MN Laws 2013, c. 143, art. 13, § 24.

[76] Alabama (Ala. Code § 434 40-27-1), Arkansas (Ark. Code Ann. § 26-5-101), Utah (Utah Code § 59-1-801.IV.9). In 2013 Utah repealed the Compact and enacted a version that does not contain either Articles III.1 or IV (Utah Senate Bill 247, effective June 30, 2013).

[77] California (Cal. Rev. & Tax Code §25128(a)), Idaho (Idaho Stat. § 63-3027(i)), Oregon (O.R.S. § 314.606) In 2013 Oregon repealed the Compact and enacted a version that does not contain either Articles III.1 or IV. 2013 Oregon Laws Ch. 407 (S.B. 307).Texas (letter ruling 201007003L – The Texas franchise tax is not imposed on net income in any case). California repealed its version of the compact entirely in 2012. CA Stats.2012, c. 37 (S.B.1015), § 3.

Compact member explicitly recognizes the election.[78] The remaining members require an equal-weighted formula, identical to Article IV of their respective enacted compacts, such that the election is of no consequence with respect to factor-weighting.[79]

The Michigan enactment does vary with respect to the one compact member that allows the election, and arguably with respect to the six compact members that continue to require the three-factor equal-weighted formula. But even with respect to these variances, the Michigan compact is in "substantially" similar form.[80] Moreover, the apportionment provisions of Articles III.1 and IV are not required for the achievement of the Compact's purposes. Far more important to the purposes of the Compact are the participation of its members in the development of model uniform laws and the performance of joint multistate audits.

In addition to the enabling statutes, various provisions of the Compact itself provide evidence that some degree of variation across state enactments is anticipated. For example, paragraph 2 of Article I of both the model Compact and the Michigan enactment states that the Compact is designed "to *promote* uniformity *or compatibility*" in tax systems (emphasis added).[81] "Promote" is defined as "to forward; to advance; to contribute to the growth, enlargement, or excellence of."[82] Enactment, by itself, is not expected to *achieve* uniformity in any particular component of tax systems, including

[78] Missouri Rev. Statutes § 32.200. *Note,* Colorado recognized the election until January, 2009.
[79] Alaska, Hawaii, Kansas, Montana, New Mexico, North Dakota; *supra,* fn. 7.
[80] *See* Part II.B., *supra.*
[81] MCL 205.581, Article I(2).
[82] Webster's New Universal Unabridged Dictionary, Deluxe 2d Edition.

uniformity in apportionment formulae or elections among the member states. Rather, enactment is intended to create the forum by which members may work to advance the growth and enlargement of uniformity or compatibility in their tax systems.[83]

Additional evidence that the Compact anticipates some variation among its members is found in Article VII. Article VII authorizes the Commission to initiate a uniformity project when two or more party States have *similar* provisions of law regarding *any phase* of tax administration, and permits it to act with respect to the provisions of Article IV of the Compact. Article VII is not limited to instances in which the Compact provisions are uniform. Thus Article VII also indicates that some variations are anticipated.

The model Compact's severability provision in Article XII also demonstrates the value placed on inclusiveness over standardization. Article XII provides:

> If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States ***and in full force and effect as to the State affected as to all severable matters***. [Emphasis added.]

Under this severability provision, the Compact continues in full force in a particular member state even if some of its provisions are found to be unconstitutional in

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[83] Pursuant to Compact Articles VI.3(b) and VII, the Commission works to advance uniformity through its Uniformity Committee. The Uniformity Committee works to draft model uniform statutes and regulations for the states to consider. The Commission's model statutes and regulations are advisory only. Articles VI.3(b) and VII. They provide a framework for the member states to design their tax systems with a view to making them more uniform. For a compilation of the Commission's completed uniformity projects, see http://www.mtc.gov/Uniformity.aspx?id=524.

that state. A legislature's decision to include such a clause in a statute is evidence of the legislature's intent that the remaining portions of the statute should stand if the court declares some of its provisions to be unconstitutional or otherwise invalid. The inclusion of a severability clause leads ineluctably to the conclusion that the member states contemplated they would remain as members even with variations in the Compact, because application of a severability clause will inevitably cause variations among the member states. If the intent were that a variation would cause a state to lose its membership, no severability clause would have been included. If preserving each of the Compact's provisions were truly critical, the Compact would have included a *non-severability* clause instead.

