



NATIONAL CONFERENCE *of* STATE LEGISLATURES

*The Forum for America's Ideas*

STANDING COMMITTEE ON  
**ECONOMIC DEVELOPMENT, TRADE & CULTURAL AFFAIRS**

**FREE TRADE AND FEDERALISM**

The National Conference of State Legislatures (NCSL) believes in the principles of free trade and efforts to expand U.S. exports through international agreements. NCSL also believes that these agreements to liberalize the world trading and investment system can and must be harmonized with traditional American values of constitutional federalism. In particular, NCSL recognizes that reservations can be made to trade and investment agreements that limit the unnecessary preemption of state law and that preserve the authority of state legislatures. Implementing legislation for trade and investment agreements also can and should be crafted to include protections for our constitutional system of federalism.

**Trade that Protects State Sovereignty**

The states are committed and prepared to treat foreign firms that do business within their borders in a nondiscriminatory fashion, under a standard based on the broad protection afforded by the Commerce Clause and the Foreign Commerce Clause of the U.S. Constitution. What the states are not prepared to accept, however, is a challenge to their sovereignty and to state authority based on an arbitrary and unreasonable standard of discrimination against foreign commerce, similar to that employed by the GATT panel in the so-called Beer II decision.

Therefore, reservations must be made to trade and investment agreements to “carve out” state laws that might otherwise be subject to challenge. Particular care must be exercised to ensure that state tax laws and revenue systems are not subject to unjustified challenge under international agreements. Provisions must also be made in federal implementing legislation that commit the federal government to protect state lawmaking authority when it is exercised in conformity with accepted U.S. constitutional principles of nondiscrimination against foreign commerce.

In general, NCSL encourages USTR to utilize “positive lists” for making commitments in trade agreements. This approach allows states to know more precisely the areas of the economy and state authority implicated in a trade agreement. A “negative list” approach commits the United States to implement trade disciplines on all covered sectors unless areas or state laws are specifically excepted in the annex of the agreement. USTR should use this approach as a last resort, but if the federal government commits the United States by using a “negative list” approach, then the annex of exceptions should retain the unbound sectors and the limits of U.S. commitments that exempt state laws.

NCSL encourages USTR and its trade negotiation colleagues in the federal government to develop economic and non-economic impact statements for agreements under negotiation. These could resemble the state and local analyses conducted by the Congressional Budget Office. NCSL recognizes that such analyses could be politically sensitive and could affect negotiation strategies

employed by other countries; therefore, it would be understandable if such analyses were shared exclusively with IGPAC. It is important that state officials have access to such information before determining whether they can support an agreement.

### **Private Rights of Action and Investor-State Disputes**

With earnest caveats for strong mandates that future trade agreements grant “no greater rights” to foreign investors than those granted to U.S. citizens, NCSL supported the Presidential Trade Promotion Authority adopted in 2002. NCSL continues to support this doctrine and enjoins trade negotiators to interpret TPA’s “no greater rights” in the broadest sense possible for the protection of state sovereignty and American federalism in negotiations for both goods and services. NCSL believes that this interpretation should incorporate substantive considerations as well as principles of takings as interpreted by the U.S. Supreme Court and procedural matters consistent with U.S. constitutional due process. NCSL is committed to working with the U. S. Trade Representative (USTR) and other federal agencies as they interpret and apply TPA’s “no greater rights” language to trade agreement negotiations.

Provisions must be made to deny any new private right of action in U.S. courts or before international dispute resolution panels based on international trade or investment agreements, especially if it could result in foreign firms gaining an advantage in terms of their tax and regulatory treatment over U.S. firms. Neither the decisions of international dispute resolution panels nor international trade and investment agreements themselves must be binding on the states as a matter of U.S. law. Implementing legislation for any agreement must include provisions that promote effective and meaningful consultation between the states and the federal government related to any dispute involving state law or any dispute that could prompt retaliation against states. These provisions should include a timetable for prompt notice to states of a potential state issue, as well as the right of attorneys for the state to participate as part of the “team” defending a state law before international tribunals. States must also be given the right to file amicus briefs before international dispute resolution panels, both independently and collectively through state organizations such as NCSL. It is imperative that when state laws are under challenge in international proceedings that the federal government defend state laws as vigorously as it defends federal law.

Because the federal government retains the power to sue a state to enforce international agreements, federal legislation implementing any new trade or investment accord must include appropriate protections for the states related to rules of procedure, evidence and remedies in such litigation. The federal government must bear the burden of proof in court showing that state law is inconsistent with an international agreement, regardless of the finding of an international dispute resolution panel. The President must be required, at least 30 days before the Justice Department files suit against a state, to file a report with Congress justifying its proposed action. In the event of an unfavorable judgment, states must be protected from financial liability. If the federal government agrees to allow foreign firms to collect money damages for “harm” caused by a state law, then the federal government must bear the burden of any such award by international tribunals and not seek to shift the cost to states in any manner.

The federal government retains the power to sue a state to enforce international trade agreements. However, NCSL asks the federal government to assure states that the federal government will not seek to preempt state law as a means of enforcing compliance with an international agreement unless the Congress has expressed clear intent to preempt state law in implementing legislation or other law. Likewise, the federal government must not withhold federal funds otherwise appropriated by Congress to a state as a means of enforcing compliance with provisions of an international agreement.

