States' Rights and International Trade

A Legislator's Guide to Reinvigorating Federalism and Preserving Policy Space in the Era of Globalization, December 2009

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This Legislator's Guide

With this Legislator's Guide, Public Citizen's Global Trade Watch division has condensed all of the information state officials need to know about the problems today's trade pacts pose to states' rights and policy space. It also explains how to reinvigorate federalism in the era of globalization, so that the United States can gain the benefits of trade without unnecessarily sacrificing our democratic policymaking systems. While law and policies under local jurisdiction are also frequently implicated in trade agreements, for brevity's sake this Guide will highlight challenges to state laws and opportunities for state officials to act.

The Introduction to this Guide provides context for why state officials' day-to-day effectiveness is inhibited by today's trade agreement policymaking and an update on the current state of play. The first three sections of this Guide focus on how trade agreements' procurement, service-sector and investment rules can limit state policymakers' regulatory options. We also include information about the many creative ways in which states have worked to simultaneously promote increased trade and preserve their policy options.

We conclude by highlighting opportunities for state officials to improve the system of federal-state trade consultation on trade agreements, both at the state and at the federal levels, so that states are guaranteed a formal process to "opt in" to trade-agreement terms before being bound to trade pacts' mandatory, non-trade regulatory constraints – in other words, the right to prior informed consent. Fast Track trade authority sunset in 2007. In the coming years, President Obama will request that Congress provides him with new trade agreement authority. How Congress formulates the delegation of its exclusive constitutional authority over trade to the new president will greatly determine both the substance of and policymaking procedures for future trade agreements. This Guide is an essential tool for state legislators seeking to understand the extremely rare opportunity that this pending debate over the future form of trade agreement authority will provide to transform our trade policymaking processes and create trade agreements that work for Americans.

We hope this guide is useful for you,

Lori Wallach, Director of Public Citizen's Global Trade Watch Division

Sarah Edelman, Coordinator of Global Trade Watch State and Local Program

Introduction

"[I]t is clear that world trade is evolving into new areas that touch not only the sovereign heart of nation-states, but also areas within the constitutional prerogative of subnational governmental units."

– University of Chicago law review article[1]

"[I]t is vital to maintain the principle that the federal government may request, but not require, states to alter their regulatory regimes in areas over which the states hold constitutional authority … "

– Letter from 29 U.S. State Attorneys General[2]

Background on the Conflict Between Overreaching "Trade" Agreements and Federalism

The vast majority of Americans understand that our current trade policy, symbolized by the 1994 North American Free Trade Agreement (NAFTA) and the 1995 World Trade Organization (WTO) agreements, have harmed the U.S. economy. Since the establishment of NAFTA and the WTO, the U.S. trade deficit has grown from under $100 billion to nearly $700 billion, or almost five percent of national income.[3] The United States has lost nearly five million (over one out of every four) manufacturing jobs in the NAFTA-WTO era,[4] and studies show that the U.S. economy could have supported millions more well-paying manufacturing jobs if not for the massive $1.9 billion per day trade deficit that has accrued under current U.S. trade policy.[5]

The loss of manufacturing jobs, along with the increased offshoring of high-end service-sector jobs, has contributed to downward pressure on wages across the economy. Current trade agreements have degraded the *quality* of jobs available to the majority. For instance, according to the Brookings Institution, the average worker displaced from manufacturing went from earning $40,154 to $32,123 when re-employed.[6] When workers in manufacturing are displaced and seek new jobs, they add to the supply of U.S. workers competing for available non-professional jobs in hospitality, retail, health care and more, placing a downward pressure on wages in those sectors as well.[7]

Education is not enough to protect workers from the wage pressure caused by trade. Increasingly, college-educated workers are seeing their wage growth stagnate, even in technologically sophisticated fields like engineering.[8] Moreover, offshoring of American jobs is moving rapidly up the income and skills ladder. Alan S. Blinder, a former Federal Reserve vice-chairman, Princeton economics professor, and NAFTA-WTO supporter, says that 29 to 38 million American jobs could be offshored in the foreseeable future.[9] The majority of the jobs Blinder identified are not in manufacturing.[10] Indeed, according to Blinder's data, American workers with at least a four-year college degree are those most vulnerable to having their jobs offshored.

Polling data demonstrate that Americans of all political stripes are increasingly worried about the impact of trade agreements on their lives and livelihoods. Among Americans who say that trade deals have impacted their families, nearly three out of four say that impact has been negative.[11] Sixty-one percent of Americans believe "free trade" costs U.S. jobs, and 56 percent believe it lowers wages. Only nine percent believe "free trade" creates U.S. jobs, and only eight percent believe it raises wages – results which are consistent across party affiliation lines.[12] In a 2008 poll, by a margin of nearly three to one, likely voters believed that the United States should revise or withdraw from NAFTA.[13]

The global economic crisis, triggered in part by trade agreement rules that allowed risky financial products to be traded across borders unfettered by regulatory oversight, has exposed the weak underbelly of the "real" U.S. economy. Even before the crisis, a National Academies study found that U.S. employers will continue to demand mostly lower-skilled labor for the foreseeable future, projecting that occupations like hospitality and restaurants will have the greatest labor demand in the coming decades.[14] The recession will only exacerbate the trend toward low-wage service-sector employment. Fortunately, some economists, financiers, CEOs of major firms and even former trade negotiators are beginning to recognize that for the United States to dig itself out of this hole, it will need to reinvigorate the domestic economy and devise a more balanced trading system.[15]

Many state and local officials are acutely aware of these devastating economic trends, and have watched with mounting frustration as Congress has repeatedly approved trade deals that replicated the NAFTA/WTO model, eroding the middle-class standard of living and the "fundamentals" of the real economy. Moreover, in recent years, state officials across the nation have begun to realize that today's trade agreements are no longer mainly about traditional trade matters, such as setting tariffs (border taxes) on goods, but rather implicate a vast array of "non-tariff" or "non-trade" state and local level regulatory issues.

Beginning in the 1990s, with agreements such as NAFTA and the WTO, federal trade officials began including legally-binding constraints on domestic governments' regulation of foreign firms operating within the United States, the level of safety regulations to which imported food and products can be subjected, and even how federal and state tax dollars could be spent when governments sought to procure goods and services. These agreements, which were negotiated with considerable input from an array of business interests, imposed limits on regulation regarding many non-trade matters regulated by states and localities, including: state efforts to expand health care to the poor, initiatives to leverage government procurement dollars to create jobs, and cutting-edge energy and environmental policies to reduce reliance on fossil fuels and address global warming. NAFTA, WTO and the 11 U.S. free trade agreements (FTAs) in effect now with 17 countries are dramatically different from the trade agreements that preceded them. These pacts exploded the boundaries of what was traditionally included in trade agreements, creating previously unheard-of challenges for states' rights. Effectively, these agreements impose a form of international preemption that is designed to establish a uniform global marketplace in which foreign investors, service providers and goods can move without being hindered by domestic policy differences. As explained by the former Director-General of the WTO: "We are writing the constitution for a single global economy."[16] Signatory countries must ensure the conformity of their domestic policies with trade-pact terms. These agreements set binding constraints on federal *and subfederal* non-trade regulatory policy. Federal, state and some local policies that do not conform to the agreements' requirements and constraints are subject to challenge as "barriers to trade" in closed-door foreign trade tribunals established in the agreements. One commenter called NAFTA a "hunting license" for those seeking to challenge state laws in the name of "free trade."[17]

Thus, a range of non-trade issues reserved for state and local governments – including public-health and environmental policies; prevailing-wage laws; "Buy-America" rules and other procurement policies; low-cost health care programs and prescription-drug benefits; state funding for public services, and even local libraries – are under NAFTA and/or WTO jurisdiction. This means that "trade" agreement rules impose limits on the non-trade policy space needed by state and federal elected officials to respond to even the most urgent problems facing citizens.
As illustrations of the problem, in Sections 2 and 3 of this document there are analyses of how trade-agreement rules impact several of the most critical issues of our time: local development and job creation, America's health care crisis, energy independence and climate change. In each of these crucially important areas, trade-agreement rules threaten to chill innovation and curtail the policy options available to legislators.

Demand Grows for a New Way Forward on Trade Pacts at the State, Federal and Global Levels

During the George W. Bush administration, the United States entered into many regional and bilateral trade agreements that have the same troubling provisions implicating state regulatory authority as NAFTA and WTO. Three leftover NAFTA-style agreements that Bush signed in 2007 with Panama, Colombia and South Korea have not been considered by Congress. Many business interests have pushed the Obama administration to bring them to a vote in the same way that then-President Clinton pushed approval of the NAFTA deal that the first President Bush had signed and left for Clinton's first year in office. The fact that the Bush II pacts remain sidelined is not the only sign of change regarding the way in which "free trade" pacts are viewed at the state, national and global levels.

State-Level Developments. In recent years, state and local officials concerned about the NAFTA-WTO model's erosion of states' rights have reinvigorated efforts to protect state regulatory authority and policy space. For instance, in the lead-up to the formation of the WTO in the mid-1990s, 37 state governors agreed to bind their states to comply with the WTO's procurement rules. However, during the Central America Free Trade Agreement (CAFTA) debate in 2005, only 19 governors chose to do so. By 2007, the vast majority of states indicated concern with the overreach of trade agreements' non-trade policy constraints by refusing to subject their states to compliance with the limits on state procurement policy included in proposed NAFTA-style agreements with Colombia and Panama. As a result, governors of only eight states and Puerto Rico signed up their state purchasing agencies to comply with these agreements' procurement chapters – a significant collapse in support since the WTO's procurement agreement a decade earlier.

In 2007, the National Conference of State Legislatures (NCSL) issued a detailed condemnation of federal officials' undermining of states' rights through "trade" policy. In a bipartisan policy statement called "Free Trade and Federalism," the group called for trade agreements that are "harmonized with traditional American values of constitutional federalism," and that "limit preemption of state law" and "preserve the authority of state legislatures." Significantly, the statement calls for U.S. trade negotiators to utilize a "positive list" approach for making service-sector, investment and procurement commitments in trade agreements. (Under the "positive list" approach, only sectors and states listed as having explicitly agreed to be bound to agreements' non-trade regulatory constraints must comply). As explained by NCSL, "this approach allows states to know more precisely the areas of the economy and state authority implicated in a trade agreement and would avoid the kind of serious problems we now face in the area of internet gambling."[18] This last reference is to a 2005 WTO ruling against U.S. laws prohibiting Internet gambling – a WTO ruling that implicated as potential WTO violations numerous state and local gambling laws.

In 2008, NCSL also took a stand against the proposed U.S.-Colombia FTA, an agreement that has proven so controversial that a vote on it in Congress has been delayed time and time again. In its August meeting in New Orleans, the NCSL Standing Committee on Labor and Economic Development voted down the second resolution in three months calling for the association to support the U.S.-Colombia FTA. Nearly a dozen legislators spoke in opposition to the resolution, citing the agreement's inconsistency with NCSL's position on "Free Trade and Federalism." Legislators also shared concerns that a Colombia FTA, as an expansion of the NAFTA model, would not only fail to bring promised development to Colombia, but would result in the offshoring of more U.S. jobs and expose more state laws to attack by foreign corporations in foreign "investor-state" tribunals. These tribunals give greater rights to foreign investors than are granted to U.S. firms operating on U.S. soil, and subject environmental, health and other regulatory policies to challenge from foreign *investors*, not just foreign governments, in foreign tribunals not U.S. courts.

In 2009, NCSL enacted a new policy urging President Obama to honor his commitment to federal-state cooperation by taking concrete steps to ensure that states' rights are safeguarded in international trade agreements. The policy, "Affirming and Strengthening President Obama's Recent Order on Safeguarding Federalism," builds on President Obama's May 20, 2009 orders to heads of executive departments and agencies to avoid preempting state law and asks that these orders be extended to the Office of the U.S. Trade Representative (USTR) in the context of international trade agreements.[19]

State legislatures were active on other fronts as well. Anticipating the June 2007 sunset of federal "Fast Track" trade negotiation authority, over a dozen states seized the opportunity to pass resolutions that year critical of the Fast Track process and in support of a new trade-agreement negotiation and approval system to replace Fast Track. Fast Track was the primary mechanism by which the United States negotiated and entered into NAFTA/WTO-style trade agreements. The Fast Track process did not provide for any meaningful consultation with states, much less an opportunity for state officials to decide if they wanted to be bound to trade agreements' non-trade regulatory constraints.

Joint resolutions calling for a replacement of the Fast Track process passed in the Maine, Nevada and Utah state legislatures. Single-chamber resolutions passed in New Hampshire, Montana, Wisconsin, Rhode Island, Alabama, Hawaii, Pennsylvania and Vermont. Most of these resolutions call for the replacement of Fast Track with a more "democratic and inclusive mechanism that enshrines the principles of federalism and state sovereignty."[20] Citing the fact that international trade agreements now have far-reaching impacts on state and local laws, the resolutions admonish the federal executive branch for ignoring states' demands under the Fast Track process. The resolutions call on the federal government to respect states' desire to be formally consulted and given the chance to decide whether or not to be bound to the service-sector, investment and procurement chapters of future trade agreements. Many, for instance the Wisconsin resolution, call for the inclusion of an "explicit mechanism for ensuring the prior informed consent of state legislatures before states are bound to the non-tariff terms of any trade agreement that affects state regulatory authority [in order] to ensure [that] the United States Trade Representative respects the decisions made by states."[21]

Five states – Maryland, Rhode Island, Hawaii, Minnesota and Maine – have gone a step further than resolutions. These states have passed binding legislation creating a formal procedure providing that state legislatures, not just governors, are consulted and have an opportunity to vote upon federal requests before the state's non-trade policies (such as procurement provisions) are bound to trade agreements. To date, whether USTR will comply with these new state procedures has not yet been tested. The most recent U.S. trade agreements – with Peru, Panama, Colombia, and South Korea[22] – were signed before the aforementioned states implemented these new laws requiring prior informed consent processes with respect to binding the state to conform with trade agreement service-sector and investment regulatory constraints.[23] The new processes for binding state procurement policy to meet trade pact limits also have not yet been tested. The governors of these states opted not to bind their states to these recent trade agreements, thus the new process involving the state legislature was not triggered.

National Developments. This push for more inclusive processes that involve a broader array of interested parties in trade agreement policymaking paralleled progress on the national scene. In 2007, Congress refused President Bush's request for renewal of Fast Track trade authority, choosing instead to allow the delegation of authority to expire. The debate over how Congress should share its exclusive constitutional authority over trade with the executive branch will likely resurface, perhaps as soon as 2010. This debate could provide an exciting opportunity for states to demand improvements in U.S. trade policy – including safeguards for the principle and practice of federalism and a new, more inclusive and transparent mechanism for negotiating and approving trade agreements.

The ground was laid for such improvement in 2008, when the Trade Reform, Accountability, Development and Employment (TRADE) Act was first introduced in Congress by U.S. Sen. Sherrod Brown (D-Ohio) and Rep. Mike Michaud (D-Maine). The TRADE Act was reintroduced in 2009 with over 100 original cosponsors, including legislators from a diverse array of states and political caucuses. This landmark legislation offers a path toward a new globalization policy that can harvest the benefits of trade without undermining the principles and practice of American democracy, including our systems of federalism and checks and balances.

The TRADE Act sets forth in detail what provisions trade agreements must and must not include, and it requires review and renegotiation of some key existing trade agreements. It provides groundbreaking new protections for state sovereignty, recognizing that existing "trade" pacts have inappropriately encroached into states' domestic non-trade policy space. It also describes a new presidential trade negotiation process to replace Fast Track, which dramatically improves federal-state consultations by providing states with authority to determine to which trade-pact investment, service-sector and procurement terms they will be bound. The 2009 TRADE Act, supported by nearly half of the House Democrats including half of the full committee chairs and blocs of representatives from the conservative New Democratic and Blue Dog caucuses, will help frame the debate about the substance and process of an improved U.S. trade agreement policy approach.

Another important development has been a significant shift in the composition of Congress regarding senators' and representatives' views on trade. In both chambers of Congress and from the traditionally "free trade" states like Florida, Colorado, New York and New Mexico, successful candidates in 2008 election races ran on a platform calling for the fundamental overhaul of U.S. trade and globalization policies. There has been a net increase of 35 fair trade supporters in the 111th Congress, including a growing number of Republicans.[24] Through the course of the campaign cycle, candidates ran at least 137 paid television ads specifically addressing trade and globalization issues. This outcome builds on the shift in the fair-trade composition of Congress that occurred in 2006, when the House and Senate saw a net shift of 37 fair traders. Thus, in 2006 and 2008, there was a combined net gain of 72 members of Congress in the fair-trade composition of Congress.

In addition, trade was a hot topic in the 2008 presidential primary. Former Sen. John Edwards focused on the issue prominently, which pushed former Sens. Hillary Clinton (D-N.Y.) and Barack Obama (D-Ill.) into a competition to outdo each other on trade reform pledges. Both promised significant changes to NAFTA and other trade agreements as well as the way that trade policy is made in America. Clinton promised to "fix" NAFTA and called for a "timeout" on new trade pacts.[25] Obama said he would "renegotiate" NAFTA: "While NAFTA gave broad rights to investors, it paid only lip service to the rights of labor and the importance of environmental protection. Ten years later, CAFTA – the Central America Free Trade Agreement – had many of the same problems, which is why I voted against it. We must add binding obligations to the NAFTA agreement to protect the right to collective bargaining and other core labor standards recognized by the International Labor Organization. Similarly, we must add binding environmental standards so that companies from one country cannot gain an economic advantage by destroying the environment. And we should amend NAFTA to make clear that fair laws and regulations written to protect citizens in any of the three countries cannot be overridden simply at the request of foreign investors."[26] Obama made an array of specific written trade reform commitments in response to questionnaires and letters organized by state and national advocates and policymakers.

Global Developments. On the global scene, the "Doha Round" of WTO expansion negotiations launched in 2001 remains deadlocked even as talks continue in Geneva, Switzerland. Indeed, no WTO summit had been convened since a 2005 Hong Kong Ministerial meeting almost led to the same public implosions seen at the 1999 Seattle and 2003 Cancun

WTO Ministerials even though WTO rules call for such meetings every two years. In 2009, a pro forma WTO Ministerial, dubbed a housekeeping session by its organizers, was held at which the Doha Round agenda was intentionally kept off the Ministerial agenda to avoid another public meltdown. After a high-level WTO meeting in July 2008 convened to force action on the Doha Round agenda imploded, WTO expansion supporters feared that one more high-profile rejection would permanently derail the Doha Round.

At issue is an expansion of the WTO's power and scope which has been rejected by many WTO signatory countries since the 1999 Seattle Ministerial meeting when WTO expansion was first attempted. Since then, a small bloc of powerful countries and a large bloc of multinational agribusiness, financial service, energy and other corporations have pushed relentlessly for WTO expansion through the Doha Round agenda. The proximate cause for the current deadlock is various governments' unwillingness to concede on particular themes. However, driving the governments' positions is strong public opposition – in poor and rich nations alike – to expanding the WTO's scope and authority after more than a decade's experience with many of the WTO's damaging outcomes.

While few of the 153 WTO member countries are happy with the Doha Round agenda, the United States, European Union, Canada, New Zealand, Australia and a few developing countries – notably Brazil, which seeks new agribusiness export rights – continue to push the agenda. Meanwhile, no country or bloc of countries wants to be held responsible for ending the talks. Indeed, countries regularly declare that they seek a "rapid conclusion to the Doha Round" and then proceed to list major changes they require to the agenda if they are to agree to a conclusion!

This situation, which the Obama administration could alter by taking a new approach to WTO, poses threats to the interests of U.S. state legislators. If the current Doha Round agenda is allowed to limp to a conclusion, even more important service sectors, now under state regulatory authority, could be put under WTO jurisdiction. This shift in jurisdiction could erode state officials' ability to regulate finance, health care, education, energy services and more. To date, the Bush administration's outdated 2001 Doha Round agenda is standing in as the U.S. position.

Yet, many of the Obama administration's domestic policy goals could be undermined if the Doha Round were completed. For instance, the financial crisis in the United States and Europe was viewed as a critical illustration of the dangers posed by the radical deregulation that is a core element of the WTO's service-sector agreement, the General Agreement on Trade in Services (GATS). The United Nations (UN) Commission of Experts, chaired by Nobel Prize-winning economist Joseph Stiglitz and comprised of financial experts from around the world, highlighted the problem in its "Report on Reforms of the International Monetary and Financial System": "*The framework for financial market liberalization under the Financial Services Agreement of the General Agreement on Trade in Services (GATS) under the WTO and, even more, similar provisions in bilateral trade agreements may restrict the ability of governments to change the regulatory structure in ways which support financial stability, economic growth, and the welfare of vulnerable consumers and investors.* "[27]

Yet, the Doha Round would require further financial service deregulation! And, perversely, the communiqués issued by twenty large-country governments meeting on the crisis in a series of G-20 summits have included a call for the completion of the WTO Doha Round talks even as the communiqués called for worldwide reregulation. Thus, while the *Financial Times* suggested that the crisis may have ended the much vaunted "Washington Consensus" that "free trade," privatization and deregulation are the best vehicles for promoting economic growth,[28] the proposed WTO Doha Round would further this outdated model and existing U.S. WTO obligations on financial services would remain in place and could undermine the regulation efforts being taken by Congress. Thus, for the Obama administration to succeed in its goal of stabilizing the U.S. and global economies, WTO rules must be altered.

Similarly, the Doha Round includes energy services proposals that could undermine policies being considered by the United States and many other countries to combat climate change. An energy neutrality proposal would deem domestic policies that distinguish between types of energy – solar versus coal versus oil versus wind – to be "discriminatory" under trade rules and thus forbidden.

The confluence of events discussed above – and the conflicts between the key challenges policymakers now face and the direction of the WTO talks – reveal that there is now a unique opportunity for state legislators to help set a new course in U.S. trade policy and policymaking. The effects of the financial crisis are now being felt by workers and consumers around the world. Here in the United States, both state and federal policymakers are charged with picking up the pieces. Legislators at both levels are developing innovative ideas to tackle the problems of job creation and local development, skyrocketing energy costs, many Americans' lack of healthcare, and the problems posed by global warming. These critical policy challenges will highlight why existing "trade" agreement rules, which conflict with many promising policy solutions to these crises, must be altered. Policymakers must be free to effectively address these challenges without being handcuffed by non-trade related constraints contained in "trade" agreements' service-sector, investment and procurement chapters.