IBM notes that a number of states have withdrawn from the Compact and that Michigan is free to do so if it wishes to require single sales factor apportionment.[84] Clearly, a state *may* withdraw from the Compact pursuant to Article X. A state could choose to do so for any number of legal, fiscal or political reasons. The mere fact that a number of states have withdrawn from the Compact over the years in no way indicates that they did so because they viewed the Compact as binding. The ultimate issue in this case is whether a state is *required* to choose between its choice of mandatory apportionment formula and continued membership in the Compact.

Given that Article XII of the Compact requires it to be "liberally construed so as to effectuate [its] purposes," the inherent flexibility suggested by its plain meaning should

[84] Brief of IBM, p. 37.

be given weight, and it should not be construed in a rigid manner. If the only options available to a state that would like to depart from the Compact's equally weighted apportionment election are to withdraw in full, acquiesce in a provision that is contrary to the state's preferred policy, or convince every other state — including states whose policy choices may be quite different — to amend their enacted versions of the Compact, the Compact could not long endure and its purposes of developing model uniform laws and performing joint multistate audits would be entirely frustrated. The Compact does not require such a destructive set of choices.

B. The Members' Course of Performance Shows That They Have Interpreted the Compact to Allow for Variations in the Enactment of Articles III.1 and IV

As far back as the early 1800's, the United States Supreme Court expressly recognized that binding interstate compacts, even though statutory, are also contractual in nature, stating "...the terms 'compact' and 'contract' are synonymous."[85] Thus, in addition to general principles of statutory construction, substantive contract law applies in the interpretation of a binding interstate compact:

> When adopted by a state, the compact is not only an agreement between the state and other states that have adopted it, but it becomes the law of those states as well, and must be interpreted as both contracts between states and statutes within those states.[86]

Where the issue is the proper interpretation of a binding compact — a binding contract —

[85] *Green v Biddle*, 8 Wheat 1, 40 (1823).
[86] 1 A Sutherland, *Statutes and Statutory Construction* §32.5.

the governing law is state contract law.[87]

Most relevant to this case is the basic premise of contract law that "the parties [to the contract] themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was."[88] In this case, both the Michigan enabling statute and the model Compact's suggested enabling statute state that variances are acceptable, as long as the enacted compacts are in a "form substantially as follows."[89] But "substantially" is not defined. The members' *course of performance* is relevant in determining whether the compacts that vary with respect to Articles III.1 and IV remain in "substantially similar form."

In interpreting the obligations of the parties to a compact, courts have long recognized that, as for contracts generally, the actual performance of a compact by the parties has high probative value in determining the scope of those obligations: "In determining [the meaning of a compact] the parties' course of performance under the Compact is highly significant."[90] Under Section 2-208 of the Uniform Commercial Code, *course of performance* is relevant even if the express terms of the compact seem

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[87] *See* Guantt Construction Company v the Delaware River and Bay Authority, 241 NJ Super 310; 575 A.2d 13 (NJ Super Ct 1990); Gothic Construction Group v Port Authority Trans-Hudson Corp., 312 NJ Super 1, 711; A.2d 312 (NJ Super Ct 1998).

[88] UCC §2-208, cmt. 1. Section 2-208 of the U.C.C. is codified, without substantive change, at MCL 440.1303.

[89] The Multistate Tax Compact Suggested Legislation and Enabling Act is available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf (last visited October 18, 2013). The Michigan Enabling Act is codified at MCL 205.581, Sec. 1.

[90] *Alabama v North Carolina, supra,* 130 S Ct at 2309.

clear on their face.[91]

The course of performance doctrine has two material elements, both of which have been satisfied in this case. According to MCL 440.1303:

> (1) [A] "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if both of the following are met:
>
> > (a) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party.
> >
> > (b) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

The primacy of course of performance in interpreting modern compacts is demonstrated by the United States Supreme Court's reliance on the actions of the compacting parties taken years or even decades after the compacts became effective in order to ascertain the original understanding of those parties in entering into the compact. For example, in *New Jersey v Delaware,* 552 US 597, 128 S Ct 1410 (2008), the parties' course of performance beginning more than 60 years after the Compact of 1905 was enacted demonstrated that the parties to the compact never intended either party to exercise exclusive jurisdiction over riparian rights on the Delaware River. In *Alabama v North Carolina, supra*, the parties' course of performance over the eleven year period after Congress approved interstate compacts providing for the disposal of low-level radioactive waste proved that no member state of the Southeast Interstate Low-Level Radioactive Waste Management Commission was obligated to continue meeting its

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[91] 1 Hawkland, Uniform Commercial Code ¶2-208:1 (2001).

licensing obligations under the compact if the costs of doing so became prohibitively expensive. And in *Tarrant Regional Water District v Herrman, supra*, the Water District's actions starting twenty-two years after Congress ratified the Red River Compact in 1980 established that the compacting parties did not authorize any member of the Compact to take or divert water from within another member's borders.