## **Consultation**

The President, the U.S. Trade Representative, and other federal agencies involved in negotiating trade agreements must remain cognizant of the intimate role that state legislators play in crafting state laws, policies, and programs. It is imperative that the USTR and others consult with state legislators and NCSL at the outset of trade negotiations in order to insure that both the negotiators and state legislators are aware of any state laws, policies, or programs that may be impacted by an agreement.

In this respect, NCSL is very concerned about the manner in which the federal government consults with states on trade issues. NCSL applauds efforts by the U.S. Trade Representative to revitalize the Intergovernmental Policy Advisory Group (IGPAC) and looks forward to full and active participation in this body. We are also encouraged by USTR's move away from reliance on the Single Point of Contact (SPoC) system for collecting information from states and for relaying important information to states. NCSL encourages USTR and other federal agencies involved in trade negotiations to develop effective systems of communication with state and local officials that respect the fact that many public policy decisions require approval or action by both legislative and executive governmental institutions, that incorporate all branches of government and that, as appropriate, rely on state and local officials' national associations for information collection and dissemination. Such information collection and dissemination efforts must respect both the needs and time frames of negotiations but also the many demands on the time and attention of state policymakers by allowing enough time for sufficient study and appropriate response.

## **Procurement**

The United States is party to the World Trade Organization's Agreement on Government Procurement (GPA). When negotiating the GPA, USTR solicited the state governors for permission to include state procurement and to bind state procurement processes to the GPA. USTR asserts that 37 states were voluntarily bound through this process to the GPA. In September 2003, USTR requested state governors to make similar commitments to several free trade agreements (FTAs) being negotiated at the time. NCSL recognizes that consultation with a limited number of governors is simpler than communicating with 7,500 legislators and that USTR has increasingly made these letters available publicly on the web. Nonetheless, the federal government must work with state legislatures to assure that decisions made about state procurement practices are made with their consent.

NCSL is concerned that this process does not adequately provide for consultation with state legislatures or consider a need to change state law to adjust and obligate state procurement policy. State procurement policy and practices often are set in state law and are sometimes designed to serve social or economic purposes beyond the mere provision of goods and services for state government use. NCSL encourages USTR to insure that states can retain the ability to use procurement policy to promote these public interests while negotiating any modifications to GPA or procurement chapters in FTAs.

## **Services**

Services constitute an important and growing segment of the American and the global economies. NCSL concurs that it is critical that the United States remain competitive in services sectors. However, international competition in service industries cannot compromise state constitutional or traditional authority or in any way impinge upon states' ability to protect the public interest. Services negotiations in particular must incorporate a concerted effort to consult with state legislatures, where policies about government-provided services, regulation of monopolies, provision of essential services (such as energy, water, health, education, or public safety), or privatization are

set. Consultation with state legislators is absolutely necessary prior to, during, and after a General Agreement on Trade in Services (GATS) round or the negotiation of an FTA including services provisions. NCSL applauds the consultations that have been undertaken related to electric utility services and encourages USTR to devote substantially the same attention and effort, potentially through similar mechanisms, to consultations related to other sectors.

NCSL recognizes that sections 2103 and 2106 of the Presidential Trade Promotion Act of 2002 now require that the President notify the Congress as new rounds of GATS negotiations begin and that the Congress approve the results of those negotiations before implementation. NCSL applauds the Congress for instituting this modification to the GATS process and looks forward to working with USTR and the Congress as negotiations continue.

### **Adjusting to Free Trade**

NCSL acknowledges that free and open trade can bolster economies and increase standards of living. However, there are many who may suffer as states, localities, manufacturing or service industries, or communities adjust to the new realities of open markets. NCSL supports federal efforts to provide meaningful Trade Adjustment Assistance (TAA) to affected workers and encourages the Congress and the implementing federal agencies

- to work with NCSL and state legislatures to insure that TAA programs are flexible to suit different states' needs;
- to engage in aggressive outreach to insure that workers, employers, and communities are informed of the benefits of the TAA program and are able to effectively utilize the program; and
- to fund TAA at a level that will afford assistance to all who need help.

In general, the federal government should work with the states to expand citizen understanding of the importance of international trade and work with the private sector to develop lifetime educational and workforce training opportunities that prepare Americans to compete successfully in a changing global economy.

### **Building Capacity in Trading Partners**

NCSL recognizes that the advent of investor-state provisions in trade agreements directly relates to the legitimacy, reliability, and transparency of government institutions and processes in some trading partners. NCSL supports federal efforts to fund programs by the USTR and other agencies to assist in building the trade capacity and trade agreement compliance of developing countries.

### **Support for Trade Negotiating Representation**

NCSL recognizes that the negotiation of trade agreements – whether bilateral, multilateral, or global – on such a range of goods, services, and investment opportunities as America's trillion-dollar economy demands is a monumental undertaking. NCSL supports the authorization and appropriation of adequate resources so that USTR is best equipped to fully consult with state legislators in order to represent their interests and the American public in trade negotiations while protecting and preserving American constitutional principles.

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