At some point in the coming years, President Obama will likely ask Congress for some form of trade negotiation authority. Anticipating such a debate, states now have a unique opportunity to play a key role in developing a Fast Track replacement that ensures future trade agreements promote robust trade flows for their states, while safeguarding federalism and states' right to regulate in the public interest.

Today's "Trade" Pacts Impose a Form of Backdoor Preemption of State Regulatory Authority

In the waning days of the 110th Congress, public-interest groups and state officials discovered that a bill imposing massive preemption of state authority – via international trade agreements – was being expedited and sent for a floor vote despite never having been reviewed by the full congressional committee of jurisdiction. Unbelievably, in the midst of the financial meltdown, the proposal would have used international trade agreements to undermine existing state insurance regulation.

The controversial bill, the Insurance Information Act (HR 5840), empowered the U.S. Department of Treasury to *enter into* international trade agreements on insurance without congressional debate or approval and unilaterally interpret existing trade and other commercial agreements' insurance-related requirements, and then preempt state insurance regulation on the basis of conflicts with those agreements. The McCarran-Ferguson Act grants states the exclusive authority to regulate insurance in the public interest. While federal bank regulators had been asleep at the wheel, contributing to the 2008 meltdown of federally-regulated banks and investment firms, states have done a comparatively good job of regulating the insurance industry for solvency and stability. Only one major insurance firm, AIG, has been implicated in the financial crisis, and it was the firm's federally-regulated financial-services holdings that sparked its rapid demise – not its state-regulated insurance holdings.[29]

In contrast, the Insurance Information Act in effect created a "globalization czar" at Treasury with the power to single-handedly overturn state consumer-protection law and micromanage state-level insurance enforcement actions or regulatory decisions that conflicted with "international insurance policy" as established by the Department. The insurance globalization czar would be empowered to enforce key trade-agreement rules against states, *even when no other signatory country to a trade agreement had challenged a U.S. state law or won a trade suit against the United States*. The Treasury would be allowed to make the determination of a state policy's inconsistency unilaterally and preempt the state policy by merely publishing its determination in the Federal Register.

Explaining what was at risk, the Maine Superintendent of Insurance said the bill would "give one person the power to invalidate state insurance laws that are perceived as 'inconsistent with' international agreements. These laws would not be limited to international affairs, but could include long-established state insurance laws regulating purely domestic markets, such as licensing laws or laws requiring the use of U.S. statutory accounting principles. All of this would be done without any of the protections provided by the U.S. Constitution when international treaties are negotiated and Congress preempts state law."[30]

The Wisconsin Insurance Commissioner vigorously protested the bill, saying that it "creates an unaccountable federal process that produces deregulation of the insurance industry to the detriment of consumers."[31] In a strongly worded letter, NCSL declared that "the determination as to whether or not a state insurance law is in violation of an international agreement or treaty should not be made by an unelected federal bureaucrat who holds no responsibility to the American consumer."[32]

The powers that the bill proposed to grant to the Treasury could have undermined vital consumer protections in the American insurance market:

- State branching and subsidiary requirements for licensed insurers could have been undermined, allowing overseas insurance firms operating be-

yond the reach of U.S. regulation or courts to sell directly to U.S. consumers. Imagine the enormous risks that would be created if vulnerable American consumers could be targeted by foreign firms to buy life, auto or home insurance over the Internet without recourse to justice in U.S. courts should the firms fail to honor their obligations.

- State enforcement actions against risky or fraudulent foreign insurers could have been undermined or overturned by empowering the globalization czar to second-guess every regulatory decision or enforcement action considered "discriminatory" toward foreign firms and governments.

- State collateral requirements for foreign reinsurers could have been reduced or eliminated. These requirements ensure that overseas firms that are not subject to the U.S. court jurisdiction as U.S. firms have the resources to guarantee the insurance policies they underwrite in the United States. The financial stability of domestic insurance firms would be put at risk if state regulators are prevented from ensuring that foreign firms can meet their financial obligations here.

- The elimination or modification of "discriminatory" legal form requirements (i.e. the requirement for U.S. incorporation in order to provide insurance services in the United States) could have encouraged domestic insurers to join the offshoring race-to-the-bottom that has wracked the U.S. manufacturing sector.

Quick action on the part of concerned state officials, the National Conference of Insurance Legislators (NCOIL), and a coalition of concerned consumer and labor groups helped to prevent a vote on the matter in the 110th Congress. Perversely, the bill – which would impose a new ceiling on state insurance regulation – reappeared as an amendment to the major congressional financial reregulation package in the 111th Congress. Thanks to efforts of consumer-conscious state legislators who are now in Congress, such as Rep. Jackie Speier (D-Calif.), the worst aspects of the proposal were removed. However, as the first session of the 111th Congress closed, the proposal was still being discussed in the context of the Senate financial reregulation bill.

However, few members of Congress who were asked to vote on the proposal likely even knew that U.S. trade negotiators in the 1990s had bound wide swaths of the U.S. insurance sector to comply with the deregulatory terms of the WTO service sector agreement, GATS. Nor did they know that many of our most powerful trading partners consider the very existence of state-level regulation of the insurance market to be a trade barrier. These countries want their insurance firms to be able to apply for one U.S. insurance license and then be permitted to operate nationwide without dealing with differing state-level regulatory constraints. For instance, every year the European Union (EU) lists "Insurance Market Fragmentation" in the United States as a primary concern in their annual accounting of U.S. trade barriers: "A remaining impediment for EU insurance companies seeking to operate in the U.S. market is the fragmentation of the market into 56 different jurisdictions, with different licensing, solvency and operating requirements….The decentralized U.S. regulatory/supervisory structure entails heavy compliance costs for EU companies in each of the 56 jurisdictions."[33]

This congressional proposal to use international trade agreements to preempt state non-trade regulatory space is just the most recent illustration of the conflict between over-reaching "trade" agreements and federalism. Backdoor preemption of state authority has become part and parcel of globalization under pacts such as WTO and NAFTA. Before continuing to a discussion of what state and local officials can do to remedy this situation, it is necessary to review the roots of the problem.

1 Primer: “Free Trade” and Federalism

THE PROBLEM IN BRIEF:
States are rarely consulted about trade-agreement provisions that limit their policy space and constrain their regulatory authority.

State Legislatures Feel the Bite of Existing U.S. WTO Obligations

What began as a state legislative effort to protect the children of Maryland from unsafe toys turned into yet another example of the inappropriate expansiveness of “trade” agreement rules. Thanks to a disgruntled Chinese government and the WTO’s expansive limits on regulatory authority, Maryland Del. James Hubbard’s (D-Prince George’s County) bill to ban lead in toys has entered the ranks of innovative state policies considered so-called “barriers” to international trade.

As the number of toys being recalled because of poisonous lead paint grew in 2007,[34] Hubbard became increasingly dissatisfied with the Bush administration’s slow federal response to the crisis. He proposed state legislation that would allow Maryland to conduct its own monitoring of toys and children’s products for lead paint. The bill, H.B. 8, was intended to clear Maryland store shelves of dangerous toys.[35] According to the *Washington Post* it also inspired the Bush administration to get involved – not in speeding up the federal response, but by alerting China to the proposal’s possible WTO conflicts! The *Post* reported that:

> “The Office of the U.S. Trade Representative alerted the Chinese government, which sent a letter from Beijing to protest the bill as a barrier to trade. Lawmakers in Annapolis were unfazed and passed the bill.”[36]

In delving deeper, Hubbard and other legislators were astonished to learn that the U.S. federal government regularly “alerts” the WTO to new food and product laws or regulations proposed at both the state and federal level that might be considered “barriers to trade” by foreign trading partners. In other words, federal trade officials act as a type of global informant, “turning in” federal and state legislators that propose cutting-edge consumer-protection, environmental and other measures presumptively considered to be WTO violations in order to give U.S. trading partners an opportunity to *lobby against* these bills while they are still pending. Indeed, this type of notification is *required* by certain WTO agreements such as the WTO’s Technical Barriers to Trade (TBT) Agreement, which sets the criteria that WTO nations must follow when setting product standards, technical regulations or conformity assessment rules.[37] There are elaborate procedures and databases to facilitate these communications between the WTO governments and the WTO Secretariat.[38]

Hubbard later received another communiqué from the People’s Republic of China, when he introduced a cutting-edge measure to ban a chemical compound called bisphenol A (BPA), from children’s products and cosmetics.[39] Significant concerns have been raised about the safety of BPA, a chemical used in the creation of clear, hard plastics. Scientists have

found that BPA poses risks to human development, including links to early puberty, prostate effects, and breast cancer.[40] New studies showing BPA leaching from heated baby bottles has led many consumer and health groups to call for a complete ban on the use of the chemical in food and beverage containers.[41]

After introducing his BPA-ban legislation, Hubbard promptly receive a four-page letter – in English and Chinese – opposing the measures as a trade barrier under the WTO's TBT agreement. Chinese officials wrote that there is "no specific scientific evidence" proving that products containing BPA are hazardous to children and that a ban was not the least trade-restrictive policy option Maryland could pursue.[42] (Under the WTO's TBT agreement governments are required to pursue the "least trade- restrictive" policy option.)

In the end, the Maryland BPA bill did not pass. In a National Public Radio interview, Hubbard expressed his consternation: "This was a public health issue, not a trade issue."[43] Fortunately, legislators in California, Connecticut, Hawaii, New Jersey, New York, Maine, Massachusetts, Minnesota, and Pennsylvania have taken up the call and have proposed elimination of BPA from key consumer products. New evidence linking BPA to heart disease may force a reluctant federal government to finally take action as well.[44]

Unfortunately, Hubbard's experience is not unique. Vermont State Sen. Virginia Lyons (D- Chittenden) introduced S.B. 256 in 2008 to require the capture and recycling of certain electronic wastes.[45] Lyons was prepared for complaints from the electronics industry, but much to her surprise, just as the relevant committee took up her bill, she received a letter from the People's Republic of China asking her to "cancel" or "revise" the bill, once again citing an existing U.S. commitment under WTO's TBT Agreement not to create "unnecessary obstacles to international trade."[46]

In April, the Maine Citizen Trade Policy Commission learned of these events and wrote to USTR asking for more information about how and why the U.S. government provides notification about proposed state laws to the WTO.[47] A USTR representative joined the Maine commission's June 2008 meeting by phone and characterized its WTO notification about Maryland's lead-in-toys bill as a "mistake" and said that USTR was rectifying the problem so that it would never happen again.[48] In a follow-up letter, the same official once again promised the Maine legislators that USTR would stop providing WTO with the notifications of state regulatory proposals, stating that "the WTO notification system normally calls for us to notify proposed agency regulations rather than federal or state legislative proposals…We learned several months ago that our notifications had inadvertently included certain state legislative proposals. We have since asked NIST to ensure that it is not inadvertently notifying state legislative proposals in the future." [49] NIST is the National Institute of Standards and Technology, a federal body that does not issue regulations but keeps statistics on policies and conducts testing: it is responsible for searching for federal and state measures and notifying them to the WTO's TBT committee.

These claims and related pledges by USTR were puzzling because the plain text of the WTO TBT agreement clearly requires that notice be provided about mandatory technical standards proposed at the federal or state level in law or regulation. Article 2.9 of the WTO TBT agreement says that WTO members *shall* "notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account." Indeed, the very point of this WTO provision is to facilitate comments from foreign governments to federal and state legislators while policy is being crafted, not after the policy is finalized.[50]

For many months after, the WTO was *still* being notified of state legislative proposals, but the rate of notifications appears to have slowed. A review of the 2009 U.S. notifications to the WTO revealed that the United States continues to report finalized state regulations and enacted state legislation but is no

longer reporting *pending* state legislative proposals. Yet the obligation in the TBT Agreement persists. Rather than rely on promises made by an ever-changing group of federal trade officials, state legislators may want to seek changes to the underlying agreements themselves and work with Congress to make sure these notification requirements are not included in future pacts. Unfortunately, the opposite is being proposed with respect to the WTO service-sector agreement, GATS, in which new rules are being negotiated as part of the Doha Round that would require new notification of pending service-sector regulatory policies.

As states are increasingly facing the unanticipated regulatory constraints of existing trade agreements, legislators from around the country are hoping to ameliorate these problems by seeking a new model of federal-state consultation regarding trade agreements that protects state sovereignty, federalism and states' obligations to regulate in the public interest. Before discussing the model that legislators are advocating, below is a review of the components of the current model.

Trade Agreements Delve Deeply into Matters of State Law and Policy

An increasing number of trade agreements contain provisions that constrict state officials' policy options in the areas of government procurement and the regulation of the service-sector and foreign investment. The WTO, a 153-member international commerce agency headquartered in Geneva, Switzerland, houses 17 major "Uruguay Round" agreements that went into effect in 1995. A number of these, such as the WTO's service-sector and procurement pacts, contain provisions that directly limit state governments' regulatory authority. Beyond the multilateral sphere, the United States has negotiated regional and bilateral agreements such as NAFTA, CAFTA and various bilateral FTAs that contain additional service-sector and procurement constraints and far-reaching limits on the regulation of foreign investment and investors operating within the United States.

These pacts are not so much about trade *per se*, but were designed to establish a global "barrier free" market in which goods and services could move freely without being hindered by differing domestic regulatory policies. The agreements include powerful enforcement mechanisms that ensure that signatory countries comply with the extensive rules. These agreements establish their own extra-judicial, binding dispute resolution systems with tribunals that hear challenges brought by signatory countries against other countries' laws. Unlike international environmental, labor-rights or arms-control treaties, these agreements' enforcement systems allow imposition of indefinite trade sanctions if countries fail to conform their laws to the pacts' terms. In short, the pacts establish a form of international preemption over innumerable areas of non-trade regulatory policy. Many subfederal officials have taken note of the shift from traditional trade agreements that governed federal tariff policy to this new breed of mega-pacts, which impact a wide array of non-trade matters from the regulation of land use and development; to state gambling, education, energy and health policies and more. These subjects of traditional state and local jurisdiction are now covered by trade-agreement provisions and are increasingly caught up in hot-button "trade" disputes, even though the issues at stake have nothing to do with moving goods between countries.

WTO, NAFTA and the various FTAs were not treaties: the U.S. Senate did not ratify them by a two-thirds supermajority vote, as the Constitution requires for treaty approval. Rather, these agreements are "international executive agreements with congressional approval." Congress approved implementing legislation for each deal with simple majority votes in each chamber. The implementing legislation included Congress' official consent to the pact, and also simultaneously approved changes to federal laws to bring them into conformity with the terms of the pacts. Once approved

by Congress, these agreements have the status of binding federal law, which, like other federal law, preempts conflicting state law. The agreements additionally include provisions that explicitly require the federal government to ensure state and local compliance with pacts' expansive non-trade regulatory terms.[51]

For instance, the WTO's service-sector agreement applies constraints specifically to "measures by Members" taken by "central, regional or local governments and authorities; and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities."[52] The WTO requirement that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements"[53] establishes an affirmative obligation on the U.S. federal government to secure the compliance of states and localities with an array of non-trade regulatory provisions. NAFTA requires signatory countries to take "all necessary measures" to ensure observance by state and provincial governments.[54]

Enforcement of Constraints on Policy Space: State Laws Have Been Challenged As "Barriers to Trade"

State and local laws that conflict with the terms of various trade agreements can and have been challenged as illegal barriers to investment and trade. Such challenges can be launched by other signatory governments bringing cases to trade agreement tribunals, which is called "state-state" enforcement. In addition, NAFTA, CAFTA and the other FTAs allow direct challenges by foreign investors and companies, who are authorized to circumvent domestic courts and bring challenges against the United States in World Bank or United Nations foreign investor tribunals to demand compensation for domestic policies which they believe conflict with the new foreign investor rights established in the pacts. This is called "investor-state" enforcement.

If another WTO nation challenges a state policy as a violation of one of the many WTO agreements, the case is heard before the powerful, binding dispute resolution system built into the WTO. WTO tribunals are staffed by a rotating roster of trade lawyers who are not required to have any expertise in the policy being challenged. The rules concerning who may qualify as a WTO tribunalist – for instance having served in the past on a country's GATT (General Agreement on Tariff and Trade, the precursor to the WTO) or WTO delegation or having worked within the institutions – tend to result in inherent bias in favor of the institution relative to challenged domestic laws.[55] There are no meaningful conflict of interest rules, nor do other basic due process guarantees of the U.S. judicial system apply. These tribunals are empowered to judge local health, labor and environmental policies' compliance with WTO rules – without reference to U.S. law or jurisprudence on the matter. In fact, tribunals have ruled against domestic laws 90 percent of the time.[56] (According to Public Citizen's analysis, of the 150 completed WTO challenges, tribunals ruled that domestic laws were WTO-compliant in only 15 instances.)

If a WTO tribunal rules against a state law, policymakers must eliminate or amend the measure; until that happens, the federal government is subject to punitive trade sanctions from other WTO members.[57] WTO trade sanctions can and have been constructed to target specific local economies. For instance, when the Bush administration placed temporary tariffs on imported steel in 2002, the EU responded by "pulling out the electoral map" and placing retaliatory tariffs on products from regions of the United States where they thought President Bush was electorally vulnerable, targeting farm products from the Midwest and textiles in the Carolinas.[58]

There is no legal mechanism that allows a WTO or NAFTA tribunal directly to amend or overturn a U.S. state law. Rather, WTO, NAFTA, CAFTA and

other FTAs legally bind the U.S. federal government to *ensure* that state and local governments comply with trade tribunal rulings by modifying or withdrawing challenged state policies. A past GATT[59] ruling specifically requires that the U.S. government take all constitutionally-available steps to force state compliance, including preemption, litigation and cutting off federal funds.[60] Even small WTO member countries like the tiny island nation of Antigua (which won a WTO case against the U.S. Internet gambling ban, discussed below) have the potential to impose trade sanctions against the United States to apply pressure to the U.S. government if a trade tribunal ordered change of state or federal laws is ignored. For instance, by "suspending" their compliance of other WTO rules (such as copyright terms in the WTO's intellectual-property rights agreement that require Antigua to pay a fee each time certain U.S. music is played), Antigua could impose sanctions that entail a lot of lost revenue for key U.S. industries – creating pressure on federal policymakers to force compliance with WTO rulings.

After an initial wave of WTO cases and NAFTA investor-state challenges, enforcement of NAFTA and WTO non-trade policy constraints has become more subtle. Given that trade attacks on health and environmental laws draw terrible press and controversy and are expensive to litigate, foreign governments and investors have found that merely *threatening* challenges to chill initiatives rather than waiting for their passage and then formally filing against them is a cheaper and politically safer tactic.[61] For instance, after NAFTA threats were raised against a Canadian provincial proposal to institute a single-payer form of auto insurance, the proposal was dropped. Often these cases never come to public attention unless one party leaks the documents. Thus, while there is not a long list of formal WTO or NAFTA cases against U.S. state policies, increasingly state officials have been facing trade-agreement *threats* against state policy initiatives. Moreover, the formal cases that *have* been launched are illustrative of the threats that the NAFTA-WTO model poses to normal state governmental activity and legislative prerogatives. Several WTO and NAFTA cases have targeted state law and policy in the areas of procurement, service-sector regulation and investment:

Various state and federal gambling regulations challenged at WTO. In 2003, the island nation of Antigua launched a WTO challenge of a variety of U.S. federal and state laws banning Internet gambling, which they claimed represented "barriers to trade" in cross-border gambling services under the WTO service-sector agreement, GATS. Various investors had set up Internet gambling websites in Antigua targeting U.S. customers. When U.S. officials started to enforce the U.S. ban, Antigua filed a WTO challenge. U.S. officials responded by noting that the United States had not committed its gambling sector to WTO jurisdiction. A WTO tribunal thought otherwise. In a 2005 ruling, it noted that the United States had committed to WTO a service sector called "other recreational services" which included gambling under some classification systems and thus the U.S. gambling sector was bound and the U.S. Internet gambling regulations violated WTO rules. Happily, the plaintiffs made a technical error in their initial filing (regarding the listing of state laws), and the WTO tribunal thus dropped that aspect of the case.

The astounding WTO ruling (and USTR mistake in inadvertently submitting the gambling sector to WTO) meant that a wide array of state gambling laws became presumptive WTO violations. This included state lotteries, Indian gaming compacts, and state and local policies that ban certain or all types of gambling.[62] Additionally, the panel ruled that in service sectors to which a country has taken WTO commitments, laws that ban certain activities comprise a GATS-illegal "quota" of zero and thus violate "market access" rules even if the ban applies equally to domestic and foreign firms. This is an extremely troubling ruling in that the United States made very broad commitments to market access under GATS for many service sectors and under the ruling in this case, a nondiscriminatory regulatory ban of pernicious or dangerous activities in any of these sectors could be deemed a WTO violation.

However, the tribunal in the gambling case also ruled that the federal government could maintain its laws prohibiting Internet gambling under a narrow exception if, and only if, the United States changed a specific law (related to the use of the Internet to place interstate horse racing bets) that the tribunal found to be discriminatory against foreign gambling operators. After first agreeing to change the non-compliant federal law, U.S. trade officials realized the difficulty in doing so, and pursued various failed strategies to try to convince the WTO that the U.S. laws were already compliant. While the United States dithered, the WTO authorized Antigua to impose $21 million in trade sanctions on the United States. In 2005, 29 alarmed state attorneys general urged USTR to take the only action that would safeguard the diversity of state gambling laws from future WTO challenges: specifically, to take the unprecedented action of removing the entire gambling sector from GATS coverage.[63]

Finally, in late 2007, the Bush administration gave notice to the WTO that it would remove "gambling and betting services" from its WTO commitments. However, under WTO rules, to do so requires negotiation with and compensation for any other WTO country that claims it would lose market access because of the change. Little information was released about negotiations between the United States and the seven WTO signatory countries demanding compensation. After press reports announced that a U.S.-EU compensation deal had been concluded, a journalist filed a Freedom of Information Act (FOIA) request to obtain the settlement document. He was refused – on national security grounds. A Public Citizen FOIA lawsuit helped extract the document which showed that U.S. federal officials have offered to bind new U.S. service sectors to the WTO as compensation – including postal services, warehousing and storage, and research and development and testing services – in exchange for removing gambling.[64] The category of warehousing and storage includes storage of oil and gas – and thus implicates liquefied natural gas (LNG) facilities, a matter of considerable controversy in many states.