In this case, the members of the Multistate Tax Compact have demonstrated almost from the inception of the Compact that a state could unilaterally repeal or disable its Article III.1 apportionment election and remain "substantially" similar to the other compact enactments. In 1972 — only five years after the Compact went into effect — the member states, acting through their legislatively designated representatives to the Commission, unanimously passed a resolution that Florida remained a member in good standing of the Compact and of the Commission notwithstanding Florida's unilateral repeal of Articles III and IV and its adoption of double-weighting.[92] This is exactly the variance at issue in this case.[93] Michigan, a member of the Compact since 1970, attended the meeting at which the resolution was passed and voted in favor of Florida's continued membership.[94]

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[92] A copy of the minutes of the Commission's meeting of December 1, 1972 is attached hereto as Appendix B of this Brief.

[93] Pursuant to Article VI.1.(a) of the Compact, the Multistate Tax Commission is "composed of one "member" from each party State who shall be the head of the State agency charged with the administration of the types of taxes to which this compact applies." When those members collectively meet and issue such a resolution, they speak as the Commission and not merely as the heads of their respective tax departments.

[94] *See* Minutes of the Meeting of the MTC Dec 1, 1972 (Appendix B)

Since 1972, at least ten additional members, including Michigan, have varied from Articles III.1 and IV by enacting mandatory apportionment formulae other than the Article IV equal-weighted formula, without allowing an Article III.1 election.[95] In no case has any compact member in any way objected that such an action was inconsistent with the letter or the spirit of the Compact.

Unlike the typical compact case where course of performance is exclusively determined by examining the actions of the executive branch of state government in administering the compact, in this case the actions of the state legislatures in enacting mandatory variances from the Article IV equal-weighed formula establishes *legislative* course of performance that allows for that variation. In addition, pursuant to Article VI.1(l) of the Compact, "the Commission annually shall make to the Governor and legislature of each party State a report covering its activities for the preceding year." And with the Commission's annual report for fiscal year 1973, following the Commission's 1972 resolution approving Florida's position as a member in good standing of the Compact notwithstanding its repeal of the Article III election, the legislatures of each party state were informed that "Florida enacted the Multistate Tax Compact in 1969. When it enacted its corporate income tax in 1971, it deleted UDITPA from its statutes. Yet its corporate income tax statute is substantially in accord with UDITPA."[96] None of

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[95] *See* fn. 75-77, *supra*. California was one of these ten compact states until it repealed the Compact in 2012. Footnote 77, *supra*

[96] Seventh Annual Report, Multistate Tax Commission, Appendix B, p.27, at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY73-74.pdf.

the legislatures or governors of the party states have ever indicated in any way that the Commission's 1972 resolution is inconsistent with their views and indeed have ratified the Commission's views in each state that has subsequently repealed or disabled the election. This is direct evidence that the legislatures *themselves* share their representatives' views as to the flexibility of the Compact.

The compact member states have had numerous opportunities to object to the adoption of a varying mandatory apportionment formula by any or all of the ten states, and have declined to do so. Pursuant to Commission bylaw 6, the Executive Committee of the Commission meets periodically throughout the year.[97] In addition, the Commission itself meets at least once a year.[98] Therefore, the parties to the Compact have had repeated opportunities to object to the adoption by any or all of the ten states of an apportionment formula that precludes a taxpayer from exercising the Article III.1 election. No member state has ever raised such an objection.[99] Indeed, compact members have *supported* Michigan's compact membership by repeatedly electing its representatives to serve as Commission officers and chairs of Commission committees notwithstanding Michigan's 2008 adoption of mandatory single sales factor

[97] Commission bylaw 6 is available at http://www.mtc.gov/About.aspx?id=2232.

[98] Compact, Article VI.1 (e).