LNG facilities include a chain of services that involve the transfer of a volatile frozen fuel from ship to shore and the storage of the regassified fuel. Generally they include a deepwater port or an offshore docking site for marine tankers, a regasification process, on-shore storage tanks and pipelines. The storage aspect of the facility accounts for up to 50 percent of the total capital expenditure. The siting of LNG facilities has generated a great deal of controversy, public protest and press in coastal states because of serious concerns regarding potential damage to air and water quality, seismic safety issues, the catastrophic explosive hazards posed by aspects of the regasification and spills, as well as the risk of LNG facilities or tankers located near population centers presenting a target for terrorism.

The need for LNG imports has not been demonstrated given robust domestic supplies of natural gas, yet some 40 applications are being processed by the federal government. If LNG-related service were submitted to the constraints of the GATS as part of the U.S. compensation deal, reasonable regulatory policies in this sector could run afoul of GATS rules. For instance, the GATS market access rules explicitly prohibit the application of needs testing in covered sectors.[65] This is not a hypothetical concern: at least two states, California and Oregon, have proposed legislation establishing needs assessments for such facilities.[66] If a state consistently denied permits for these facilities under the state authorities provided by the Clean Air, Clean Water or Coastal Zone Management Acts, this too could be interpreted as a GATS market access ban.

USTR officials have said that they had no intention of committing U.S. LNG-related services to WTO. They point to an exception that they listed in their proposed EU settlement deal as evidence that LNG services were not included in their proposal. Unfortunately, a careful review of the interlocking WTO and UN classification systems used to list service sectors being bound to GATS shows that the sector USTR proposed to commit to GATS does include fuel storage and the sector USTR listed as an exception does

nothing to exclude the new commitment from covering LNG-related storage facilities. USTR, in trying to fix the GATS error made on gambling, is poised to accidentally commit LNG-related services. As has been noted in letters from an array of state and federal officials on the matter, including from Washington, Oregon, California, and Massachusetts, if LNG-related services are inadvertently committed to GATS, the United States could find itself back at the WTO defending reasonable regulatory policies in a sector far more controversial than even Internet gambling. To date, USTR has refused to amend the proposed settlement, but luckily the deal has not been finalized because not all countries have completed their compensation deals – thus providing an opportunity for states to continue to weigh in on this matter.

Remarkably, the federal government has not sought Congress' approval for this proposal to expand WTO jurisdiction over more of the U.S. service-sector economy and limit regulation in these sectors – much less consulted with states. The initial gambling dispute and now efforts to fix the problem by committing new U.S. service sectors to WTO provide a stark illustration of how trade rules reach deeply into the domestic regulatory prerogatives of federal and state governments.

The European Union and Japan challenge Massachusetts' Policy Regarding Divestment from Burma. In 1997, the EU and Japan brought a case to the WTO challenging a Massachusetts law – based on the anti-apartheid laws of the 1980s – that was aimed at the dictatorship in Burma. The case focused on the fact that state procurement policy set conditions (not doing business in Burma) regarding what firms could qualify for a contract that extended beyond what was permitted under WTO rules. WTO rules limit supplier qualifications to those that are "essential to fulfill the contract," for instance the firm's technical or financial capacities. Massachusetts officials were flummoxed to learn that their state procurement policies were required to comply with WTO constraints to which they had never agreed. They later learned that a previous governor had sent a letter to federal officials committing to bind the state's procurement laws to meet WTO rules without legislative consultation, much less approval. This WTO suit was ultimately withdrawn before coming to a ruling, after the same business interests that pushed for the WTO challenge won a suit in U.S. court based on a narrow domestic preemption claim that federal policy existed regarding Burma.[67]

However, the U.S. State Department went on to invoke the WTO attack on Massachusetts' law in its successful lobbying campaign to derail Maryland's passage of similar legislation, which banned procurement with firms operating in Nigeria. (The Maryland measure was targeted at pressuring the Nigerian dictatorship to stop its massive human-rights violations which included executions of political opponents challenging environmentally and socially destructive oil projects.) U.S. federal government officials descended on the Maryland state capital, lobbying to kill the proposal, which had been expected to pass easily. The federal government's case was that the proposal violated trade rules and one of the leading arguments was the example of how a similar Massachusetts law had drawn a WTO challenge. In the end, the Maryland bill was defeated by a single vote.[68] Today, dozens of states are proposing similar procurement policies against the governments of Sudan and Iran.

NAFTA Attacks on State Law. Foreign investors have used NAFTA's investor-state enforcement system more than a dozen times to directly attack normal governmental activity at the state and local level in the three NAFTA member countries. With regard to cases against the United States, aspects of the state tobacco settlements, which have resulted in a dramatic drop in the rate of teenage smoking in the United States, are being challenged by Canadian tobacco traders.[69] California's ban on Methyl Tertiary Butyl Ether (MTBE), the gasoline additive and water pollutant, was challenged by a Canadian investor.[70] A Canadian mining firm brought a NAFTA suit over a California law that requires reclamation of open-pit, cyanide heap- leach mining sites.[71] A particularly shocking trend has been the number of U.S. domestic court decisions that have been challenged in NAFTA trade tribunals. A NAFTA tribunal ruling in one such case, involving the challenge by a Canadian funeral conglomerate of

a Mississippi jury award in a private contract dispute, demonstrates that few domestic court decisions are immune from a rehearing in a NAFTA trade tribunal – not even decisions by the highest court in the land.[72] Most recently, a Canadian drug company is suing the United States under NAFTA because it was not clearly granted the right to manufacture a generic version of a Pfizer drug by the U.S. court system.[73] In another recent case, a U.S. firm has filed a NAFTA suit against Canada's national and provincial health care delivery systems after being frustrated in efforts to open a private surgical center.[74] These cases are discussed further in Section 4 of this *Guide*.

States' Role When State Laws Are Challenged. State and local officials have no standing before either the state-state or investor-state trade-agreement enforcement tribunals and must rely on the federal government to defend a challenged state or local policy.[75] After state officials protested, provisions were added to the WTO implementing legislation and NAFTA's nonbinding administrative report that call upon federal officials, at a minimum, to notify and consult with states on disputes that affect their interests.[76] Notably, the texts of the agreements themselves recognize only the role of federal officials in defending challenges of state and local laws and policies.

When California's ban on the gasoline additive MTBE was challenged under NAFTA, federal lawyers relied upon the expertise of four lawyers in the California attorney general's office. These lawyers worked hard on this case and report a generally cooperative relationship, but they were not allowed to speak in front of the trade tribunal or otherwise formally participate in the litigation. While federal lawyers ultimately prevailed and received $3 million in compensatory legal fees, the California lawyers were not compensated for their time and hard work. It has yet to be seen if the federal government will compensate the California attorney general's office for the time of the state lawyers who worked hard on a more recent NAFTA case involving a Canadian mining operation's challenge to a California mining reclamation law.

Current Federal-State Trade Consultation Mechanisms Leave Much to Be Desired

While the federal government generally works cooperatively with states and state international trade offices in the area of export promotion, in other very important areas, consultation has been extremely limited or nonexistent. USTR relies on a severely flawed, outdated system for consulting states on most trade-related matters. The current consultation system was largely designed back in the 1970s, when the Fast Track trade negotiation procedure was established. The premise behind Fast Track and the federal-state consultation system was that trade agreements covered only traditional trade matters, such as tariffs and quotas, over which states have no authority.

Since the early 1990s, NAFTA, WTO and the FTAs that followed have thoroughly shattered that assumption in that they delve deeply into numerous matters under state jurisdiction. Yet, the consultation system has not been updated to reflect this enormous shift. State governments were first challenged to examine the issue of federal-state consultation on trade matters in the 1990s as the negotiations of the WTO and NAFTA were wrapping up and these pacts' extensive scope was revealed to affect state authority. Given that little consultation had occurred as the pacts were being negotiated, state officials' alarm – and the prospect that it could make passage of the pacts even more difficult – resulted in some accommodations relating to how already-signed pacts would be implemented domestically. The most relevant such accommodation had to do with *how* the federal government would preempt state law to force compliance with trade agreement enforcement rulings. The trade agreements' domestic implementing bills required that when the federal government sought to force state compliance after state policies were successfully challenged in trade tribunals, the federal government had to initiate a formal court case to preempt the state law – rather than simply issuing a regulation doing so or threatening to cut off federal funding or otherwise pressuring a state.

Unfortunately, federal-state consultations *during* trade negotiations have not been significantly improved since WTO and NAFTA, despite some changes to process described below including establishment of the state "single point of contact" (SPOC) system. The federal government has simply presumed it has the authority to commit all levels of U.S. government to comply with trade pacts' sweeping non-trade regulatory constraints – without obtaining consent by subfederal governments (except with respect to procurement) and often without giving meaningful notice to states about the contents of negotiations that are underway that affect their authority.

Now the question of improving federal-state consultation on trade agreements has a new urgency. First, President Obama's future request for trade authority provides a unique opportunity to truly transform the old, inadequate system. Second, negotiations currently underway and those likely to be launched greatly implicate state authority. If the WTO Doha Round's current agenda is continued, these negotiations will implicate a vast array of new matters now under state and local control to WTO jurisdiction. In addition, the Bush administration launched negotiations on an investment agreement with China and an additional NAFTA expansion agreement with four Pacific Rim countries, including New Zealand, Vietnam, and Brunei, shortly before the 2008 election. President Obama has recently stated that he intends to take up these new negotiations. Thus, in bilateral and multilateral venues, federal trade officials are actively negotiating legally binding commitments regarding higher education, professional licensing, construction, insurance, energy, hospital facilities, rental/real estate, zoning, retailing and many other service sectors normally regulated by states and localities. Yet, the federal-state consultation process now in place is woefully inadequate. Key components of the current limited system of federal-state consultation include:

Rare Direct Consultation. On rare occasions, the federal government directly consults with states in the form of a letter to the governor. This consultation usually involves the federal government requesting states to bind themselves to an agreement's *government procurement provisions* only. Regarding trade agreements' other non-trade rules covering service sector regulation, food and product safety standards, zoning, and investment regulation, USTR simply binds states to comply without asking for consent. And, even regarding procurement, under current consultation processes, state legislatures are kept out of the loop even though legislatures, not governors, set state procurement policy. Thus, even in the rare circumstances when USTR consults directly, the consultation is not designed to ascertain the wishes of states, but rather of individual governors.

USTR claimed that "state commitments to cover government procurement in trade agreements are voluntary; a state decides whether, and the extent to which, it will cover its procurement under the new agreements; a state decides the manner in which it will make a commitment to cover its procurement; [and] a state may exclude sensitive goods and services."xliv However, in practice, USTR has refused specific state requests to list some state laws as exceptions (*i.e.*, listing state laws that would not be required to comply with the agreements' constraints) when governors have signed on to past trade-pact procurement rules.[77] For instance, in 2004, Governor Gary Locke of Washington submitted a list of laws he wanted USTR to exclude as a condition of his binding Washington State to comply with CAFTA's procurement rules.[78] USTR Robert Zoellick failed to include Locke's reservations for sensitive Washington State procurement policies, and instead listed the state as bound to CAFTA procurement rules without any exceptions. Unfortunately, this example is not the only evidence demonstrating the lack of commitment to the USTR promise that states can define participation in trade pacts' procurement rules on their own terms. USTR also expressed its reluctance to work cooperatively with states when it flatly rejected a 2005 proposal by NCSL to simply copy state legislatures on trade-related communications by USTR to governors.[79]

Indirect Consultation on WTO Service Sector Agreement and Other Matters. USTR occasionally sends communications about pending trade agreements via a SPOC system. The SPOC system, established by the Clinton administration in the mid-1990s after state officials raised concerns about WTO and NAFTA, established a federal-state consultation process based on the designation of a single person to receive USTR communications within each state. Then and since, state SPOCs are usually someone in the state's Washington, D.C. office or the state's Department of Commerce whose activities focus on export promotion. Many states' designees lack the expertise to understand the domestic regulatory impacts of trade agreements and are often unaware of the significance of their role with respect to state regulatory authority. Often, legislative leaders or other state officials with enormous interest in trade talks do not even know who serves as their state's SPOC. As a result of this flawed system, important communications from USTR often are not reviewed by state officials with interest or expertise in the matter at hand, and are not always shared with the appropriate branches of state government and the appropriate state elected officials. The SPOCs have been the primary avenue of federal-state consultation over the ongoing WTO service-sector negotiations, and the result has been a haphazard response from inappropriately low-level state employees. NCSL has recommended that USTR move away from its reliance on SPOCs and develop a more effective system of communication with state and local officials that incorporates the legislative as well as executive branches of government.[80]

IGPAC – One of 27 U.S. Executive Branch Trade Advisory Committees. The Intergovernmental Policy Advisory Committee (IGPAC) is one of the 27 advisory committees of the federal trade advisory committee system. This system was originally established by Congress in the 1974 Trade Act, which also established Fast Track. The advisory committee system was designed to obtain private-sector input on

trade negotiations that might otherwise have come through Congress but for Fast Track newly limiting Congress' role to a perfunctory vote after negotiations were completed and the pacts signed.[81]

IGPAC is made up of approximately 24 members who are appointed by and serve at the behest of the president. Some IGPAC members neither serve as elected public officials nor work for state governments. The vast majority of presidential appointees to the federal trade advisory committees represent large businesses and campaign contributors focused on exports and overseas investment. The total federal trade policy advisory committee system consists of 700-plus advisors, meaning that state and local governments vested with formal legal authority over many of the policy matters under discussion in trade negotiations represent a tiny minority of advisors relative to private- sector advisors promoting their various commercial interests .[82]

Unfortunately, because of the composition of the advisory system and its operating rules, recommendations made by IGPAC members and the handful of other trade advisors sprinkled into various other advisory committees, who do not rubber-stamp administration proposals are easily ignored. Moreover, federal trade officials set the agenda regarding the topics to which the advisors provide input. Thus, even though IGPAC exists to provide a state and local perspective on trade matters that impact state and local regulatory authority, IGPAC was not consulted about the new service sectors the United States was planning to sign up to the GATS as compensation for taking back "gambling services" after losing the WTO Antigua gambling case (discussed above). Some of the service sectors proposed for new WTO commitment, such as "storage and warehousing services" will have significant implications, limiting domestic regulatory options regarding the size, location and number of gas, oil and chemical storage facilities.

IGPAC operates under numerous constraints, starting with the fact that it does not include representation from all 50 states. Indeed, many IGPAC advisors represent associations of state and local officials. Those advisors who do represent states operate under significant limitations that undermine their ability to function successfully. For instance, the Bush administration began making the text of various trade agreements and negotiation documents classified – for alleged national security reasons – to try to limit who can have access to them. This is a relatively new practice that has not yet been tested in court. All trade committee advisors must undergo a background check and receive a national security clearance. IGPAC and other trade advisory committee members can be criminally prosecuted for giving classified documents to any other state official (even their own governors) or other individuals who have not been cleared for this purpose. However, even without documents being classified, IGPAC members are forbidden from sharing documents, even with their states' elected officials. They are extremely limited in what they can even say about IGPAC matters.

Moreover, IGPAC does not receive any federal funds or have independent counsel or professional staff to support the challenging task of analyzing complex trade matters. There are no federal funds even to fly IGPAC members to Washington, D.C. for face-to-face meetings. While IGPAC members have worked hard to fulfill the committee's obligation to weigh in from a state perspective on important trade issues and agreements, the severe constraints imposed upon members, the lack of representation from all states as well as the lack of resources and staffing make IGPAC an insufficient mechanism for representing state interests in trade policymaking.

At the Root of the Problem is Fast Track Trade Authority

The disregard for states' authority and jurisdiction by federal trade negotiators has not been caused by any particular president or administration's personal animosity to federalism. Rather, the blighted condition of federal-state consultation over trade matters is a bipartisan practice rooted in the use of extremely outdated processes for the negotiation of U.S. trade agreements. Presidents of both political parties have concentrated power to ride roughshod over state sovereignty and the principles of federalism through the use of what is known as Fast Track trade authority.

Public Citizen's 2008 publication, *The Rise and Fall of Fast Track Trade Authority* reviews the development and history of the Fast Track mechanism, which delegates Congress' exclusive constitutional authority to set U.S. trade policy to the executive branch.[84] In brief, Fast Track trade authority (renamed Trade Promotion Authority by its supporters in 2002) was first developed by President Nixon and implemented in 1974. While hundreds of trade deals were approved without Fast Track, the most controversial – such as the WTO and NAFTA – would not have passed without it. Fast Track was utilized to prevent a wary Congress from exercising its exclusive constitutional authority to set the terms of U.S. trade policy, or from exercising its normal oversight, debate and amendment rights.

Since 1974, Fast Track has been reauthorized five times, although it also has had lapse periods, including for eight years between 1995 and 2002 – most of the Clinton administration. Fast Track was Nixon's idea of how the executive and legislative branches should coordinate connected constitutional authorities: Congress has exclusive authority over the contents of trade policy, while the executive branch has exclusive authority to represent the United States to foreign sovereigns. Nixon's Fast Track effectively delegated all of Congress' authority over trade agreements to the executive branch, eliminating critical checks and balances the founders wisely inserted into the Constitution regarding trade policymaking.

As discussed in Section 6 of this *Guide*, Fast Track authorizes the president and USTR staff to determine the countries with which the United States will seek agreements, decide the desired content, negotiate the trade agreements, sign them and then send the final trade package to Congress with implementing legislation to conform U.S. law to the pact's rules. Under Fast Track, Congress' role is strictly limited to a "yes" or "no" vote on the final package *after* the agreement is signed, with limited debate and no amendments. Not surprisingly, since NAFTA and WTO, each attempt to get Congress to cede so much authority with Fast Track is a *battle royale* in Congress. In 1995 and 1997, legislation authorizing Fast Track was withdrawn to avoid sure defeat, and in 1998, another attempt to obtain Fast Track was actually voted down by a majority of the House. The mechanism was ultimately re-established in 2002 for a five-year period – by a two-vote margin after a two-year effort.

While Fast Track's design strictly limits Congress' role in trade policymaking, it completely *excludes* any meaningful role for states, despite the array of non-trade regulatory issues under state authority that trade pacts affect. The only way to get better trade agreements, and thus better results, is to secure a better process – one that ensures a meaningful role for states and their elected representatives in trade policymaking.

The 2002 grant of Fast Track given to President Bush expired in June 2007. Congress decided not to grant new authority even though the Doha Round of WTO negotiations was still underway and many more bilateral FTAs were in the pipeline. At some point in 2010 or 2011, it is likely that Congress will receive a request from the new president for some type of trade negotiation authority. Given Congress' ire about the old Fast Track system, concerned state officials have a unique opportunity to participate in formulating a new system to replace the Fast Track model and in so doing ensure that a new negotiating

THE SOLUTION IN BRIEF:

Both state-level and federal-level legislation is needed to ensure that states are formally consulted and state legislatures vote on whether to opt in before being bound to the non-trade regulatory constraints of new agreements.

mechanism establishes a mandatory and meaningful federal-state consultation process.

Other nations with federalist systems have found ways to recognize and respect the authority of subfederal governments in trade policymaking. A new 2008 publication by Public Citizen called Federalism and Global Governance: Comparative Analysis of Trade Agreement Negotiations and Approval Mechanisms Used in U.S. and Other Federalist Governance Systems – reviews the international agreement negotiation and approval mechanisms used by Canada, Belgium and the United Kingdom.[85] These countries' processes generally respect the role of subfederal regulatory authority in international agreement negotiation and approval to a greater degree than in the United States.

Particularly relevant are the mechanisms that Canada has successfully used to expand commerce while providing a significant role for provincial governments. For instance, Canada has a mechanism that allows provincial officials to agree to or veto federal trade proposals touching upon regulatory matters under subfederal jurisdiction.[86] The United States would benefit greatly from such a system. At a minimum, what is needed in the United States are mechanisms for ensuring that states give their explicit approval prior to being bound to the non-trade regulatory terms of trade agreements.

There is much that states can do to develop appropriate procedures to handle trade-related information and inquiries from the federal government. However, states also can have a major role in insisting that whatever mechanism replaces Fast Track includes a much more robust consultation system, one that ensures that state legislatures have a formal opportunity to express their consent before being bound to the non-trade regulatory terms of trade agreements. In order to accomplish these goals, a two-pronged approach is needed at the state and federal level.

State Process. States can take action by passing legislation that formally clarifies and clearly provides that *only an act of the state legislature* – not just a governor's actions – can bind a state to the non-trade terms included in any trade agreement that affects subfederal regulatory authority. The recent success of this approach is discussed in Section 5 of this *Guide*. In addition, Annexes 1 and 2 of this Guide contain two versions of legislation that some states have proposed or adopted to implement such a policy change. The first is the "Safeguarding Economic Development in Trade Act," which is based on a bill passed by the Maryland General Assembly and enacted into law in 2005. The second, "Jobs, Trade and Democracy Act," accomplishes the same goal with further components that carry a fiscal impact. It was proposed in the New Jersey Legislature in 2008 and passed by both chambers in 2009.

Federal Process. State legislatures also have a critical role to play in the coming congressional debate when the new president requests some type of trade negotiation authority. Many in Congress agree that the Fast Track mechanism must be replaced and federal legislators are actively discussing the components of a new, more democratic model which (among other things) safeguards the principles and practice of federalism. Similarly, some state legislators have been actively discussing the components of a new model. Section 6 reviews the growing confluence of these approaches.

2 Procurement Rules in Trade Pacts Jeopardize State Legislative Control over State Purchasing Policy

HOT TOPICS:
Trade Pacts and Climate Change, Annex 5

States have been at the forefront of efforts to develop "green-collar jobs" and "new energy economies" by utilizing state procurement policy. States have employed the power of the purse to send market signals, generate demand and create new opportunities – tackling the pressing need for job creation while at the same time addressing climate change and the skyrocketing cost of energy.

According to the Consortium for Energy Efficiency, the 50 state governments and approximately 3,043 county, 19,279 city, and 16,656 town governments in the United States spend an estimated $12 billion per year on energy bills and another $50 to $70 billion per year on energy-related products.[87] This buying power has the potential to trigger a market transformation, increasing the demand for and availability of energy-efficient products *that could be built here in the United States* and new renewable energy systems *that could utilize American-made technology*. States are pursuing hundreds of green-economy-promoting initiatives includes setting green-building standards for all public buildings, issuing policies to promote locally-produced green products and creating a market for renewable-energy technologies by passing renewable portfolio standards and renewable fuel standards.

However, whether states can also promote the development of U.S. green economy firms and jobs is unfortunately a matter in part controlled by trade agreement procurement rules. When Congress passed the major stimulus bill in early 2009, many Americans were shocked to hear that WTO rules limited if and when U.S. tax dollars could be directed to purchase U.S. goods and services for major U.S. infrastructure projects and more. Some 37 U.S. states are also bound to WTO procurement rules which generally forbid giving preference to domestic goods and services when the government makes purchases using American taxpayer dollars.

History. Until NAFTA and the WTO, trade-agreement provisions did not extend far beyond setting tariff and quota levels. Such past agreements did not include binding rules constraining government procurement policy. Unfortunately, adding such non-trade rules was a goal of the first Bush administration and the Reagan administration before it. Thus, the United States was among 26 nations that first negotiated the WTO's Agreement on Government Procurement (AGP) during the GATT Uruguay Round talks which began in 1986 and established the WTO. Thus, the WTO procurement agreement was among those approved when the Clinton administration ultimately pushed approval of the Uruguay Round through Congress in 1994 utilizing Fast Track procedures.

The very notion of setting one-size-fits-all global rules on government purchasing was so strongly opposed by a majority of the nations involved in WTO negotiations that the AGP is one of few WTO agreements that does not automatically cover all WTO signatory countries. Only countries that have opted into the agreement, including the United States and now 39 other mainly developed countries, are covered by its rules.

The goal of the AGP is to open federal and state government procurement contracts to competition from foreign goods and service providers in exchange for U.S. firms being allowed to bid on foreign countries' procurement contracts. With respect to procurement contracts over a set value, the agreement requires equal treatment for foreign firms (*i.e.*, no Buy America or preferences for local producers) and limits the criteria governments can use to describe the goods and services they seek and the kinds of qualifications they may require of suppliers.

The AGP applies only to those purchasing entities that the United States has listed in an annex of the trade agreement (many federal government agencies, 37 states[88] and various entities such as port authorities), and to contracts for goods and services above a certain dollar threshold.[89] In addition to the AGP, there are six other trade agreements in effect covering eleven countries with government procurement provisions that are binding down to the state level: the U.S.-Chile FTA, U.S.-Singapore FTA, U.S.-Australia FTA, U.S.-Morocco FTA, CAFTA, and the U.S.-Peru FTA. The Bush-signed agreements that Congress has not approved with Colombia, Panama and Korea have similar terms. Both Korea and Singapore were already signatories to the WTO AGP. NAFTA and the U.S.-Oman FTA both include a government procurement chapter, but they do not cover state-level procurement.

Federal-State Consultation. While the concept of including procurement rules and negotiation of the actual terms predated the Clinton administration, the endgame maneuvers to determine what U.S. government entities would be bound to the rules fell to President Clinton's trade representative, Mickey Kantor. He bound many federal agencies to the agreement and its constraints on Buy America preferences and other common procurement policies. He also decided to issue requests to state governors that they volunteer to bind state procurement policies to meet the pact's constraints. Although setting state procurement policy is generally the role of the legislative branch of government, state legislatures were not consulted, only governors. In the end, 37 governors sent letters that USTR interpreted as agreeing to conform their state purchasing policies to the agreement.

Early in 2003, U.S. Trade Representative Robert Zoellick then bound the same 37 states – without consulting them – to comply with the terms of the U.S.-Chile and U.S.-Singapore FTAs' procurement chapters. While Singapore was already a WTO AGP signatory, with respect to Chile the federal government simply presumed new obligations for the states. However, in an apparent about-face, Zoellick then sent a letter to all 50 states that same year asking the governors to provide an open-ended authorization committing their states to be bound to the procurement provisions in a list of trade agreements that were then under negotiation.[90] In essence, he asked governors to deposit a "signature card" good for five future procurement agreements, including CAFTA.

Initially, a number of states sent back letters to USTR granting consent. However, as word began to circulate that being bound to the procurement terms of agreements like CAFTA would jeopardize legislation introduced in 30 states that would ban the offshoring of state service contracts, many governors began to reconsider. In short order, a bipartisan group of governors from eight states withdrew their initial agreement to bind their states to comply with the government procurement rules in CAFTA (Pennsylvania, Iowa, Missouri, Maine, Oregon, Minnesota, Kansas, and New Hampshire). Many other governors simply said "no" in the first place. In the end, only 19 governors signed their states to comply with CAFTA's procurement provisions. Most recently, only eight governors were willing to volunteer their states to conform with the procurement policy constraints in the 2007-passed Peru FTA and the signed but not-approved Colombia and Panama trade agreements, indicating rapidly dwindling support for such pacts. (See chart in Annex 4 for information about your state's status.)

> *"It is unacceptable that state legislatures are not being consulted regarding AGP and other procurement-related issues. Under most state constitutions, the legislature has substantial power to enact spending measures and to set up procurement policies. NCSL demands that USTR consult with state legislatures about state procurement practices. USTR should only be able to bind a state to an international procurement agreement following formal consent from the state legislature."*
>
> **– NCSL's "Free Trade and Federalism" Policy, Annex 13.**

Whether a governor's signature alone is an appropriate, or even legal, procedure by which to bind state procurement policy to conform to constraints in international agreements and thus limit future policy options is a critical question. State officials must tackle this question so that proper procedures can be established to ensure that such decisions are made by the state legislative branch, if that is the legal and appropriate mechanism. Some states have already analyzed what their state constitutions require in this regard. For instance, in Washington State, the legal counsel for the House of Representatives concluded that the governor lacked the authority to bind the state's procurement policy to trade agreements, because the state legislature would have to explicitly grant him the power to do so.[91] In 2005, the Maryland General Assembly also studied the issue and decided to take legislative action and pass a bill clarifying that the power to agree to be bound by the procurement terms of any trade agreement rested exclusively with the state legislature and not the governor.

By doing so, Maryland became the first state to require the legislature's informed consent prior to being bound by the government procurement terms of any trade agreements. Rhode Island passed similar legislation in 2006; Hawaii in 2007; Minnesota in 2008; and Maine in 2009. So far, none of these state legislatures have been asked to take action to approve being bound to the procurement chapters of new trade agreements, nor has USTR signed these states on to the procurement chapters of trade agreements negotiated after these state laws were passed.

How the Trade Agreement Procurement Rules Affect State Authority

The procurement rules contained in trade pacts threaten a variety of common state purchasing policies.

"Non-Discrimination" Rule Prohibits Anti-Offshoring Laws, "Buy America" "Buy-state" and Other Economic Development Policies. Each procurement pact requires that states bound to its terms provide the same or more favorable treatment to foreign goods and foreign service suppliers from countries that have signed the agreement relative to what they provide to domestic firms supplying "like" goods and services. This rule, which is called "non-discrimination," means state governments whose purchasing policies are bound by the pacts cannot favor the purchase of local goods or services for economic-development reasons or any other reason. This rule also forbids anti-offshoring policies that require work under state contract be performed in the state or even in the United States.

"Technical Specification" Rules Strictly Limit Criteria that Can Be Used to Describe Desired Goods and Services. The procurement agreements also contain rules limiting technical specifications that states can use when they request bids from companies seeking to provide goods or services. The WTO AGP, for instance, requires that "technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling…shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade…and

that technical specifications prescribed by procuring entities shall, where appropriate, be in terms of performance rather than design or descriptive characteristics."[92] This rule means that procuring entities are prohibited from setting specifications describing goods or services sought based on *how* a good is made or *how* a service is provided. Thus, any requirement that distinguishes products or services on the basis of how energy-efficient they are (*i.e.*, how much energy they use or carbon dioxide they produce) rather than what they do (light a room, drive down the road) could be considered a WTO-prohibited technical specification.

As a result, state procurement policies specifying energy-efficiency or recycled-content standards for products or setting renewable-energy standards conflict with trade pact constraints. Procurement standards focusing on other "production processes," for instance banning products made in sweatshops or with child labor or unsustainable-harvested wood products, similarly run afoul of these rules.

"Supplier Qualification" Rules Prohibit Consideration of Contractors' Labor or Environmental Track Records or Their Willingness to Do Business with Human-Rights-Violating Countries. The procurement agreements also restrict what sorts of qualifications and criteria states may employ to choose suppliers of goods and services. For instance, under WTO AGP, procuring entities must limit supplier-participation conditions in procurement "to those which are essential to ensure the firm's capability to fulfill the contract in question."[93] Thus, states required to meet trade-agreement procurement rules are forbidden from barring contractors based on past environmental, labor rights or worker-safety violations. This rule also forbids state procurement policies that exclude businesses operating in countries with human rights offenses (e.g. the aforementioned WTO challenge of the Massachusetts policy that excluded firms doing business in Burma from state procurement contract bidding). It also could run afoul of requirements that companies be green-certified, pay prevailing wages or provide preferences for suppliers with a unionized workforce.

Consequences for State Policy

If a state procurement policy is judged by a trade tribunal to violate the trade agreement's rules, it must be eliminated or changed. Otherwise, the tribunal could authorize the imposition of trade sanctions until the policy is brought into compliance with the agreement's terms. The prospect of formal WTO challenges of U.S. procurement policies has increased after an explosion of threats related to the 2009 stimulus bill. Many common state procurement policies conflict with the trade agreement rules, including:

Local Job Creation Policies. An array of economic-development policies aimed at making sure that taxpayer dollars are used effectively to create in-state jobs by giving preference to locally-produced goods and services (so-called "Buy-Local" policies common in dozens of states) are prohibited under trade-agreement procurement rules. In addition, at least eight states have anti-offshoring laws or executive orders that apply to state contracts (Arizona, Illinois, Maryland, Michigan, Minnesota, Missouri, Tennessee and Washington) that may be subject to challenge before trade tribunals. A variety of state efforts to create new energy economies at the state level, such as contracts for locally-produced solar panels, wind turbines, or energy efficient products may also run afoul of these rules.

"Green" Procurement Policies. Policies at risk include: requirements for energy efficiency or recycled content in goods or a percentage of energy from renewable sources, as well as preferences for certain environmental or consumer-safety labels and eco-friendly packaging requirements that may have the unintended "effect" of creating an obstacle to trade. Seventeen states and the District of Columbia have laws or executive orders creating "green-build" standards for new state-owned buildings. States are also working to retrofit existing buildings and utilities to

make them more energy-efficient. Contracts conditioned on these types of green-build and green-design standards could disadvantage foreign firms trying to get into the market vis à vis local firms that are already operating at a certain scale under such rules, making them an unintended obstacle to trade.

Policies Targeting Companies' Human Rights, Environmental or Labor Conduct. Under trade-agreement procurement rules, suppliers cannot be disqualified because of the companies' labor, human rights or environmental records or practices. "Sweat-free" rules that ban the purchase of goods from companies using sweatshop labor or child labor are prohibited.

Prevailing Wage, Living Wages and Project-Labor Agreements. Trade-agreement procurement rules place limits on the requirements that can be imposed on contractors. Concerns have been raised that policies requiring a supplier to agree to pay prevailing wages or living wages as a condition for qualifying to bid on a contract could be challenged. This threat exists because such requirements extend beyond "those which are essential to ensure the firm's capability to fulfill the contract in question" which is a standard set for permissible supplier qualifications in the trade pacts. Project-labor agreements that require fair treatment of workers and their unions in order to avoid labor disputes in public works projects also could be subject to challenge under the same logic if agreeing to such terms is a condition for a bidder to qualify for state business.

Pro-Union or Pro-Public Bidding Assistance. Trade-agreement procurement rules conflict with policies that provide aid to employees and unions in bidding for public contracts, and they prohibit laws that require favorable consideration of such in-house bids. Also in conflict with these rules are cost conditions for state contracts that require private bidders to provide substantial savings over public providers, but do not allow savings due to lower wages or benefits to be taken into account.

Policies Targeting Countries' Human Rights, Labor Rights or Other Conduct. Historically, states have used divestment measures to disassociate themselves from firms conducting business with foreign nations that support terrorism or commit grave violations of basic human rights. The many states that established policies in the 1980s of not doing business with firms operating in South Africa helped create economic pressure against the apartheid regime. Eighteen U.S. states have enacted divestment measures against entities conducting business with Sudan in response to the state-sponsored genocide being waged there.[94] There has also been a wave of divestment legislation targeting countries accused of supporting and harboring terrorists, with many states passing such policies with respect to Iran.[95] While Iran and the Sudan are not WTO AGP members, many of the firms doing business in these countries are based in countries that are WTO AGP signatories. Under the trade-agreement procurement rules, U.S. states and the federal government cannot treat foreign companies based in countries with which we have trade agreement procurement obligations differently based on the human-rights, labor-rights or environmental records of the countries in which they are based or in which they operate.

Looking Ahead

Maryland, Rhode Island, Hawaii, Minnesota and Maine have made history by successfully creating a formal "opt-in" mechanism to require a vote by the state legislature before state purchasing policies can be bound to comply with trade agreements by federal trade negotiators. Other states could consider this option that not only demonstrates their support for formal federal-state trade agreement consultation processes but also ensures that states legislatures are given the opportunity to express their informed consent *prior* to being bound to trade-agreement terms. Samples of the legislation passed in the above states that establish a state legislative approval process before a state can be bound to conform its policies to the procurement – and in some states service-sector and investment – rules of global trade pacts are included in Annexes 1 and 2 of this *Guide*.

But, more reform is needed to ensure states' continued success. The decision to consult states with regard to the procurement provisions of trade pacts was made by President Clinton's Trade Representative: it is not written in law. Developing a formal opt-in mechanism to allow U.S. states to decide whether to be bound to the non-trade regulatory constraints contained in today's trade agreements is a reform that is strongly supported by the legislators that Public Citizen surveyed in 2008.[96] In order to bind the federal government and future administrations, federal legislation is needed to ensure that states' wishes in this regard are respected. With sustained support by state legislators, it could be an important component of any Fast Track replacement legislation developed by Congress in the coming years.

For more information on trade and state procurement, please see Public Citizen's Briefing Paper on Procurement: http://www.citizen.org/procurement.

3 Service-Sector Rules in Trade Pacts Limit State Health Care, Energy, Other Policy Options

HOT TOPICS:
Trade Pacts and Health Care, Annex 6
Trade Pacts and Higher Education, Annex 7
Trade Pacts and Financial Regulation, Annex 10

Among the most pressing challenges facing state legislatures are revenue shortfalls exacerbated by the economic crisis, the desperate need for domestic job creation, and the skyrocketing cost of energy and health care. Today's trade agreements include measures that thwart your abilities to address these demands – and in some instances have also contributed to the underlying problems.

For instance, the seeds of the global financial crisis were planted during the original negotiations to establish the WTO, when financial-services firms lead by Citibank, AIG and American Express were intimately involved in developing a complex set of WTO financial service deregulation rules.[97] These firms were able to use the WTO to operationalize their radical deregulation vision and export it to over 100 countries worldwide with the original GATS negotiations and later extended financial services negotiations occurring in the late 1990s. And, they used the WTO to lock in deregulation in the United States. This included the United States agreeing to a "standstill" locking in the level of deregulation in place in the mid-1990s and agreeing not maintain or establish regulations related to financial firms' size and what services one firm may offer. The United States bound a wide array of banking, securities and derivatives, hedge fund and other financial service sectors to these deregulatory rules. The United States also noted in its GATS schedule that it planned to remove conflicts between GATS rules and the New Deal banking stability Glass-Steagall law. The WTO financial service rules encouraged cross-border trade in high-risk financial products, helped to create "too-big-to-fail" multinational financial service behemoths, and required a deregulatory approach in the financial services sector.

There has yet to be a formal dispute case launched at the WTO about financial regulation or the bailouts and other measures used to respond to the financial crisis. However, there have already been rumblings of such, given scores of countries are now breaking their WTO obligations. Some developing countries that were pushed to deregulate and now have been hard hit by a financial crisis blame the United States and are eager to obtain compensation. This dynamic intensifies especially as developing countries watch the United States and Europe use policies to respond to the crisis that they were prohibited from using when past crises hit them. In addition, financial firms are eager to find a means to limit the regulatory trends.[98]

With respect to banking and securities issues, these WTO financial service rules mainly pose a problem to federal policymakers as they attempt to prevent future meltdowns. However, states are also affected as the regulation of insurance is a state function. In addition, the same GATS regulatory constraints that apply to financial services also impose constraints on state legislators' policy options on greening the energy sector, creating green jobs, fixing the health-

care mess by expanding insurance coverage, lowering medicine prices, and regulating hospital and other medical facilities.

History

From the 1947 establishment of General Agreement on Tariffs and Trade until the 1988 signing of the U.S.-Canada FTA (the precursor to NAFTA), trade agreements pertained only to trade in *goods*. However, major U.S. *service* industries – most importantly major U.S. and European banks and financial-service firms – desired global rules to push their way into other countries and to be able to operate there on favorable terms. Thus, the United States was a key proponent of the WTO's GATS, which is designed to limit government regulation over the service economy. Because the U.S. demand to include the service sector in a trade agreement was so controversial, GATS is structured as a "bottom-up" agreement, which means that it applies only to the service sectors (or subsectors) each nation volunteers to bind (or "commit") to its terms.

The GATS was part of the Uruguay Round package of WTO agreements that was pushed through Congress in 1994 by the Clinton administration utilizing Fast Track. As few in Congress ever reviewed the content of the thousands of pages comprising the Uruguay Round package, it is not surprising that Congress approved the binding of nearly 100 sectors of the U.S. service economy to the WTO's regulatory constraints[99] with little discussion, debate or understanding. Yet, the rules of the GATS, discussed below, dramatically limit domestic policymakers' abilities to regulate service sector firms operating within the United States in sectors covered by the rules. That is to say that the GATS rules extend beyond simply requiring that domestic and foreign service firms are treated the same. Rather, the GATS rules simply ban whole categories of regulation even if they are applied on a nondiscriminatory basis.

States were not consulted in any meaningful manner about GATS implications for the service sectors under state jurisdiction. Key aspects of our economy such as financial services (banking and insurance), health-care services, retail services and land use, information services, telecommunication services, media services, transportation services, construction services, cultural services (such as libraries, entertainment and the arts), and certain professional services are bound to GATS. This means that domestic policies in these areas must comply with the constraints contained in the agreement. Some of these services are regulated at the federal level, but most are regulated at the state level.

Because the very notion of including services in a trade agreement was so controversial, many countries limited their commitments. Thus, U.S. negotiators insisted that the GATS include a built-in commitment for continuing new rounds of negotiations to deepen and expand WTO members' service-sector commitments. Accordingly, in 2000 the WTO initiated GATS-expansion talks aimed at increasing the number of service sectors covered by the agreement and expanding GATS rules by establishing new "disciplines" on domestic regulation that would further erode states' ability to regulate service-sector operations.[100]

The 2000 GATS expansion talks were later folded into the Doha Round when it was launched in 2001. Although the Doha Round remains deadlocked, the GATS expansion talks continue and even if the Doha Round is not completed, the "built-in" GATS-expansion effort may continue on another track. During these negotiations, the Bush administration offered to sign up new U.S. service sectors to comply with GATS, including higher education, pipeline transport, and warehousing and storage. This last category covers oil, gas and chemical "tank farms" as well as controversial LNG facilities – a topic discussed in Section 1 in the context of the WTO Antigua case. While many other countries found ways to consult state and local officials about the GATS talks and how to proceed with respect to service sectors regulated under subfederal jurisdiction, U.S. state and local officials have not been meaningfully consulted.

Federal-State Consultation

In the early 1990s, during the negotiations of the Uruguay Round, state officials and their congressional allies were very concerned about the potential for dispute proceedings against state laws. With regard to the GATS specifically, U.S. Sen. Kent Conrad (D-N.D), who first won statewide office as North Dakota's Tax Commissioner, succeeded in getting then-U.S. Trade Representative Mickey Kantor to promise to issue a broad carve-out for state tax policy from GATS rules. Although the promise was issued, no such broad carve-out was included in the final GATS text.[101] Reportedly, the EU objected to this safeguard for state law.

Today, the same disregard for state officials' concerns continues. While USTR seeks consent from governors before committing states to trade agreement procurement rules, it does not request consent before binding states to trade pacts' service-sector rules. Indeed, even federal-state *consultation* regarding what U.S. service sectors regulated by states might be offered up to be bound to GATS in these talks has been systematically inadequate, inappropriately low-level, confusing and "last minute."

For instance, in January 2003, USTR used its state "single point of contact" system, discussed above, to send state SPOCs a dense 400-plus page document regarding the complex WTO service-sector negotiations. Notably, the cover letter sent by USTR focused on the very narrow issue of whether state law exemptions that had been included in the original 1995 GATS agreement needed to be updated because of subsequent changes in state law. Many SPOCs failed to realize – because it was not explained to them in the document – that these complex WTO service-sector negotiations could one day have a significant impact on the future policymaking options of state officials. Many SPOCs were at a loss as to how to respond to this document and failed to do so. There is no evidence that any state legislature was consulted.

The right people were simply not being asked the right questions. For instance, one can imagine the response of a state legislative committee on energy if asked: "Does your state wish to sign up its energy utilities to WTO rules promoting privatization and deregulation?" Or the response of a higher-education committee if asked: "Are you willing to sign up the state's higher-education institutions to WTO rules and perhaps be required to share state higher-education subsidies with foreign for-profit education providers?" The U.S. proposal to bind the higher-education sector to GATS and various energy-related proposals were only two of the crucial issues at play in the GATS-expansion talks.

In Canada, where provincial officials were meaningfully consulted, subfederal education officials were given time to study the issue and commission research and legal opinions. In the end, they decided that the potential risks to higher education – especially to educational subsidies – far exceeded the potential gains, and they effectively vetoed efforts by Canadian federal trade negotiators to offer to bind Canada's higher-education sector to comply with GATS requirements. In contrast, the original 2000 U.S. proposal to bind the higher education sector to GATS authority "went to the World Trade Organization without being seen by the major representatives of the higher education community," according to the Council for Higher Education Accreditation.[102]

The January 2003 USTR letter to SPOCs also claimed that "all commitments made by states would be voluntary and subject to consultation."[103] In truth, states were not being given the information they needed to understand even the narrow question (about updating exclusions) that they were asked, and they were not asked about the truly important decisions (what to bind, and what not to bind). Indeed, it is not clear how well USTR itself understood the complex GATS issues, as evidenced by the errors made by the U.S. trade negotiators uncovered in the WTO Antigua gambling case.