[99] The states of Texas, Alabama, Alaska, Arkansas, Colorado, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, Utah, Washington and the District of Columbia recently filed an amicus brief in the California Supreme Court, supporting California's position that it was not bound by the Article III.1 election in requiring taxpayers to use a double-weighted sales factor in California's mandatory apportionment formula. *The Gillette Co. v Calif. Franchise Tax Board,* Case No. S206587.

apportionment.[100]

Thus, compact members' course of performance strongly supports an interpretation of the Compact as sufficiently flexible to recognize Michigan's 2008 legislation as fully consistent with the purposes of the Compact. In contract terms, the promotion of the Compact's purposes is analogous to the benefit the parties expected to receive upon joining the agreement. Many benefits could be expected from the participation of large and influential states such as Michigan. Every additional state enactment of the Compact enlarges the membership of the Commission, broadens the Commission's base with the addition of the views of that state's tax administrator to its deliberations, and increases the weight of the results of those deliberations in the courts and in the Congress. These and other benefits of membership would be frustrated by a rigid and inflexible interpretation of the Compact.

CONCLUSION

This case does not involve states that disagree in their interpretation of the compact, requiring a reviewing court to analyze those conflicting interpretations of the compact's meaning. Rather, the consensus of both the executive and legislative branches

[100] *E.g.*, Andy Dillon, Michigan State Treasurer, was elected to serve on the Commission's Executive Committee for FY 2011-2012 (MTC Annual Report FY 2011-2012, p.3) and FY 2013-2014 (see Commission Officers & Executive Committee Members 2013-2014, available at http://www.mtc.gov/About.aspx?id=74 (last visited Oct. 31, 2013)). Robert J. Kleine, Michigan State Treasurer, was elected MTC Treasurer for FY 2009-2010 (MTC Annual Report FY 2009-2010, p.3) and 2010-2011 (MTC Annual Report FY 2010-2011, p.4). All MTC Annual Reports are available at http://www.mtc.gov/Resources.aspx?id=174

of the member states is that the Multistate Tax Compact allows its members to replace the Article III election with a mandatory apportionment formula on a prospective basis. The Court therefore is not required in this case to ascertain the meaning of the compact, but merely to give effect to that undisputed meaning as interpreted by the members.

Respectfully submitted this 5th day of November, 2013.

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Executive Director

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** Admission *pro hac vice* pending

Appendix A

STATE APPORTIONMENT OF CORPORATE INCOME

(Formulas for tax year 2013 -- as of January 1, 2013)

ALABAMA *	Double wtd Sales	NEBRASKA	Sales
ALASKA*	3 Factor	NEVADA	No State Income Tax
ARIZONA *	Double wtd Sales/80% Sales, 10% Property & 10% Payroll	NEW HAMPSHIRE	Double wtd Sales
		NEW JERSEY	90% Sales, 5% Payroll, & 5% Property (1)
ARKANSAS *	Double wtd Sales		
CALIFORNIA *	Sales	NEW MEXICO *	3 Factor
COLORADO *	Sales	NEW YORK	Sales
CONNECTICUT	Double wtd Sales/Sales	NORTH CAROLINA *	Double wtd Sales
DELAWARE	3 Factor	NORTH DAKOTA *	3 Factor
FLORIDA	Double wtd Sales	OHIO	Triple Weighted Sales (3)
GEORGIA	Sales	OKLAHOMA	3 Factor
HAWAII *	3 Factor	OREGON	Sales
IDAHO *	Double wtd Sales	PENNSYLVANIA	Sales
ILLINOIS *	Sales	RHODE ISLAND	3 Factor
INDIANA	Sales	SOUTH CAROLINA	Sales
IOWA	Sales	SOUTH DAKOTA	No State Income Tax
KANSAS *	3 Factor	TENNESSEE	Double wtd Sales
KENTUCKY *	Double wtd Sales	TEXAS	Sales
LOUISIANA	Sales/3 Factor	UTAH	Sales
MAINE *	Sales	VERMONT	Double wtd Sales
MARYLAND	Sales/Double wtd Sales	VIRGINIA	Double wtd Sales/Triple wtd Sales (1)
MASSACHUSETTS	Sales/Double wtd Sales		
MICHIGAN	Sales	WASHINGTON	No State Income Tax
MINNESOTA	96% Sales, 2% Property, & 2% Payroll (1)	WEST VIRGINIA *	Double wtd Sales
		WISCONSIN *	Sales
MISSISSIPPI	Sales/Other (2)	WYOMING	No State Income Tax
MISSOURI *	3 Factor/Sales	DIST. OF COLUMBIA	Double wtd Sales
MONTANA *	3 Factor		

Source: Compiled by FTA from state sources.