After the USTR document was leaked and several civil society organizations provided an accessible analysis of the issues at hand and began contacting state officials whose jurisdiction would be undermined by the proposals, concerns began to build in various states. Several governors wrote to the USTR, noting that the cover letter sent to the SPOCs stated that commitments would be voluntary. These governors sought to safeguard their states' sovereignty and regulatory options by explicitly asking USTR to remove certain service sectors in their states from GATS coverage.

For instance, on April 5, 2006, Gov. John Baldacci of Maine wrote to the USTR stating, "I write to request that you carve Maine out of new service offers you are proposing in the context of the current Doha Round of negotiations …Your proposal to offer higher education to the constraints of the GATS is particularly alarming …This sector is simply too important to subject to broad and poorly worded GATS rules which are subject to various interpretations by WTO tribunals."[104] Gov. Ted Kulongoski of Oregon, Gov. Tom Vilsack of Iowa, and Gov. Jennifer Granholm of Michigan wrote similar letters to the USTR, as did members of the Maine and California state legislatures. USTR rejected the governors' requests and proceeded as they had proposed. For many state officials, this dramatic dismissal starkly reaffirmed the need for a new system of consultation between states and federal trade officials that could stop such usurpations of state regulatory authority.

"Consultation with state legislatures is absolutely necessary prior to, during and after a General Agreement on Trade in Services round or the negotiation of an FTA including service provisions…NCSL appreciates USTR's invocation of GATS article XXI to withdraw the U.S. commitment [in gambling] and calls on USTR to consult effectively, meaningfully and timely with states as USTR negotiates compensatory concessions to our trading partners. Further NCSL endorses the use of article XXI to withdraw other commitments under GATS that may run counter to state policy, regulatory or policy authority."

– NCSL "Free Trade and Federalism" Policy, Annex 13.

How the Rules Affect State Authority

The GATS covers every conceivable way that a service might be delivered, not only cross-border trade in services. It lists four modes of delivery. Cross-border supply (Mode 1) is what would be considered actual trade in services. For instance, Mode 1 establishes the right for foreign service firms abroad to deliver services to U.S. customers such as setting up an online stock trading account with a firm in another country or offshore data entry firms undertaking U.S. medical transcription, computer helpdesk lines or airline reservations. Consumption abroad (Mode 2) encompasses U.S. residents traveling abroad or sending property abroad to receive a service (*e.g.*, going to India for heart surgery or going to Switzerland to set up a bank account or a U.S. airplane being serviced abroad). Commercial presence (Mode 3) covers terms for foreign investment in the service sector with rules that encourage foreign corporations to set up new operations or buy existing service companies within the United States. Movement of natural persons (Mode 4) is the most surprising to many: the delivery of services by moving human beings across border. That is facilitating the immigration of workers (such as architects or construction workers) to the United States on a temporary basis to provide a service. In sum, GATS opens up a whole new front for wage pressure and the offshoring of service jobs in almost every sector signed up to the agreement while limiting the ability of policymakers to ensure basic consumer and other regulatory protections.

No State Policy Can Alter "Conditions of Competition." GATS' "non-discrimination" rule extends beyond the requirement to treat domestic and foreign firms the same to explicitly require that no domestic policy alter the "conditions of competition" in a way that results in less favorable treatment for a foreign service provider.[105] That means that laws that apply equally to domestic and foreign firms that may inadvertently have a different *effect* violate GATS rules. For instance, in the construction sector, even if the same controls on land use, building regulations and building permits are applied to domestic and foreign service suppliers, they may be found to be more onerous for foreign firms to meet.

State Grants and Subsidies Must be Provided Equally to Foreign Firms. The GATS non-discrimination rule also requires that public subsidies and grants be shared with foreign service suppliers operating in the United States on the same footing as U.S. service suppliers, unless such subsidies were listed as an exemption from GATS in a countries' 1994 schedule of commitments. It is worth noting that the federal government protected National Endowment for the Arts grants from GATS obligations to share subsidies with foreign service providers but failed to exempt any state arts grants or subsidies. In many other service sectors, there are no listed exceptions for subsidies even on the federal level.

States Cannot Limit Foreign Service Operations. The GATS rules guaranteeing foreign firms "market access" to U.S. service markets go well beyond requiring equal treatment.[106] They prohibit U.S. federal and state officials from "maintain[ing] or adopt[ing] either on the basis of a regional subdivision or on the basis of its entire territory" any policies that:

- limit the number of service providers in the form of quotas or by the use of needs testing;
- limit the size of a service provider by limiting the total value of service transactions or assets or on the total quantity of service output by use of numerical quotas or the requirement of an economic needs test; or
- establish public or private monopolies or exclusive service provider contracts.

Under these rules, the hours of operation or size of an operation with foreign owners (for instance, a mega retailer) cannot be limited. Regulatory bans in covered service sectors (such as bans on certain types of gambling or other unsavory or dangerous activity) are considered forbidden "zero quotas" and thus illegal barriers to market entry and presumptive WTO violations.

Government Services Not Exempt. While GATS proponents say that government services are exempt from the agreement's terms, in reality, few U.S. government services qualify for the poorly written exemption to which they refer.[107] (Only services provided exclusively by the government "which is supplied neither on a commercial basis, nor in competition with one or more service suppliers" can qualify, yet most U.S. services are provided both by the government and private companies.) The GATS contains rules on government procurement of services that are equally ambiguous. These GATS rules drag certain aspects of government procurement of services under GATS jurisdiction, such as procurement of financial services and procured services intended for resale, yet state officials have not been consulted about this aspect of GATS even though USTR recognizes state authority in this area. If a nation seeks to withdraw a sector from the terms of the agreement, GATS requires that the nation compensate the other WTO signatory countries for real and theoretical lost business opportunities, making the reversal of ill-advised GATS commitments costly and difficult.

Consequences for State Policy

If a U.S. state-level service-sector regulatory policy is challenged by another WTO member country, the binding dispute resolution system of the WTO decides the domestic law's "WTO legality." Policies ruled against by the WTO must be changed or trade sanctions can be authorized.

Jobs. When U.S. workers expressed anxiety that NAFTA and the WTO would result in the loss of millions of U.S. manufacturing jobs, sympathetically-minded proponents of those pacts admitted that industrial jobs would be lost. However, they promised that in the resultant global economy these pacts would generate new service sector opportunities for displaced industrial workers. Yet in the "new service economy," service-sector jobs are also now being offshored in search of cheaper labor. GATS provisions that label U.S. service-sector regulatory polices "illegal trade barriers" and encourage cross-border trade via the Internet or phone will result in the offshoring of an incalculable number of service jobs, including aspects of the following categories: accounting, taxation, architectural, urban planning and landscaping, environmental services, engineering, computer-related, real estate, market research, management consulting, publishing, media, advertising, communications, telecommunications, financial services, transport services, adult education and more. GATS rules that encourage an influx of foreign workers could contribute to the displacement of U.S. workers and downward pressure on American workers' wages.

Health Care. The United States signed up many "financial services" to comply with GATS strictures, including health insurance. In 2008, 46 million Americans lacked insurance.[108] In 2009, the situation worsened with an estimated 14,000 Americans per day losing their insurance.[109] While states attempt to address this dire situation, many innovative state policy options conflict with WTO rules. Many state-level health care reform proposals, especially those that create a subsidized low-cost health plan that successfully competes with private-sector plans, may violate the GATS rules against establishing government monopoly services or creating exclusive supplier contracts. Proposals that pool risk, regulate premiums and establish minimum benefit packages, may also pose challenges for foreign insurers trying to gain access to the U.S. market. These policies could be attacked for "changing the conditions of competition" and may also run afoul of the market access rules. Moreover, they could be considered a violation of GATS financial service rules, which require signatory nations to allow foreign insurers to offer "any new financial service," including unfair insurance packages.

State efforts to control spiraling drug costs with preferred drug lists have already been threatened with claims of WTO-illegality by industry groups. The United States committed wholesale and retail

distribution services to GATS, without taking an exception for pharmaceutical and other medical supplies. That means that all of the market access rules described above and the terms of competition rules apply. Also, thirty-eight states have needs testing or "certificate of need" (CON) laws intended to bring oversight to the establishment of new hospitals or nursing homes, expansions, and purchases of costly medical equipment that have been demonstrated to fuel skyrocketing health care costs. While the U.S. commitments binding the hospital sector to GATS included an exception for such policies, they were not similarly safeguarded under "construction services" which the United States also committed to GATS. This oversight leaves the CON laws at risk of a challenge from the large number of foreign-owned construction firms in the U.S. market. In order to clear the way for states and the federal government to expand health care coverage and curtail rising health care cost without the threat of a trade challenge, U.S. commitments under the GATS may have to be withdrawn or modified.[110]

Clean, Renewable Energy. The United States committed to meet GATS rules in a sector called "services incidental to energy." This includes "transmission and distribution services on a fee or contract basis of electricity, gaseous fuels and steam and hot water to households, industrial, commercial and other users."[111] Thus, the category U.S. federal negotiators committed to GATS seems to include transport and distribution of electricity and gas when these services are operated by an independent services supplier and not by a vertically integrated manufacturer.[112] Yet many state systems for organizing and regulating public and private electric utilities, as well as rural electrical co-operatives, would appear to violate GATS prohibitions on monopolies or exclusive service suppliers. Further, state Renewable Portfolio Standards (RPS) may constitute GATS violations, as they could be perceived as changing competitive conditions in ways that "discriminate" against foreign distributors of energy. For instance, a preference for locally-developed wind power over Canadian hydro power could be considered discriminatory.[113] Many states are attempting to ban or place an economic needs test upon the construction of new "traditional" coal-fired utilities to encourage the development of more energy-efficient "clean coal" plants. These measures may run afoul of GATS prohibitions on regulatory bans and economic needs tests. Proposed new U.S. GATS commitments in warehousing and storage implicate the environmental, safety and zoning regulations governing chemical, oil and gas "tank farms" as well as LNG terminals and storage facilities. As discussed in Section 1, the siting of LNG terminals is extremely controversial due to the public safety concerns if there is an accident or a terrorist event.[114]

Higher Education. As part of the Doha Round of WTO expansion talks, the United States proposed to commit private and *public* "higher education" to WTO jurisdiction, allowing for the entry of foreign for-profit schools in our market. As a result, state subsidies for public institutions and students could be required to be shared on a nondiscriminatory basis with foreign service providers. Unlike many other WTO signatory countries, the United States has offered virtually unlimited commitments in "cross-border" educational services. This would inundate U.S. accrediting bodies with requests to accredit overseas distance-learning schools. Domestic schools also could be required to accept credits from these overseas operations. Many policies that U.S. states maintain or may pursue to protect students from online scam artists and diploma mills could be considered GATS violations. Moreover, new technology combined with unfettered cross-border supply of educational services is likely to generate further downward pressure on wages for educators.

Land Use. The United States committed "retail services," "franchising" and "hotel and restaurant" development to meet GATS rules, but failed to include any safeguards for local land-use laws that prohibit development in certain areas (such as environmentally-sensitive areas or historic districts) or that place limits on the size or number of retail operations. These zoning and land-use rules are considered to be GATS violations by giant retailers such as Wal-Mart, according to a document the big box retailer submitted to the USTR.[115] These retailers oppose, for

instance, the limits the EU included in their commitments to stop development in areas of "particular historic and artistic interest" and to allow local economic needs testing before certain retail operations can be opened. U.S. negotiators included no such safeguards in the U.S. GATS commitments.

Libraries. The United States committed public libraries, archives and museums to the rules of the GATS without specifying that public funds for these institutions are limited to public institutions only. Since some localities in California, Oregon, Tennessee and Texas are privatizing their local library services and since many aspects of library services (such as on-line compilations of specialty journals, law review articles and other resources) are provided in competition with private-sector, for-profit service providers, they may not qualify for the GATS exception for governmentally-provided services. If foreign firms enter this nascent "market" they could start to demand the same level of subsidization as public library services under GATS "non-discrimination" rules.

Public Transportation. Because the United States failed to exempt public transportation systems from its GATS commitments on "road and rail transport," municipally-owned public transit systems – and even public school bus services – may have to be opened up to competition from private foreign companies to meet GATS obligations to provide market access to foreign firms. Also, public subsidies or grants may have to be shared with foreign service firms on a "nondiscriminatory" basis. States that have begun to privatize road services such as Illinois, Indiana, California, Virginia, and Colorado with 90-year management contracts to foreign firms have unknowingly opened up a new market to GATS rules and may thus be required to subsidize these private toll-ways to the same extent that they subsidize their public road system.[116]

For more information on service-sector regulation and trade, please see Public Citizen's searchable GATS Directory located at: http://www.citizen.org/GATSdirectory.

Looking Ahead

While the WTO's Doha Round talks are now deadlocked, GATS negotiations continue. The election of a new U.S. president and Congress offers state officials a renewed opportunity to educate the executive branch and Congress about their concerns with the manner in which service sectors under state regulatory control are being signed up to WTO constraints without meaningful consultation with state officials. A matter worth careful consideration by governors and state legislatures is why, if states are given an opportunity to sign on to the government procurement provisions of trade agreements, states can't have similar opt-in rights with respect to trade agreements' service-sector provisions.

As part of the Doha Round, the Bush administration developed a negotiating document called a GATS "offer," which listed all the new domestic service sectors the Bush administration was willing to offer up to GATS jurisdiction, including higher education, warehousing and storage, and other services regulated by states. To date, the old Bush position remains standing in as the U.S. position. President Obama must decide whether to support or retract the old offer. As governments have changed in other countries, GATS offers have been changed. So far, the Obama administration has not indicated it will change the U.S. GATS offers made by the Bush administration. Because state officials were not meaningfully consulted in the construction of this offer, legislators may want to seek the retraction of the offer as well as a more permanent mechanism in federal law that would guarantee states a meaningful role in the construction of any new GATS commitments binding state authority.

Legislators may also want to look at the previously existing GATS commitments, especially in health care, to see if they will constrain new state efforts to address America's health care crisis and if so they might consider whether state officials should request that the Obama administration use the GATS process for withdrawing or modifying commitments – as was done with gambling after the WTO Antigua suit. States also have the option of requesting that the Obama administration carve them out from specific sectors of the U.S. schedule of GATS commitments. While the Bush administration took no action on the governors' requests to remove states from GATS coverage in 2004, the new administration may have a different approach to these matters.

4 Investment Rules in Trade Pacts Restrict Policy Solutions to Critical Problems

HOT TOPICS:
Bilateral Investment Treaties, Annex 11

One of the most controversial aspects of NAFTA, CAFTA and similar FTAs is their investor-state enforcement which allows foreign investors (often large corporations) to sue the federal government for cash damages using special foreign trade tribunals that operate outside the U.S. court system when federal or state laws or actions negatively impact their investments. There are currently six NAFTA "Chapter 11" investor-state suits pending against the United States which could reach over $6 billion in damages.

To date, foreign investors have been awarded $204.91[117] million in the eight NAFTA cases in which the United Nations and World Bank tribunals hearing these cases have ruled in favor of the foreign investor. Four investor-state cases have been filed to date under CAFTA, with two targeting mining regulations in El Salvador where communities have been battling foreign mining firms over environmental and other concerns.

The NAFTA investor-state cases have taken on a very political tone. Repeatedly, tribunals have dismissed cases against the United States where policymaker and public reaction to the mere filing of several of these NAFTA attacks against basic regulatory policies has been explosive – yet tribunals have ruled against Canada and Mexico on cases raising similar claims. (The United States has also avoided being ruled against thanks to major procedural mistakes made by the lawyers for corporations filing cases against the United States. This includes one case in which a tribunal issued a ruling agreeing with the corporation, Loewen Group, on the merits of its NAFTA claim against the United States but ordered no compensation after the firm's bankruptcy lawyers reorganized the company as a U.S. corporation and thus terminated its rights to collect as a "foreign" investor.)

Yet even when the United States "wins" a case, it is only after years of legal battles and millions in legal costs – government resources that could have been utilized elsewhere. In some cases, tribunals have ordered losing corporations to pay federal government lawyers' legal fees, but the legal expenses accrued by states have not been reimbursed. For instance, in the Methanex case in which a California ban of the gasoline additive MTBE was challenged by a Canadian corporation, the tribunal ordered $3 million in legal fees be paid to the U.S. federal government to cover its legal expenses. However, the tribunal did not award legal fees for the California state lawyers who worked endless hours helping the federal government defend the California law. Given the pinch felt by all levels of government, the notion that critical government funds and limited legal resources must be spent to battle trade pact investor-state attacks on basic domestic regulatory policies is outrageous. Meanwhile, the mere threat of such cases has chilled innovation repeatedly, such as the Canadian province of Ontario's no-fault auto insurance plan, which was dumped after a NAFTA investor-state threat.

And, because the investor-state tribunals are not bound to any system of precedent, the panels' decisions on key elements of the rules in the past U.S. cases do not provide any guarantees against the opposite outcomes in the pending U.S. cases or the scores of cases against other countries.

The most recent NAFTA investor-state ruling involving the United States came in the Glamis Gold mining case which targeted California laws conditioning permits for certain forms of mining on firms conducting reclamation. The law was premised on both safeguarding Native American spiritual lands and on environmental concerns. Glamis Gold Inc., a Canadian firm with U.S. subsidiaries, was involved in a lengthy permitting process to develop an open-pit, cyanide heap-leach gold mine on federal lands gold mind in Southern California's Imperial Valley. This type of mining is so environmentally deleterious it is banned in many countries and in the state of Montana. To proceed with the proposed mine, Glamis first needed permission from numerous federal and state entities, which reviewed the mine's impact on the environment and on the neighboring Quechan Indian tribe. To address environmental concerns and to protect the religious and cultural practices of the tribe, the state of California promulgated a law in 2003 requiring the backfilling of open-pit mines near cultural sites to return the area to its natural state. Instead of agreeing to the new backfilling requirements as other mines have done, Glamis used NAFTA's foreign investor provisions to demand $50 million in compensation for what it claimed was an "expropriation" or "takings" of its property rights and a violation of its investor rights under the trade pact.[118]

Luckily, in June 2009 the United States dodged the NAFTA bullet when a NAFTA trade tribunal dismissed Glamis' challenge. However, the fact that this case was possible at all – much less proceeded in an investor tribunal for five years – demonstrates what critics of the process have long claimed: The overly broad provisions in NAFTA allow foreign investors to bring claims that would be laughed out of U.S. courts. The law in question was not discriminatory against Canadian firms. It applied equally to domestic and foreign firms and other Canadian mining firms proceeded with their mine projects following the rules. (For instance, Canadian firm Golden Queen Mining Co. Ltd. revised the permitting application for its Soledad Mountain Project which is a gold-silver, open pit, heap-leach mine, to comply with the new California laws.)[119] Glamis never even had a final rejection of its applications for a mine but decided to turn to NAFTA rather than comply with the law and obtain a permit following the California requirements. Indeed, the case should never have been allowed to even get to the merits, as Glamis should not have even been considered a "foreign investor" under NAFTA, given it used its U.S. subsidiaries to apply for permits as only "U.S. citizens" can take advantage of the 1872 domestic mining law that allows U.S. citizens to exploit federal lands.

The Glamis case also highlights the serious problems of the NAFTA investor cases straining limited state and federal resources. The NAFTA tribunal ruled in the Glamis case that each party is responsible for paying its own costs. Even though Glamis Gold's claims were erroneous, neither the U.S. federal government nor the state of California will be reimbursed for the legal defense costs accrued during the lengthy arbitration process.[120] The trade agreement investor-state dispute resolution system is among the major elements of the current trade agreement model that needs to be revamped. Indeed, TRADE Act, legislation introduced in the 111th Congress which now has 132 House cosponsors, calls for investor-state enforcement to never be included in future trade agreements and for NAFTA and CAFTA to be renegotiated to remove such provisions.

History

In 1993, the controversial NAFTA agreement between the United States, Canada and Mexico was pushed through Congress by the Clinton administration using Fast Track. NAFTA was called a "trade" agreement, yet much of NAFTA focuses on investment issues. Extensive new foreign-investor rights and privileges were laid out in NAFTA's Chapter 11 (which has nothing to do with U.S. bankruptcy law despite the similar name). NAFTA establishes new rights for foreign investors to acquire, own and operate a broadly defined category of "investments"[121] within the NAFTA nations (including land, factories

and service-sector firms, stocks, bonds, patents and more), and restricts government regulation of such foreign investors and their investments. Remarkably, this array of new rights and privileges is *privately* enforceable. The agreement empowers foreign investors to directly sue signatory governments in extra-judicial tribunals for cash compensation if they think that their new privileges are not being delivered. These rules and their private enforcement have been replicated in CAFTA and in all of the FTAs since NAFTA, except for the U.S.-Australia FTA – because the Australian government eventually pushed back on the U.S. demand after a massive public campaign in Australia highlighting the record of regulatory laws attacked under the similar provisions of NAFTA.[122] Unfortunately, the same language that appeared in NAFTA and CAFTA is also included in the FTAs Bush signed with Panama, Colombia and South Korea that Congress has not approved.

Specifically, the investment chapters in NAFTA, CAFTA and various NAFTA-style FTAs set a "minimum standard of treatment" that countries must provide foreign investors,[123] prohibit foreign investors from being treated less favorably than domestic investors,[124] ban common performance requirements on foreign investors (such as domestic content laws),[125] and forbid limits on capital movements, such as currency controls.[126] Additionally, these pacts provide foreign investors operating in the United States with greater compensation rights for extended categories of "expropriation" or "takings" than U.S. companies have under domestic law, *including for "indirect takings" or measures "tantamount to" a takings.*[127] These trade-pact investor rules contain no sovereign-immunity shield for governments, a radical departure from longstanding U.S. protections.

Public Citizen has uncovered 62 of these claims filed thus far by corporate interests and investors under NAFTA's Chapter 11. While only a small number of these cases have been finalized, the track record of cases and claims demonstrate an array of attacks on public policies and normal regulatory activity at all levels of government – federal, state and local. The cases have a common theme: they seek compensation for government actions that would not be subject to such demands under U.S. law, and claim violations of property rights established in NAFTA that extend well beyond the robust property rights the U.S. Supreme Court has interpreted are provided by the U.S. Constitution.

During the debate surrounding the 2002 grant of Fast Track authority, dozens of groups and organizations representing state and local legislative and judicial officials weighed in, demanding that Fast Track contain provisions to ensure that foreign investors are not granted "greater rights" in trade-agreement investment chapters than U.S. firms have under the U.S. Constitution. These groups include the Conference of Chief Justices, National Association of Attorneys General, U.S. Conference of Mayors, National Association of Counties, National Association of Towns and Townships, National League of Cities, and NCSL.[128] The next trade agreements negotiated did contain some improvements with regard to the *transparency* of trade tribunal operations but unfortunately failed to meet state and local officials' demands with respect to the substantive rights granted foreign investors – again providing foreign investors greater rights than the U.S. Constitution provides to U.S. businesses and citizens.

During the time-period when Fast Track was operational from 2002-2007, the Bush administration sought to expand NAFTA-style investor rights to new countries via bilateral and regional trade agreements, including the U.S.-Chile FTA, U.S.-Singapore FTA, CAFTA, U.S.-Morocco, U.S.-Oman FTA, U.S.-Peru FTA, and proposed agreements with Colombia, Panama and Korea. USTR also has pushed to put these extraordinary foreign-investor privileges into the WTO, but the majority of WTO member countries have flatly refused. The raft of new agreements with the foreign-investor privileges are sure to spawn new cases against state policies and new liability for U.S. taxpayers, who must foot the bill to defend the cases and pay damages to foreign investors who succeed in challenging state or federal laws. Given some policies attacked under this system have been eliminated, we also face the possibility of having vital environmental health, safety and zoning policies undermined.

Federal-State Consultation

During the negotiation of NAFTA in the early 1990s, states did not have access to key negotiating documents. The few who were aware that NAFTA included new foreign investor rights and the investor-state system became concerned about what details they were being denied. Many associations representing state officials, including governors, attorneys general, and legislators, were particularly concerned about the potential for trade tribunals to rule against state law. Growing opposition by states and state associations in 1993 began to pose a real threat to the passage of NAFTA in Congress. As a result of this vocal state-level opposition, USTR became much more conciliatory toward states, working with state associations to address some of their concerns.

While many of the "concessions" states received during the NAFTA debate were merely cosmetic, states did succeed in pushing federal officials to list an exception that "grandfathered in" existing state laws that contradicted the terms of certain rules (such as the "National Treatment" non-discrimination rule) contained in NAFTA's service-sector chapter and in NAFTA's investment chapter.[129] However, this safeguard does not apply to state policies or action occurring after NAFTA's implementation, and there have been numerous attacks on *subsequent* state law and state court decisions under NAFTA's Chapter 11. Further, the actual foreign investor rules of NAFTA were not altered to address states' concerns at the time and these rules have been largely replicated in agreements since.

States have watched with concern as local government decisions and state laws and actions have been challenged in NAFTA Chapter 11 tribunals. This concern prompted a great deal of activity – conferences, study groups, law review articles and more – focusing primarily on the concern that NAFTA grants greater substantive and procedural rights to foreign investors operating on U.S. soil than U.S. citizens enjoy under the Constitution. In one of the strongest statements, NCSL declared that it would not support the renewal of presidential trade negotiating authority unless this problem was fixed.[130] Most recently, this became an issue in the 2008 presidential primary. Both now-President Obama and then-candidate Clinton repeatedly answered "yes" to the question posed by citizen groups, "Do you support eliminating trade-agreement provisions that grant foreign investors greater rights than U.S. residents or businesses?"[131]

"Following the passage of the North American Free Trade Agreement (NAFTA) in the 1990s, several foreign investors have used the investor-state provisions of that agreement to attack state laws and state court decisions before an international tribunal. By providing access to international investment arbitration by foreign investors, NAFTA and various related Free Trade Agreements (FTAs) provide greater procedural rights for review of claims against U.S. law and policy than would be provided to a U.S. investor under similar circumstances. Consequently, the decisions of these tribunals have had an adverse impact on state sovereignty and federalism…NCSL will only support a grant of presidential trade negotiating authority if such a grant of authority includes a 'no greater procedural or substantive rights' mandate."

– NCSL's "Free Trade and Federalism" Policy, Annex 13.

How the Rules Affect State Authority

Opposition to NAFTA Chapter 11's foreign investor protections and privileges by state and local officials is in part premised on the fact that these NAFTA rules contain provisions that undermine the fundamental legal and constitutional principles upon which the U.S. system of governance and law was founded.

Public Disputes Heard in Private Tribunals. The terms of WTO are subject only to those enforcement actions taken by signatory *governments* against each other. In contrast, NAFTA, CAFTA and the NAFTA-style FTAs establish "investor-state" enforcement systems that allow foreign corporations and investors to directly sue the U.S. government in tribunals operating outside of the U.S. court system to demand compensation for federal, state and local laws and regulations that they believe negatively affect their investments. These cases are decided in private arbitral tribunals operating under the auspices of the United Nations and the World Bank. These arbitration institutions were designed to arbitrate private cases between contractual parties in narrow commercial disputes. Now, however, thanks to NAFTA's Chapter 11 and similar foreign-investor protections in other trade pacts, these private arbitral bodies are empowered to deal with significant issues of public policy. State and local public health, environmental and land-use policies all have been successfully challenged using NAFTA's Chapter 11. Yet subfederal governments have no standing in these tribunals and must rely on the federal government to defend their interests.

Foreign Investors Operating in the United States are Granted Greater Rights for Compensation for Extended Category of "Takings" than U.S. Companies Under U.S. Law. NAFTA, CAFTA and the NAFTA-style FTAs allow foreign investors to demand compensation for so-called "regulatory takings" in cases relating to government actions that would not be subject to such claims under U.S. domestic law. The "Takings Clause" of the Fifth Amendment to the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." In contrast, NAFTA Chapter 11 rules and tribunals departed from these constitutional norms in many ways, including allowing cases over the loss of expected future profits. U.S. law almost never allows compensation for government actions short of actual permanent seizure of real property – for instance to build a road – or for a regulatory action that permanently eliminates all uses and value of an entire piece of real estate for all time. While the U.S. Supreme Court has long held that "mere diminution" in the value of property does not constitute a taking, NAFTA panels have held that "incidental interference"[132] with the use of a property might constitute a taking. Thus, NAFTA Chapter 11 has been criticized for creating a new, international takings standard outside of the U.S. Constitution that grants foreign investors greater rights on U.S. soil than U.S. companies.[133]

Foreign Investors Granted Extraordinary Rights to NAFTA Tribunal Re-hearings of U.S. Domestic Court Cases. A particularly worrisome development has been the use of the NAFTA investor-state enforcement system to attack U.S. state court decisions. In 1998, a Canadian funeral conglomerate, Loewen, used NAFTA's investor-state system to challenge Mississippi's rules of civil procedure and the amount of a jury award related to a case in which a Mississippi firm had sued Loewen in a private contract dispute in state court. A World Bank tribunal issued a chilling ruling in this NAFTA case, finding for Loewen on the merits.[134] The ruling made clear that few domestic court decisions are immune to a rehearing in a NAFTA investor-state tribunal. However, the tribunal dismissed the case before the penalty phase thanks to a remarkable fluke: lawyers involved with the firm's bankruptcy proceedings reincorporated Loewen as a U.S. firm, thus destroying its ability to obtain compensation as a "foreign" investor.

NAFTA's Chapter 11 Contains No Sovereign-Immunity Shield for Governments. This constitutes a radical revision of longstanding U.S. protections and provides yet another example both of how foreign investors are granted greater rights than U.S. businesses operating under U.S. law and how NAFTA's foreign investor rules pose an unusual threat to governments' regulatory authority.

Increasing Questions Regarding the Constitutionality of Investor-State Tribunals. Increasingly, U.S. jurists and legal scholars are questioning the very constitutionality of NAFTA's investor-state foreign-investor protection system. Article III of the U.S. Constitution creates an independent judiciary, separate from the legislative and executive branches of the federal government. Former U.S. Supreme Court Justice Sandra Day O'Connor has questioned the delegation of Article III authority to an increasing number of trade tribunals. "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power,'" said O'Connor.[135] Before the passage of CAFTA in 2005, the association representing state Supreme Court justices passed a resolution stating, "[t]he question of whether the investor-state process is consistent with Article III of the U.S. Constitution raises a sufficiently serious and important issue that [it] deserves prompt, thorough examination as the United States considers negotiating additional trade agreements with various other nations."[136] This thorough examination has yet to occur.

Potential Cost to Taxpayers Could Reach Billions. Foreign investors have succeeded eight times with NAFTA Chapter 11 claims, and foreign tribunals have ordered $204.91 million in public funds to be paid in compensation to foreign firms by governments. As an increasing number of cases are being filed, billions in taxpayer dollars are being sought by NAFTA firms. While the United States has been able to deflect five NAFTA Chapter 11 cases for various technical shortcomings,[137] many more cases challenging U.S. policies are in the wings.

Consequences for State Policy

If a state law is judged by a NAFTA investor-state tribunal to violate NAFTA-granted foreign investor rights, instead of ordering the law to be changed, the tribunal orders payment of compensation to make up for investors' lost profits. The federal treasury – meaning U.S. taxpayers – are liable to foot the bill for the cash damages awarded by the tribunal. The federal government of Mexico already has tried to hold one local government hostage for the funds awarded in a NAFTA case. It has yet to be seen if the U.S. government will try something similar or otherwise attempt to pressure state and local governments to alter their policies to avoid future liability. The following cases illustrate the threat that NAFTA-style investment rules pose to state and local government measures.

Land Use. The Mexican government was ordered to pay the U.S. Metalclad company $15.6 million in compensation in the first of several NAFTA land-use challenges.[138] In this case, a Mexican municipality denied construction and operating permits to a U.S. firm that had acquired a previously existing and heavily contaminated toxic-waste transfer facility. The U.S. firm acquired the site after it had been closed by the local government because of serious contamination problems during its previous operation under Mexican-ownership. Under NAFTA, the local government's insistence that the new foreign investor meet the same clean-up requirements as the previous Mexican owner as a condition for operating was ruled to be a NAFTA-illegal "expropriation."

Public Health. Aspects of the 1998 state tobacco settlements, which have resulted in a dramatic drop in the rate of teenage smoking in the United States, are currently subject to a pending NAFTA investor-state challenge by Canadian tobacco traders.[139] In a previous example of the chilling effect such challenges can pose, Philip Morris threatened in 2004 to

bring a NAFTA investor-state suit against a proposed, groundbreaking Canadian law restricting misleading claims made on cigarette packages.[140] That law never passed. Instead, Canada agreed to a voluntary agreement with the tobacco industry that has allowed them to substitute certain misleading marketing terms for others (i.e., "light" becomes "smooth").[141] Another U.S. investor, Melvin J. Howard, who hoped to operate a private surgical center and was frustrated in these efforts by the public nature of Canada's healthcare system, filed a NAFTA case against Canadian provinces and Canada's national health-care system.[142]

State Court Rulings. Domestic court decisions, like the Loewen decision discussed above, continue to be reheard in NAFTA investor-state tribunals. A new 2008 case involves a Canadian generic drug manufacturer named Apotex that sought to develop a generic version of the Pfizer drug Zoloft when the Pfizer patent expired in 2006. Due to legal uncertainty surrounding the patent, the firm sought a declaratory judgment in U.S. District Court for the Southern District of New York to clarify the patent issues and give it the "patent certainty" to be eligible for final government approval of its product upon the expiration of the Pfizer patent. The court declined to resolve Apotex's claim and dismissed the case in 2004, and this decision was upheld by the federal circuit court and the U.S. Supreme Court. Because the courts declined to clarify the muddled patent situation, another generic competitor got a head-start in producing the drug. Apotex is challenging all three court decisions as NAFTA "expropriation" and trade discrimination. The drug manufacturer is suing the United States for $8 million under NAFTA Chapter 11.[143]

Toxics Bans. Corporations have five times challenged bans or phase-outs of toxic substances or trade in them under NAFTA's Chapter 11. The U.S.-based Ethyl Corporation challenged Canada's proposed public-health and environmental-related ban on the gasoline additive MMT and Canada negotiated a settlement – reversing the policy and paying $13 million to the firm. In a second case, the Canadian firm called Methanex challenged California's ban on the gasoline additive MTBE. The tribunal initially allowed the case to proceed to the merits phase, but then in 2005, in the context of building outrage about the case, ruled that the firm did not have proper standing to pursue the case after all. In explaining its dismissal of the case, the tribunal stated that Methanex, which produced the main component of MTBE but not the chemical mixture itself, had failed to prove that California's ban was sufficiently "related to" the company's U.S. investments.[144] While $3 million in federal government legal costs defending against this challenge were reimbursed, the lawyers from the Office of the California Attorney General who the federal government invited to help with the case were not compensated.[145] Interestingly, in the S.D. Meyers NAFTA Chapter 11 case, a tribunal granted a U.S. firm $4.8 million for a much more tenuous "investment" than that in the Methanex case. In the S.D. Meyers case, a U.S. firm claimed that it had an investment in Canada related to its treatment of PCB-contaminated waste from Canada even though it had no facilities in Canada. Canada had implemented the Basel Convention ban on transboundary trade in hazardous waste several months before the United States, so while U.S. law would have allowed S.D. Meyers to continue to ship the waste to its U.S. facilities, Canadian law banned it. The panel found that "market share" constituted a NAFTA protected investment and ruled that Canada had failed to provide the firm with the NAFTA-guaranteed minimum standard of treatment. Finally, in two pending NAFTA investor-state cases, U.S. companies have challenged Canada's federal phase-out of certain uses of the hazardous pesticide lindane and a Quebec provincial ban on the sale and use of certain lawn pesticides containing the active ingredient 2,4-D.[146]

Looking Forward

The investor-state suits targeting state law and the extensive foreign-investor privileges granted in NAFTA Chapter 11, CAFTA and an increasing number of NAFTA-style agreements have generated an extraordinary level of concern among state and local officials. Neither state governors nor state legislatures are consulted prior to states being bound to the investment provisions contained in trade agreements. This concern has trickled up to become a political concern for federal candidates for public office. Presidential candidates Clinton and Obama both pledged to “fix” NAFTA and future agreements, specifically to address the “greater rights” issue in investor-state dispute resolution. The 2006-2008 elections cycles also brought new expectations and opportunities when 72 fair trade candidates were elected to Congress. These new officials will be more receptive to efforts by concerned state legislators to educate them about problems with NAFTA’s investor-state system and the manner in which states are bound to this system without being given the opportunity to express their prior informed consent. Indeed, the new composition of Congress may present a rare opportunity to go further and press for the removal of those provisions from all future trade agreements or at the very least the creation of a system in which states are granted the right to explicitly opt in or opt out of such provisions. Many members of Congress have already expressed their support for such a mechanism as evidenced by the federal TRADE Act discussed in Section 6.

For more information on trade and investment, please see Public Citizen’s report, NAFTA’s Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005 located at: http://www.citizen.org/trade/nafta/CH_11.

A Spanish translation is available at: http://www.citizen.org/cap11. Also see an update chart of all NAFTA investor-state cases at http://www.citizen.org/documents/Ch11CasesChart-2009.pdf

5 What State Elected Officials Can Do at the State Level to Promote Better Trade Policymaking

The way in which federal officials are negotiating trade agreements that directly and broadly affect state regulatory authority with very limited input from the states amounts to a type of back-door preemption of states' rights. The U.S. Constitution strikes a balance, granting certain powers to the federal government while reserving authority in many areas for state governments. It explicitly grants the federal legislative branch authority to set our nation's trade policy and grants the federal executive branch authority to conduct relations with other nations. Yet as explicitly enumerated under the 10th Amendment to the Constitution, states are empowered to regulate a wide array of industries and issues. It is this "right to regulate" that is being increasingly undermined by federal trade negotiators.

When trade agreements only covered traditional trade matters – such as setting tariff and quota levels, for instance – federal versus state authority was clear. The traditional trade pacts were the federal government's business. NAFTA and WTO exploded the boundaries of what is included in "trade" agreements. However, given there was no discussion or transparent decision to drastically expand the scope of today's international commercial agreements to include an array of non-trade regulatory issues, the implications for state authority were also not considered.

Expressing concern about this quiet but pervasive erosion of states' rights by international trade agreements, 29 state attorneys general wrote to federal trade negotiators in 2005: "*[I]t is vital to maintain the principle that the federal government may request, but not require, states to alter their regulatory regimes in areas over which the states hold constitutional authority…*"[147] States must assert their constitutional sovereign rights against the trade agreements' encroachment and reestablish the important balance needed for our federalist system of governance to function. An important mechanism to help restore the proper balance would be a new system for federal-state consultation and cooperation over negotiation of international trade agreements. The creation of such a system will require both state-level changes and federal-level reforms, discussed in Sections 5 and 6 of this *Guide.*

Maryland Leads the Way Developing a Formal "Opt-In" Procedure for State Legislatures to Consider Whether to Commit to Trade Agreement Regulatory Rules

As noted above, Maryland was the first state to enact legislation that directly addresses the incursion of trade agreement rules into the domestic policy space previously reserved for state legislatures. Maryland's effort to safeguard states' rights in the era of globalization began in December of 2003. That month, Maryland Gov. Robert Ehrlich wrote to the USTR agreeing to bind the state's procurement policies to CAFTA's procurement policy constraints. He made this commitment without consulting the Maryland legislature. Yet setting the state's policy regarding procurement is clearly a legislative function. And, the strong separation of powers language included in the Maryland Constitution prohibits the encroachment by one branch of government into an area reserved for another branch. Ehrlich's action to bind Maryland to CAFTA's procurement rules altered the legal rights and duties of the state in relation to the other parties to the agreement. For example, in procuring goods and services while being bound to CAFTA, Maryland

would not be allowed to give preference to Maryland suppliers or contractors over suppliers or contractors from CAFTA signatory countries.

In 2005, the Maryland legislature decided that it had to take action to prevent this executive-branch encroachment into a legislative matter. The legislature not only voted to rescind the governor's consent for Maryland to be bound to CAFTA's procurement rules, but also enacted a law mandating that only the Maryland General Assembly – not the governor – has the power to bind the state to comply with trade agreements' procurement provisions. The governor vetoed the bill and the legislature overrode his veto. The bill became Maryland law.[148]

Despite this action, USTR refused to remove Maryland from the list of states bound to CAFTA's procurement rules. Maryland legislative leaders were outraged. Rep. Ben Cardin (D-Md.), then of the House Ways and Means Committee and now a U.S. senator, protested to the USTR at a public hearing and demanded that Maryland's law be respected. USTR claimed that since the agreement had already been signed it was too late to remove states. Yet the agreement had not been approved by Congress, and USTR conveniently ignored the provision in CAFTA that allows any party to adjust its commitments or withdraw and add parties bound to the procurement chapter.[149]

In 2006, Rhode Island enacted legislation similar to the Maryland law, and in 2007 enacted additional legislation that required a formal legislative opt-in procedure for the state to be bound to the service sector and investment chapter of trade agreements as well as the procurement chapter.[150] In 2007, Hawaii also decided to take action. Hawaii State Rep. Roy Takumi (D-Pearl City), frustrated that Gov. Linda Lingle committed Hawaii to the restrictive procurement provisions of trade agreements, introduced and passed H.B. 30, which gives the Hawaii House and Senate the authority to approve or reject any requests from the federal government binding the state to conform its state procurement policies to future trade agreements.[151]

The Minnesota Legislature passed a similar provision in 2008 as part of a larger omnibus economic development bill that simply states "any decision of the state to enter into government procurement agreements relating to United States trade agreements must be approved by the governor and the legislature." The bill also sets up a committee to advise the state on the issue of trade and procurement.[152]

Most recently, during the 2009 legislative session, Maine State Rep. Sharon Treat (D-Hallowell) introduced LD 1257 to, as she said, "help ensure that the Maine Legislature is 'in the loop' and that a governor cannot bind the state to a treaty's provisions without specific legislation authorizing that action."[153] The Maine legislature passed LD 1257,[154] which requires legislative consultation and approval prior to the state committing to the federal government to be bound to non-tariff provisions of trade agreements. Gov. Baldacci showed his support for establishing a transparent, democratic state-level process for making decisions related to international trade agreements and signed the bill into law in June 2009.

Two other states came close to passing similar legislation to those described above in 2009. The California State Legislature passed AB 1276,[155] introduced by Assembly Member Nancy Skinner (D-Berkeley), and the New Jersey State Legislature passed the "Jobs, Trade and Democracy Act" (Annex 2). Unfortunately, governors in both states ignored calls for openness and transparency and vetoed the bills.

Whether federal trade officials will comply with these measures to safeguard state legislatures' legal and constitutional responsibility to determine the state's procurement policies has not yet been formally tested. Federal officials have not yet faced a situation in which a governor in a state with the new policy writes to federal officials agreeing to be bound without securing consent from the state legislature. Two states had passed laws requiring that state legislatures approve any decision to opt-in to trade agreement procurement rules before the recent trade agreements with Peru, Colombia, and Panama had been signed. These states, Maryland and Rhode Island, were not listed as bound to these pacts'

procurement rules, even though these legislatures took no formal action on the agreements. That is to say that the governors did not send in consent to be bound nor, apparently, were the new legislative processes triggered in that the new procedures pertain to situations in which a state is contemplating opting in to a pact's procurement rules. None of the state laws requiring legislative authorization for a state to be bound to trade-pact investment or service sector regulatory constraints were in effect at the time the last U.S. trade pacts were signed. Thus, whether USTR will comply with these state laws that require that states can only be bound to commercial pact non-trade regulatory terms if states opt in and give their prior informed consent is a matter that merits close monitoring.

State Legislators Weigh in on the Details of a New Way Forward

In 2008, Public Citizen consulted with 50 state legislative officials from across the nation who had been active on trade issues regarding their ideas about needed reforms to the U.S. trade-agreement negotiation process. When asked, "Do you believe states should have a more robust, inclusive and formal process for advising federal officials on trade policy?" all but four legislators said the "consultation process needs improvement."

Specifically, legislators supported the following mechanisms to improve federal-state consultation over trade:

Creation of a Formal "Opt-in" Mechanism that would require states to have affirmatively given consent to federal trade officials before negotiators can bind a state to comply with trade agreement regulatory constraints covering procurement, regulation of foreign service providers operating within a state, and investment matters that fall under state jurisdiction.