Notes:
The formulas listed are for general manufacturing businesses. Some industries have a special formula different from the one shown.
* State has adopted substantial portions of the UDITPA (Uniform Division of Income Tax Purposes Act).
Slash (/) separating two formulas indicates taxpayer option or specified by state rules.
3 Factor = sales, property, and payroll equally weighted.
Double wtd Sales = 3 factors with sales double-weighted
Sales = single sales factor

(1) Minnesota, New Jersey and Virignia (certain manufactures) are phasing in a single sales factor which will reach 100% in 2014.
(2) Mississippi provides different apportionment formulas based on specific type of business. A single sales factor formula is required if no specific business formula is specified.
(3) Formula for franchise tax shown. Department publishes specific rules for situs of receipts under the CAT tax.

FEDERATION OF TAX ADMINISTRATORS -- JANUARY 2013

Appendix B

MINUTES OF THE MEETING OF THE MTC DEC 1, 1972, INCLUDING RESOLUTION NO. 1

BYRON L. DORGAN, Chairman
Tax Commissioner
State of North Dakota

WILLIAM E. PETERS, Vice Chairman
State Tax Commissioner
State of Nebraska

ALLISON GREEN, Treasurer
Treasurer, Department of Treasury
State of Michigan

Multistate Tax Commission

EUGENE F. CORRIGAN, Executive Director

EXECUTIVE COMMITTEE
VERNON HOLMAN
Chairman, State Tax Commiss
State of Utah
EWING H. LITTLE
Chairman, State Tax Commiss
State of Idaho
CHARLES N. MACK
Director, Department of Revenu
State of Oregon
JAMES T. McDONALD
Director, Department of Revenu
State of Kansas

MINUTES OF THE MEETING OF THE

MULTISTATE TAX COMMISSION

GENERAL SESSION
December 1, 1972
Denver, Colorado

Chairman Byron L. Dorgan called the meeting to order at 9:13 a.m. December 1, 1972, at the Radisson Hotel, Denver, Colorado.

Mr. Corrigan then took the roll call, which showed the following states present, two being recorded shortly after the roll call:

Regular Member States		Associate Member States
Alaska	Montana	Alabama
Arkansas	Nebraska	Arizona
Colorado	Nevada	California
Hawaii	New Mexico	
Idaho	North Dakota	
Illinois	Oregon	
Kansas	Texas	
Michigan	Utah	
	Washington	

Mr. Corrigan noted that regular member Indiana, associate members Minnesota, Ohio and Tennessee, and non-members Kentucky and New York had been taking part in the meeting during the week, making a total of 20 regular members, 6 associate members and 2 non-members in attendance.

Approval of Minutes

The minutes of the last meeting of the Commission having been mailed to the member states more than 30 days prior to this meeting in accordance with the requirements of the By-laws, and no proposed objections, changes or alterations being submitted from the floor, the Minutes were approved as presented.

1909 - 26th STREET TELEPHONE (303) 447-[redacted]

Resolutions

Chairman Dorgan had, on November 30, appointed the following men to be members of the Resolutions Committee:

Arthur Fulmer, Florida, Chairman
Jene Bell, Montana
Sydney Goodman, Michigan
Nolan Humphrey, Arkansas
William Peters, Nebraska

On behalf of the Committee, Chairman Fulmer submitted resolutions for approval as follows:

RESOLUTION No. 1

WHEREAS, the State of Florida views its position as fully consistent with the principles of the Multistate Tax Compact and the Multistate Tax Commission as enunciated in Article I of the Compact; and

WHEREAS, the State of Florida has repealed Articles III and IV of the Multistate Tax Compact, while still legislatively, adhering to the spirit of the Compact; and

WHEREAS, the State of Florida will continue to strive together with tax administrators, national tax groups, and representatives of the business community to develop new and additional methods of resolving multistate tax problems;

NOW, THEREFORE, BE IT RESOLVED that the State of Florida be recognized as a regular member in good standing of the Multistate Tax Compact and the Multistate Tax Commission.

On motion made and seconded, the resolution was unanimously approved, Florida abstaining.

RESOLUTION No. 2

WHEREAS, the purpose of the Multistate Tax Commission is to bring uniformity to the tax laws of the various states of the United States insofar as said laws affect multistate business; and

WHEREAS, the Commission believes that the business community and the States should have a single place to which to take their tax problems;

NOW, THEREFORE, BE IT RESOLVED that the Multistate Tax Commission invite the business community to attend all

PROOF OF SERVICE

The undersigned certifies that one (1) true and correct copy of Brief of A*micus Curiae* Multistate Tax Commission in Support of Defendant/Appellee Department of Treasury of the State of Michigan was served upon the below-named parties on November 5, 2013, by depositing a copy in the United States mail in an envelope bearing sufficient postage, before 5:00 p.m.

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