Ninety-two percent of legislators supported the establishment in federal law of a new consultation process that would flip the current presumption with respect to who gets to decide whether each U.S. state is bound to trade pacts' non-trade regulatory constraints regarding service-sector commitments, government procurement and investment. The current practice of federal trade officials has been to seek opt-in consent before they bind states to trade pact procurement obligations. However, federal negotiators have not sought consent before binding states to conform state-level regulatory policy on an array of service sectors and investment matters to trade pact constraints. Further, the opt-in process used with respect to state procurement obligations in trade agreements is not now required by statute. As described earlier, at least twice – with the U.S.-Chile and U.S.-Singapore FTAs' procurement chapters – federal officials did not obtain consent and simply bound all states that had consented to past pacts.

Creation of a New Trade Advisory Committee on which Every State Has Its Own Representative Chosen by the State.

Eighty-six percent of legislators said they would support the creation in federal law of an "all-state trade committee that has representation from every state, access to trade negotiation documents, and meets regularly with federal negotiators to resolve trade concerns." Such a proposal would largely replicate the system currently operating in Canada, which facilitates consultation between the federal and provincial governments during trade negotiation and approval processes to avoid the possibility that the federal government takes a position in conflict with the provinces on matters that are under provincial purview. The Federal-Provincial-Territorial Committee on Trade (C-Trade) serves as the primary vehicle for Canadian federal-subfederal consultation. It has representation from all provinces and territories and meets quarterly (sometimes weekly or daily via telephone if necessary). C-Trade provides access to confidential trade negotiating documents to committee members on a secure website.

A few legislators surveyed thought that the proposal to create an all-state committee was unrealistic or subject to marginalization and preferred that funds be used to make IGPAC more effective. However, the overwhelming majority of respondents supported the proposal. Sixty-six percent of legislators went one step further to support granting an all-state committee the authority to veto by vote certain provisions of prospective trade agreements that affect state and local regulatory authority. There was a diversity of opinions regarding who should represent the state on such a committee, with respondents split between designating the governor (24 percent), state legislators (16 percent), a mix (14 percent), an appointee (10 percent), or the attorney general (four percent). State legislators were also split on how the committee should be funded, with 26 percent supporting the option of both the state and federal government, and 36 percent supporting just the federal government.

Development of a Mechanism to Withdraw States from Existing Trade Agreement Obligations Limiting Non-Trade Regulatory Space When State Policies Are Challenged in Trade Tribunals.

Seventy-four percent of legislators supported the establishment of a mechanism in federal law to provide states with a means to obtain action by federal trade officials to withdraw or renegotiate state commitments under trade agreements when state laws are challenged in trade tribunals. State laws and regulations challenged before trade tribunals and judged to violate trade agreement rules must be changed or trade sanctions can be imposed on the United States. However, in some instances, an alternative exists – withdrawing the commitment that led to the challenge. For example, the Bush administration finally decided to withdraw the gambling sector from WTO jurisdiction after the WTO authorized trade sanctions and Congress refused to change the laws in question. While the United States then had to undertake negotiations to compensate WTO countries who claim to be economically harmed by such a change, the gambling case demonstrates the importance of being able to exercise that option. However, there currently is no formal mechanism through which states can obtain action from the federal government to withdraw from WTO jurisdiction service sectors that are the subject of WTO attacks on state laws. Among those who did not support establishing such a mechanism, one deemed it unnecessary, and another thought that the problem would be solved if state attorneys general were given a greater role in defending trade agreement tribunal challenges against state laws.

What Legislators Can Do to Ensure State Legislatures Have a Role in Trade-Agreement Related Decisions

Create a Formal "Opt-in" Mechanism Requiring a Vote of the State Legislature before Your State Can Be Bound to the Procurement, Investment and Service Sector Rules of Trade Pacts. Annexes 1 and 2 of this Guide contains sample legislation that some states have used to accomplish this policy goal.

Spot your SPOC and Create a More Formal Process for Communicating with Federal Officials. As described above, USTR has for each state a "single point of contact" or SPOC, usually someone in the state Department of Commerce, with whom USTR communicates on trade agreement matters. Find out who your state's SPOC is. Find out who they speak to in the federal government and how often. Is the SPOC an appropriate person for the job? Do they have the necessary expertise and will they keep the legislature informed? Or should the job be transferred to another office or branch of government? Consider the sample bill in Annex 1 that shows how you can legislate to create a formal consultative mechanism for the SPOC to report systematically to the state legislature on all USTR communications.

Consider a Citizen's Commission on Globalization. Follow the lead of Maine and others and consider whether your state needs a special committee comprised of legislators and citizens that holds public hearings on trade issues, calls upon USTR officials to testify, and meets on a regular basis to analyze new developments regarding trade and investment agreements and their potential impact on the state. Don't wait until a hard-fought state regulation is implicated in a NAFTA or WTO case – get ahead of the curve.

Join the Trade Debate at NCSL. Interested state legislators could consider becoming active in NCSL which has had a significant role in generating a policy response to the issue of preserving state sovereignty in the era of globalization. Get appointed to NCSL's Labor and Economic Development Committee. Make sure your views are represented by the committee's policy positions. NCSL's position on trade has been evolving over time and has become increasingly focused on the sometimes unanticipated impacts of trade-agreement rules upon state sovereignty. Ask NCSL to beef up lobby efforts to represent state legislators' concerns on trade issues in the U.S. Capitol. Contribute ideas for panel topics and speakers at future meetings to make sure your concerns are aired.

Defy the Trade Rules. If told that a legislative proposal conflicts with U.S. commitments under the WTO, NAFTA or other trade pacts (as were legislators in Maryland and Vermont recently), do not succumb to the chill! Follow their example and continue to do business as usual at the state capitol. If U.S. trade negotiators have trampled on state law and prerogatives by agreeing to bind state governments to international commercial rules not agreed to by the affected jurisdictions, then that is the federal government's problem. The solution is to change the trade rules and improve how U.S. international commercial policy is made – not halt state initiatives or change existing state policies. Given the number of federal and state laws that violate trade agreement rules that have not drawn challenges, call the bluff of those making the threat. Will a foreign investor expose itself to the wrath of filing an investor-state case against a popular policy? And, even if a law that corporate or federal government lobbyists are threatening as WTO or NAFTA-illegal is *challenged*, it takes several years for the case to be resolved – and often up to five years before sanctions could be imposed. This provides an opportunity to educate the public and generate support for the challenged policy and to push for changes to NAFTA and WTO rules.

6 What State Elected Officials Can Do At the Federal Level to Promote Better Trade Policymaking

A diversity of state officials have sent letters, passed resolutions and initiated innovative legislation to express their concerns with the current process by which federal negotiators consult states and the backdoor preemption of states' rights included in today's trade agreements. USTR has been responsive in some instances but not in others. To make sure that states are not at the mercy of the particular administration in federal office at the time, the best way to secure the gains for states' rights that have been achieved to date is by enshrining them in federal legislation while ensuring additional improvement to consultation processes are formally established in the same manner. USTR must be legally required to consult states prior to binding them to comply with not only the procurement rules in trade pacts, but also the non-trade regulatory constraints included in trade pact investment and service sector chapters. States can play a critical role in demanding such new procedures at the federal level to require appropriate state consultation and states' prior informed consent in the context of the foreseeable debate on presidential trade authority.

In June 2007, the old presidential trade authority – Fast Track – expired. Congress' refusal thereafter to provide new trade authority to President Bush means that President Obama arrived in office without having a delegation of Congress' trade authority in place.

Moreover, on his way out, President Bush consolidated congressional ire about the outdated Fast Track mechanism. Many in Congress had already become increasing unhappy with the Fast Track process because it eliminated Congress' ability to shape the *contents* of trade agreements yet simultaneously left members of Congress facing political fallout when the agreements Fast Tracked through Congress began causing damage.

Bush intensified congressional concerns about Fast Track by simply *using* the procedure to its full authority: he tried to force a vote on the Colombia Free Trade Agreement after congressional leaders informed him that they were not prepared to vote on the pact. While Fast Track has always contained provisions that allow a president to *force* Congress to vote on a trade pact within a set number of days after the President submits it to Congress, presidents never used this heavy-handed maneuver. Instead, they negotiated with congressional leaders on the timing of trade pact votes and only submitted agreements after congressional officials agreed. Witnessing President Bush use Fast Track to try to wrest control of the House floor from the Speaker awakened many in Congress to the full implications of Fast Track's extraordinary delegation of congressional authority to the executive branch.

The 2007 expiration of Fast Track, in the context of considerable congressional interest in altering the trade authority delegation process, provides a unique opportunity for state officials. State officials must be prepared to engage in the foreseeable debate about how to replace Fast Track with a mechanism that provides a meaningful role for more interested parties. Indeed, some members of Congress have wasted no time in getting the conversation started – with 132 House members now signed on to a bill that would replace Fast Track with a mechanism that would provide states with a meaningful role and that restores the checks and balances between the federal executive and legislative branches that Fast Track crushed. The good news is that the concerns expressed by state legislators since NAFTA and the WTO agreements

were first negotiated in the 1990s are finally being heard by members of Congress. Yet at the same time considerable work remains to be done to ensure that the Obama administration and those in Congress not yet committed to reform understand and support states' interests and demands.

Fast Track is No Longer an Appropriate Mechanism for Dealing with the Complexities of Today's Trade Agreements

To understand how to restore respect for state authority and regulatory space, it is important to review the way trade pacts were negotiated and considered by Congress under Fast Track for the past 25 years. The trade agreements that jeopardize treasured state policies and constrain state sovereignty were all negotiated and propelled through Congress using Fast Track.

The U.S. Constitution's Article I-8 gives Congress exclusive authority "to regulate commerce with foreign nations." The Constitution also grants the executive branch responsibility over relations with foreign sovereigns. Thus, the negotiation and entry into international commercial agreements requires a shared authority between the branches. This design is one of many checks and balances built into the Constitution to avoid one branch of government having absolute control over a vital policy area.

Historical documents from the time of the Constitution's framing show that granting Congress the authority to regulate foreign commerce was an intentional decision to move away from the European model, which gave control of such matters to the "king," and instead put that power in the body "closest to the people." Over the course of the nation's history, various mechanisms have been devised to manage the coordination between branches required to negotiate and implement trade agreements. (For those interested in the details, request a copy of a book published by Public Citizen, *The Rise and Fall of Fast Track Trade Authority*.) As the issues being negotiated have changed, so has the coordination mechanism.

The Fast Track trade negotiation mechanism, which was first devised by President Nixon and passed in 1974, delegates away to the executive branch not only Congress' constitutional trade authority, but numerous other legislative branch authorities – sweeping away vital checks and balances. Fast Track was never a good idea, but when it was first established trade agreements were limited to traditional matters, such as tariffs and quotas. Fast Track is long overdue for replacement with a new process that takes into account the reality of the vast array of non-trade domestic regulatory issues included in today's sweeping international trade agreements.

By granting a president Fast Track authority, Congress in one fell swoop gave away numerous rights and authorities reviewed in the list on the following page.

Core Aspects of Fast Track Trade-Authority Delegation[157]

- Allowed the executive branch to select countries for, set the substance of, negotiate and then sign trade agreements – all before Congress had a vote on the matter.
- Required the executive branch to notify Congress 90 calendar days before signing and entering into an agreement, but provided no means for Congress to halt such a process.[158]
- Empowered the executive branch to write lengthy implementing legislation for each pact on its own, without congressional committee mark ups. That is to say, the process circumvented normal congressional processes. These executive-authored bills altered wide swaths of U.S. law to conform domestic policy to each agreement's requirements, as well as formally adopted the agreement texts as U.S. law. As a concession to congressional decorum, the executive branch agreed to participate in "non" or "mock" hearings and markups of the legislation by the trade committees. However, this is a practice, not a requirement. In 2008, President Bush chose to ignore this practice and exercise the president's Fast Track right to force a vote on an agreement by submitting it without informal agreement on timing or mock mark ups, despite congressional leaders' objections to the pact's submission at that time.[159]
- Once the executive branch transferred such a bill, the agreement itself, and various supporting materials to Congress, the House and Senate were required to vote on the implementing legislation and the attached agreement within 90 legislative days.
- Such bills were automatically referred to the House Ways & Means and Senate Finance Committees. (In the 2002 Fast Track bill, the House and Senate Agriculture committees also got a formal referral.) However, if a committee failed to report out the bill within 45 legislative days from when the president submitted the legislation to Congress, the bill was automatically discharged to the floor for a vote.
- A House floor vote was required no later than 15 legislative days after the bill was reported or discharged from committee. Thus, within 60 legislative days, the House was required to vote on whatever agreement the president has signed, and whatever legislation changing U.S. laws he had written to implement the package.
- The Finance Committee was allowed an additional 15 days after the House vote, at which time the bill was automatically discharged to the Senate floor for a vote required within 15 legislative days.
- The floor votes in both the House and Senate were highly privileged. Normal congressional floor procedures were waived, including Senate unanimous consent, debate and cloture rules, and no amendments were allowed. Debate was limited to 20 hours – even in the Senate.
- Once the president provided Congress with notice of his intent to sign an agreement, he was authorized to sign after 90 calendar days. However, there was no mandatory timeline for him to submit formal implementing legislation and start the 90-legislative day vote clock. Thus, an agreement whose legal text has been finalized just minutes before the delegation authority expired could be sent to Congress even years later. (This is why the Panama and Korea FTAs still would receive Fast Track treatment even though the Fast Track delegation under which they were negotiated expired in mid-2007.)
- Once a president submitted an agreement under Fast Track, that agreement's Fast Track treatment was "used up." If Congress adjourned before the mandatory vote clock ran out or if Congress voted against the agreement, Fast Track for that agreement expired. If it were to be submitted again for a later vote, normal congressional floor procedures would apply.

- An advisory committee system was established to obtain private sector input on trade-agreement negotiations from presidentially appointed advisors.[160] This system is organized by sector and industry and included 700 advisors comprised mainly of industry representatives, but also included IGPAC. Throughout trade talks, these individuals obtained special access to confidential negotiating documents to which most members of Congress and the public have no access. However, they are barred from discussing the information they gather with those without security clearance. Additionally, they have regular access to executive branch negotiators and must file reports on proposed trade agreements. The Fast Track legislation listed committees for numerous sectors, but not consumer, health, environmental or other public interests.[161]
- The 2002 Fast Track created an additional requirement for 90-day notice to the House Ways and Means and Senate Finance committees *before* negotiations could begin, but neither those committees nor the executive were required to take any further action after receiving this notice.[162]
- The 1974 Fast Track also elevated the Special Trade Representative (STR) to the cabinet level, and required the Executive Office to house the agency. The 1979 Fast Track changed the name of the STR to the U.S. Trade Representative or USTR.

In sum, Fast Track completely eliminates any meaningful role for states in trade policymaking. At the same time it limits the role of the vast majority of congressional representatives to a simple yes or no vote *after* agreements are negotiated – and signed! Surely, a more democratic mechanism can be developed in the United States as has been done in other nations, to allow the concerns of state officials and the people they represent to be heard.

Fortunately, Fast Track is not synonymous with "trade authority." Indeed, because Fast Track had gotten such a bad name, it was formally renamed "Trade Promotion Authority" during the last Fast Track debate in 2002. Call it what you will, the system now known as Fast Track is just the proper name of *one version* of how Congress and the executive branch can coordinate their constitutional roles in trade negotiations. This sharing has been arranged in different ways over the past 233 years of our nation – in the past with Congress often having the leading role.

What is clear is that the original 1974 Fast Track is now outdated relative to the realities of the scope and complexity of today's international commercial agreements, which cover so may areas of domestic policy. Many in Congress are calling for the flawed Fast Track system to be replaced with a more democratic and accountable trade negotiation mechanism. Indeed, in order to change the substance of U.S. policy, the process must be changed first.

Support Is Growing at the Federal and State Levels to Replace Fast Track

State legislatures in Alabama, Hawaii, New Hampshire, Maine, Montana, Nevada, Pennsylvania, Rhode Island, Utah, Vermont and Wisconsin have passed resolutions calling for the replacement of Fast Track. Some states have called for a more "democratic and inclusive mechanism that enshrines the principles of federalism and state sovereignty"[163] and the inclusion of an "explicit mechanism for ensuring the prior informed consent of state legislatures before states are bound to the non-trade terms of any trade agreement that affects state regulatory authority [so as] to ensure [that] the United States Trade Representative respects the decisions made by states."[164]

In 2007, NCSL's Labor and Economic Development Committee issued a lengthy policy (included in Annex 13) that reviews many of the problems discussed in this Guide and outlines components of an improved federal-state consultative mechanism. The policy: demands that USTR only bind states to the procurement terms of any trade agreement following the formal consent of the state legislature; requests that USTR use a positive list approach for making services, procurement and investment commitments to allow states to know precisely the areas implicated by trade-agreement constraints; calls for a provision in any new presidential trade negotiation authority that would ensure no greater procedural or substantive rights for foreign investors; requests provisions in trade pact implementing legislation that would allow state attorneys to participate in defending state law and be compensated for their work; demands consultation with states prior, during, and after service-sector negotiations; and generally calls for the protection of state lawmaking authority from trade rules.

States' calls for a transformation of trade policy-making are not falling on deaf ears. In 2008, Sen. Sherrod Brown (D-Ohio) and Rep. Mike Michaud (D-Maine) worked with an array of interested parties inside and outside Congress to develop a bill that presents an alternative vision of what a "good" trade agreement should and should not include and that includes a Fast Track replacement mechanism. The bill was supported by a broad array of labor, consumer, environmental, family farm and faith groups and reintroduced in 2009: it now has 132 House cosponsors of diverse political stripes. The TRADE Act requires the review and remedy of our existing trade agreements, provides groundbreaking new protections for state sovereignty, recognizes that existing "trade" pacts have inappropriately encroached into states' domestic non-trade policy space, and describes a new presidential trade negotiation process to replace Fast Track that dramatically improves federal-state consultations.

TRADE Act provisions indicate that the concerns expressed by many state legislators are being heard. Among other important safeguards, the TRADE Act:

- Prevents international preemption of state regulatory authority by establishing that states would only be bound to the procurement, investment and service-sector provisions of future trade agreements only when they have been fully consulted and have given consent;
- Calls for a positive list approach for services, investment and procurement commitments, which is the system used in certain WTO agreements proving it is entirely feasible;
- Reestablishes state authority to regulate domestic and foreign service-sector firms operating in state territory in the same manner domestic firms are regulated, including allowing states to establish a ban on services considered harmful if the ban is applied to domestic and foreign service firms alike;
- Provides that foreign investors operating in the United States shall have no greater rights than those provided to domestic investors by the U.S. Constitution, and shield states from costly investor-state battles; and
- Provides that procurement rules in trade pacts not undermine prevailing-wage policies, recycled-con-

tent policies, sustainable-harvest policies, renewable-energy policies, human rights, or project-labor agreements. States would be free to implement common state purchasing policies such as "Buy Local" to encourage local economic development or ban lead or plastics additives in toys without fear of a trade challenge.

The TRADE Act and Public Citizen's 2008 state legislator's survey also indicate a growing convergence around the components of a Fast Track replacement mechanism.

- Specifically the TRADE Act sets out criteria for a new mechanism to replace the Fast Track negotiation process. To obtain agreements that benefit a wider array of interests, this new process includes Congress setting "readiness criteria" that every potential trading partner would have to meet before the executive branch can select a country for prospective trade negotiations. In Public Citizen's survey of state officials, 78 percent of legislators said they would support Congress establishing such readiness criteria for future trade agreements. There are no formal criteria in federal law today: thus, the president is allowed to pick U.S. trading partners without consulting Congress or the public about what countries are appropriate.
- The TRADE Act proposes mandatory "negotiating objectives" regarding what must be and must not be in future trade agreements, and the common-sense requirements that Congress must certify that the objectives were met and then vote on an agreement before it can be signed. Seventy-six percent of legislators consulted in the Public Citizen survey supported similar language regarding mandatory goals for trade agreements. Sixty-six percent supported a congressional review of whether or not such mandatory goals have been achieved and a vote on a trade agreement before it is signed by the executive branch. (While negotiation objectives have been included in grants of Fast Track trading authority, without a congressional review and a vote before signing, there has been no mechanism to assure Congress these goals have been met and negotiators have systematically ignored them.)
- State legislators also support other reforms to federal-state cooperation on trade agreement negotiations that were not included in the TRADE Act. However, the convergence of ideas and communication that has taken place to date between state and federal policymakers creates a solid foundation for further discussions of an appropriate Fast Track replacement mechanism that respects the duties and obligations of states as well as the principles and practice of federalism while seeking trade expansion.

What States Can Do To Secure A New Federal Process For Negotiating Trade Agreements That Respects State Regulatory Authority

The expiration of Fast Track in 2007, Congress' unhappiness with the old Fast Track system and the election of a new president and Congress provides a rare opportunity for state legislators and Congress to work together to devise a new system of presidential trade authority – one providing states with meaningful consultation regarding trade-agreement provisions that limit state regulatory authority.

Outreach and Education. State legislators must educate their federal representaives about their concerns with the backdoor preemption of state regulatory authority contained in today's trade agreements. The history reviewed in this Guide is not well understood by many current members of Congress, and will be entirely new ground for many newly-elected members. Yet scores of those elected to Congress in 2006 and 2008 campaigned on trade reform and have shown leadership on the issues. To date, letters sent by state officials to the USTR and other federal policymakers have generated significant interest in Congress. To help ensure that Congress incorporates redress to state legislators'concerns into its trade reform agenda, state legislators can ramp up activities in their states related to trade-reform such as organzing sign-on letters on specific issues, sponsoring informational hearings with expert testimony, requesting legal opinions from attorneys general or legislative counsel. Such activities can provide a platform to inform members of your states' federal delegation about the need for a Fast Track replacement that respects state regulatory authority and the necessary component parts to any replacement legislation.

Some States Have Passed Resolutions in Support of a Fast Track Replacement. Some states' legislatures took action to help generate demand for the replacement of the flawed Fast Track mechanism. Annex 3 of this booklet contains a sample resolution similar to resolutions passed in several states that call for "a more democratic model for negotiating the terms of trade that enshrines the principles of federalism and state sovereignty" and require "an explicit mechanism for ensuring the prior informed consent of state legislatures before they are bound to the terms of any trade agreement that impacts their regulatory authority."

Join with Members of Congress to Devise a Fast Track Replacement that Works for States. The federal TRADE Act contains important safeguards for protecting federalism and states' rights in the era of globalization, and it starts the dialogue at the federal level about the type of process that should replace Fast Track negotiating authority. Does your federal delegation support the Fast Track replacement mechanism described in the TRADE Act? Do members of your federal delegation have their own ideas on how to improve the trade agreement negotiation and approval process? When these decisions take center stage in the coming years, state officials will have a narrow window of opportunity to make sure that their concerns about federalism are reflected in the new Fast Track replacement. Starting a dialogue now with your federal delegation is important. Join Public Citizen's Working Group on Federal-State Consultation to stay updated on developments and to take part in this important dialogue. To join, please contact Sarah Edelman, Public Citizen's State and Local Program Coordinator at (202) 454-5193 or sedelman@citizen.org.

Annex 1

Maryland's Safeguarding Local Economic Development in Trade Act*

Summary

The Safeguarding Local Economic Development in Trade Act ensures that only the legislature can bind the state to comply with procurement, investment and service-sector regulatory constraints in international trade agreements and declares the legislature's opposition to any future "Fast Track" trade promotion authority.

SECTION 1. SHORT TITLE

This Act shall be called the "Safeguarding Local Economic Development in Trade Act."

SECTION 2. FINDINGS AND PURPOSE

(A) FINDINGS – The legislature finds that:

1. Today's international "trade" agreements have impacts that extend significantly beyond the bounds of traditional trade matters such as tariffs and quotas, and instead grant foreign investors and service providers certain rights and privileges regarding operations within a state's territory, subject various state non-trade related laws to challenge as "barriers to trade" in the binding dispute resolution bodies that accompany the pacts, and place limits on the future policy options of state legislatures.

2. Given current economic challenges, local economic development, job creation, and energy conservation will continue to be high priorities for states. Government procurement policy will serve an essential role in fostering local "green" economies. However, when states agree to be bound by government procurement provisions contained in trade agreements such as WTO, NAFTA and various NAFTA-expansion agreements such as CAFTA, common economic development and environmental policies, such as buy-local laws, policies to prevent offshoring of state jobs, and recycled content laws could be subject to challenge as "barriers to trade" as they contradict the obligations in the trade agreements.

3. Today's trade agreements also curtail state authority to regulate the service-sector economy with respect to the public interest. Some existing trade agreements' service-sector provisions could conflict with state efforts to enhance economic conditions such as reining in health-care costs, expanding health-care coverage to the uninsured, and investing in environmental infrastructure retrofitting. Efforts to stabilize the economy by promoting consumer protection in financial services such as insurance, promoting energy conservation through renewable portfolio standards (RPS), or stemming the flow of white collar jobs overseas could also conflict with trade agreements' service-sector provisions.

*** The Safeguarding Local Economic Development in Trade Act was passed by Maryland's state legislature in 2005.**

4. NAFTA-style trade agreements grant foreign firms expansive new rights and privileges for operating within a state that exceed those granted to U.S. businesses under state and federal law, and allow foreign investors to directly sue signatory governments in foreign tribunals to demand compensation if these rights and privileges are constrained in a manner that undermines the foreign investor's expected future profits. NAFTA has already allowed for compensation from "regulatory takings" cases and has provided a mechanism for investors to challenge state and local land-use decisions, state environmental and public health policies, adverse state court rulings, and state and local contracts that would not have been possible in U.S. courts.

5. Despite the indisputable fact that today's international trade agreements have far-reaching impacts on state and local law and policy, federal government trade negotiators have failed to provide state legislatures with necessary information and documents regarding provisions directly affecting state jurisdiction, have failed to consult with state legislatures when seeking the consent of states to be bound to trade-agreement procurement obligations, and have sought neither governor nor legislature consent before binding states to comply with numerous other trade-agreement provisions.

6. The current encroachment on state regulatory authority by international trade agreements has been exacerbated because recent U.S. trade policy was formulated and implemented under the "Fast Track" trade negotiating and approval mechanism. Fast Track eliminated any meaningful role for states and limited Congress' role to a yes or no vote with no amendments after negotiations are completed and a final agreement has been already signed by the President. Because of its extraordinary limits on congressional and state authority, Fast Track needs to be replaced with a more democratic presidential trade negotiating mechanism that ensures that the prior informed consent of states is secured before states are bound to the services, investment or procurement terms of any trade agreement, and provides Congress with a vote before agreements are signed to ensure congressional negotiating objectives, including those protecting state sovereignty, are met.

(B) PURPOSE – This law is enacted to protect the state's sovereignty; the state's ability to safeguard the health, safety and welfare of its citizens; and the Founders' system of federalism in the current era of globalization.

SECTION 3. INTERNATIONAL TRADE AGREEMENTS

After section XXX, the following new section XXX shall be inserted:

(A) The individual or office in the state government that has been designated as the "State Point of Contact" for interactions with the Office of the United States Trade Representative (USTR) shall transmit copies of all information received from and sent to the U.S. government to the House Committees on [Health and Safety, Environment and Labor] and the Senate Committee on [Health and Safety, Environment and Labor].

(B) Except as provided in subsection (C) of this section, [State] officials, including the governor, may not:

1. Bind the state to the terms of an international trade agreement or otherwise commit the state to comply with the non-tariff terms of an international trade agreement; or

2. Give consent to the federal government to bind the state to the terms of an international trade

agreement or otherwise indicate that the state will comply with the non-tariff terms of an international trade agreement.

(C) The governor may bind the state or give consent to the federal government to bind the state to the government procurement, services or investment rules of an international trade agreement only if the legislature enacts legislation that explicitly authorizes the governor to do so.

SECTION 4. COMMUNICATIONS TO THE FEDERAL GOVERNMENT

(A) It is the sense of this legislature that the Congress of the United States should replace the failed "Fast Track" system of trade negotiation and approval with a new, more democratic and inclusive model, including the requirements that the USTR fully and formally consult individual state legislatures regarding procurement, services, investment or any other trade-agreement rules that impact state laws or authority before negotiations begin and as they develop, and to seek informed consent from state legislatures prior to binding states to conform their laws to the regulatory terms of international commercial agreements.

(B) Not later than October 1, 2010, the Attorney General shall notify the USTR of the enactment of this legislation.

SECTION 5. EFFECTIVE DATE

This Act shall take effect on July 1, 2010.

Annex 2

New Jersey's Jobs, Trade and Democracy Act*

Purpose

The model bill ensures that state citizens and the state legislators they elect have access to information on the impact of international trade policy on the state economy; it also clearly establishes the role of the state legislature in setting trade policy for the state. It also helps workers and businesses that have been impacted by trade. The model bill:

- Requires the consent of the state legislature in order to bind the state to international trade agreements, and establishes State Legislative Points of Contact to serve as official liaisons with the Governor's office and the Federal Government on trade policy.
- Establishes an Office of Trade Enforcement to:
- Monitor trade negotiations and disputes;
- Analyze the potential impact of proposed international trade agreements on the state;
- Assess impact of trade on the state economy and make trade policy recommendations;
- Assist local workers, firms and communities on trade matters.
- Requires the Office of Trade Enforcement to provide annual reports to the Governor and Legislature on the impacts of trade on the state, and requires the Governor and Legislature to respond to policy recommendations for handling trade's impacts on the state.
- Establishes a Citizens' Commission on Globalization appointed by the Governor and Legislature to assess legal and economic impacts of trade agreements, hold hearings and make recommendations to the governor, legislature, congressional delegation and U.S trade negotiators.

A Bill for an Act

I. This Act may be cited as the "Jobs, Trade and Democracy Act."

II. Findings: The Legislative Assembly finds that:

(A) States have traditionally enjoyed a large degree of autonomy to set their own procurement policies under the U.S. system of federalism.

(B) Recent international trade agreements threaten to erode this traditional state autonomy by requiring state government to accord foreign suppliers of goods and services treatment no less favorable than that afforded to in-state suppliers. In addition, any more than necessary, and limit supplier qualification to those that are "essential" to the performance of the contract.

***The Jobs, Trade and Democracy Act passed the New Jersey state legislature in 2009.**

(C) The governor – not the state legislature – chooses to bind [state] to the terms of various international trade agreements upon the request of the U.S. Trade Representative (USTR).

(D) State legislators have an important role to play in preserving state authority over procurement policy. These critical decisions should be made only with the involvement of the state legislatures, and only after the public has been adequately informed and has openly debated the issues involved.

(E) It is critical for citizens, state agencies, the state legislature and other elected officials in the state to have access to information about how trade impacts state legislative authority, the state's economy and existing state laws in order to participate in an informed debate about international trade issues.

III. Role of the State Legislature in Trade Policy

(A) It shall be the policy of the State of [state] that approval for the state to be bound by any trade agreement requires the consent of the state legislature.

(B) State Legislative Points of Contact: Two State Legislative Points of Contact (SLPCs) will be appointed at the beginning of each legislative session; one by the [majority and minority leaders] in the Senate, and one by the [majority and minority leaders] of the [House/Assembly]. The legislature declares that the purposes of the SLPCs are to:

1) Serve as the state's official liaisons with the federal government and as the legislature's liaisons with the governor on trade-related matters;

2) Serve as the designated recipients of federal requests for consent or consultation regarding investment, procurement, services or other provisions of international trade agreements which impinge on state law or regulatory authority reserved to the states;

3) Transmit information regarding federal requests for consent to the Office of the Governor, the Attorney General, all appropriate legislative committees and the Office of Trade Enforcement;

4) Issue a formal request to Office of Trade Enforcement and other appropriate state agencies to provide analysis of all proposed trade agreements' impact on state legislative authority and the economy of the state;

5) Inform all member of the legislature on a regular basis about ongoing trade negotiations and dispute settlement proceedings with implications for the state more generally;

6) Communicate the interests and concerns of the legislature to the USTR regarding ongoing and proposed trade negotiations; and

7) Notify the USTR of the outcome of any legislative action

(C) The following actions are required before the State of [state] shall consent to the terms of a trade agreement:

1) When a request has been received, the governor, majority or minority leader or ranking member of the appropriate committee of jurisdiction may submit to the legislature, on a day on which both houses are in session, a copy of the final legal text of the agreement, together with –

   a) A report by the Office of Trade Enforcement which shall include an analysis of how the agreement of the State of [state] to the specific provisions of the agreement will change or affect existing state law;

   b) A statement of any administrative action proposed to implement these trade- agreement provisions in the State [state]; and

c) A draft of legislation authorizing the state to sign on to the specific listed provisions of the agreement in question.

2) A public hearing – with adequate public notice – shall occur before the legislature votes on the bill; and

3) The bill authorizing the State of [state] to sign on to specific listed provisions of an agreement is enacted into law.

(D) Sense of the Legislature: It is the sense of this legislature that the Congress of the United States should pass legislation instructing the USTR to fully and formally consult individual state legislature regarding procurement, services, investment or any other trade-agreement rules that impact state laws or authority before negotiations begin and as they develop, and to seek consent from state legislatures in addition to governors prior to binding states to conform their laws to the terms of international commercial agreements. Such legislation is necessary to ensure the prior informed consent of the State Legislature of [state] with regard to future international trade and investment agreements.

(E) Notice to USTR: The state Attorney General shall notify the USTR of the policies set forth in section (d) in writing no later than [date], and shall provide copies of such notice to the president of the Senate, speaker of the House of Representatives, the governor and Sat of [state]'.

IV. Office of Trade Enforcement and Citizen's Commission on Globalization

(A) The state shall establish an Office of Trade Enforcement and a Citizen's Commission on Globalization.

(B) The Office of Trade Enforcement is directed to:

1) Monitor trade negotiations and disputes impacting the state economy;

2) Analyze pending trade agreements the state is considering signing and provide the analysis to the governor, the legislature, the Citizen's Commission and the public;

3) Provide technical assistance to workers and firms impacted by unfair trade practices;

4) Provide a Trade Impact Report to the governor, the legislature, the Citizen's Commission and the public no later than [date] and annually thereafter;

5) Provide additional research analysis as requested by the governor, the legislature and the Citizen's Commission.

(C) Each annual Trade Impact Report required under section (b)(4) above shall include:

1) An audit of the amount of public contract work being performed overseas;

2) An audit of government goods being procured from overseas;

3) A study of trade's impacts on state and local employment levels, tax revenues and retraining and adjustment costs;

4) An analysis of the constraints trade rules place on state regulatory authority, including but not limited to the state's ability to preserve the environment, protect public health and safety and provide high-quality public services; and

5) Findings and recommendations of specific actions the state should take in response to the impacts of trade on the state identified above. Such actions may include, but shall not be limited to:

a) Revocation of the state's consent to be bound by the procurement rules of international trade agreements;

b) Prohibition of offshore performance of state contract work and preferences for domestic content in state purchasing;

c) State support for cases brought under federal trade laws by residents of the state;

d) State advocacy for reform of trade agreements and trade laws at the federal level; and

e) Implementation of a high-road growth strategy formulated with business, labor and community participation. Such strategy may in include, but not be limited to:

(i) More effective early warning and layoff aversion measures;

(ii) Increased assistance and adjustment programs for displaced workers and trade-impacted communities;

(iii) Stronger standards and accountability for recipients of state subsidies and incentives;

(iv) Investments in workforce training and development;

(v) Investments in technology and infrastructure; and

(vi) Increased access to capital for local producers.

(D) Within 30 days of receipt of the annual Trade Impact Report:

1) The governor shall review the report and issue a public statement explaining which of the report's recommendations for specific action under section (c)(5) the governor will act upon in the next 30 days, whether through executive action or proposed legislation.

2) The legislature [or specific committee] shall review the report, hold public hearings on the report's recommendations for specific action under section (c)(5), and introduce legislation to enact those recommendations accepted by the legislature [or committee].

(E) A Citizens' Commission on Globalization shall be appointed by the [governor and/or legislature].

1) The following stake holders shall be equally represented on the commission: employers, labor organizations and government.

2) The commission shall:

a) Assess the legal and economic impacts of trade agreements;

b) Provide input on the annual Trade Impact Report;

c) Hold public hearings on the impacts of trade on the state and communities, as well as the Annual Trade Impact Report impacts of trade on the state; and

d) Make policy recommendations to the governor, state legislature, state congressional delegation and U.S. trade negotiators.

Annex 3

Safeguarding Federalism in Trade Negotiation

To the Honorable Barack Obama, President of the United States, and to the President of the Senate and the Speaker of the House of Representatives, and to the Senate and House of Representatives of the United States, in Congress assembled, and to Ambassador Ronald Kirk, the United States Trade Representative. We, the Senate and House of Representatives of the State of [XXX], in legislative session assembled, respectfully represent and petition as follows:

a) Whereas, democratic, accountable governance in the states generally, and specifically the authority granted to the legislative branch by [XXX]'s Constitution, is being undermined by international trade rules enforced by the World Trade Organization (WTO) and established by the North American Free Trade Agreement (NAFTA) and other NAFTA-style free trade agreements, and is further threatened by similar provisions in an array of pending trade agreements;

b) Whereas, today's "trade" agreements have impacts that extend significantly beyond the bounds of traditional trade matters such as tariffs and quotas, and instead grant foreign investors and service providers certain rights and privileges regarding acquisition of land and facilities and regarding operations within a state's territory, subject state laws to challenge as "non-tariff barriers to trade" in the binding dispute resolution bodies that accompany the pacts, and place limits on the future policy options of state legislatures;

c) Whereas, NAFTA and other U.S. free trade agreements grant foreign firms new rights and privileges for operating within a State that exceed those granted to U.S. businesses under state and federal law;

d) Whereas, NAFTA has allowed for compensation from "regulatory takings" cases and has provided a mechanism for investors to challenge state and local land-use decisions, state environmental and public health policies, adverse state court rulings, and state and local contracts that would not have been possible in U.S. courts;

e) Whereas, when states are bound to comply with government procurement provisions contained in trade agreements, common economic development and environmental policies, such as buy-local laws, prevailing wage laws, policies to prevent offshoring of state jobs as well as recycled content laws could be subject to challenge as violating the obligations in the trade agreements;

f) Whereas, recent trade agreements curtail state regulatory non-trade authority by placing constraints on future policy options;

g) Whereas, the WTO General Agreement on Trade in Services (GATS) could undermine state efforts to expand health-care coverage and rein in health-care costs, and places constraints on state and local land-use planning and gambling policy;

h)Whereas, new GATS negotiations could impose additional constraints on state regulation of energy, higher education, professional licensing and more;

i)Whereas, despite the indisputable fact that international trade agreements have a far-reaching impact on state and local laws and policy authority, federal government trade negotiators have failed to respect states' rights to prior informed consent before binding states to conform state law and authority to trade- agreement requirements and have refused even to copy state legislatures on key correspondence;

j)Whereas, Fast Track eliminated vital checks and balances established in the U.S. Constitution by broadly delegating Congress' exclusive constitutional authority to set the terms of trade over to the executive branch such that the executive branch is empowered to negotiate broad-ranging trade agreements and to sign them prior to Congress voting on the agreements;

k)Whereas, the ability of the executive branch under Fast Track to sign trade agreements prior to Congress' vote of approval means executive branch negotiators have been able to ignore congressional negotiating objectives or states' demands and neither Congress nor the state have any means to enforce any decision regarding what provisions must be included and what provisions may not be included in any U.S. trade agreement;

l)Whereas, federal trade negotiators have ignored and disrespected states' demands regarding whether or not states agree to be bound to certain non-tariff trade-agreement provisions;

m)Whereas, Fast Track Trade Authority was not necessary for negotiating trade agreements as demonstrated by the existence of scores of trade agreements, including major pacts such as the agreements administered by the WTO, implemented in the past thirty years without use of Fast Track;

n)Whereas, Fast Track, which was established in 1974 by then-President Richard Nixon when trade agreements were limited to traditional matters such as tariffs and quotas, is now woefully outdated and inappropriate given the diverse range of non-trade issues now included in "trade" agreements that broadly affect federal and state non-trade regulatory authority;

o)Whereas, President George W. Bush intensified congressional opposition to Fast Track by employing Fast Track to try to seize control of the schedule of the House of Representatives and force a vote on the Colombia Free Trade Agreement after Congressional leaders explicitly rejected scheduling such a vote;

p)Whereas, the Fast Track authority President George W. Bush won by one vote in 2002 expired in 2007–President Bush sought an extension of Fast Track powers, but thanks to efforts by many state and federal officials, this request was rejected;

q)Whereas, the expiration of the last grant of Fast Track offers a critical opportunity to replace Fast Track and establish a new procedure for negotiating and approving U.S. trade agreements – one that provides states with meaningful consultation about provisions of trade agreements that limit state regulatory authority;

r) **NOW, THEREFORE, BE IT RESOLVED**, that the State of [XXX] respectfully requests that the United States Congress create a replacement for the outdated Fast Track system so that U.S. trade agreements are developed and implemented using a more democratic, inclusive mechanism that enshrines the principles of federalism and state sovereignty and restores institutional checks and balances by requiring a Congressional vote to approve a trade agreement before it can be signed and entered into by the president;

s) **BE IT FURTHER RESOLVED**, that this new process for developing and implementing trade agreements include an explicit mechanism for ensuring the prior informed consent of state legislatures before states are bound to the non-tariff terms of any trade agreement that affects state regulatory authority so as to ensure that the United States Trade Representative respects the decisions made by states;

t) **BE IT FURTHER RESOLVED**, that the Intergovernmental Policy Advisory Committee (IGPAC) be reformed or replaced to ensure that the body responsible for state and local consultation with federal negotiators includes the following: representation of all fifty states, access to trade negotiating documents, and the authority to veto, by majority vote, provisions of prospective trade agreements that affect areas of state and local regulatory jurisdiction;

u) **BE IT FURTHER RESOLVED**, that a mechanism be established to provide states a means to obtain action by federal trade officials to withdraw or renegotiate U.S. trade-agreement commitments that bind states when state laws or policies are challenged as violations of such provisions in trade tribunals;

v) **BE IT FURTHER RESOLVED**, that Congress establish standing "readiness criteria" to include labor, human rights, and environmental standards that every potential trading partner would have to meet as well as prospective economic opportunities for U.S. workers, farmers, and firms before the executive branch can select a country for prospective trade negotiations.;

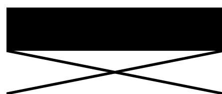
w) **BE IT FURTHER RESOLVED**, that copies of this (Memorial) be immediately transmitted to the Honorable Barack Obama, President of the United States, Ambassador Ronald Kirk, the United States Trade Representative, the President of the United States Senate, the Speaker of the House of Representatives, and each member of Congress from the State of [XXX].

Annex 4

States Bound to International Trade-Agreement Government Procurement Provisions

	WTO AGP*	U.S.-Singapore FTA	U.S.-Chile FTA	U.S.-Australia FTA	U.S.-Morocco FTA	CAFTA	U.S.-Peru FTA	U.S.-Colombia FTA**	U.S.-Panama FTA**
Alabama									
Alaska									
Arizona	■	■	■						
Arkansas	■	■	■	■	■	■	■	■	■
California	■	■	■	■					
Colorado	■	■	■	■	■	■	■	■	■
Connecticut	■	■	■	■	■	■			
Delaware	■	■	■	■	■	■			
Florida	■	■	■	■	■	■	■	■	■
Georgia				■					
Hawaii	■	■	■	■	■	■			
Idaho	■	■	■	■	■	■			
Illinois	■	■	■	■			■	■	■
Indiana									
Iowa	■	■	■						
Kansas	■	■	■	■	■				
Kentucky	■	■	■	■	■	■			
Louisiana	■	■	■	■	■	■			
Maine	■	■	■	■					
Maryland	■	■	■	■	■	X			
Massachussetts	■	■	■						
Michigan	■	■	■						
Minnesota	■	■	■						
Mississippi	■	■	■	■	■	■	■	■	■
Missouri	■	■	■						
Montana	■	■	■						
Nebraska	■	■	■	■	■	■			
Nevada									
New Hampshire	■	■	■	■	■	X			
New Jersey									
New Mexico									

	WTO AGP*	U.S.-Singapore FTA	U.S.-Chile FTA	U.S.-Australia FTA	U.S.-Morocco FTA	CAFTA	U.S.-Peru FTA	U.S.-Colombia FTA**	U.S.-Panama FTA**
New York	■	■	■	■	■	■	■	■	■
North Carolina									
North Dakota									
Ohio									
Oklahoma	■	■	■	■					
Oregon	■	■	■	■	■	☒			
Pennsylvania	■	■	■	■					
Puerto Rico						■	■	■	■
Rhode Island	■	■	■	■	■	■			
South Carolina									
South Dakota	■	■	■	■	■	■			
Tennessee	■	■	■	■					
Texas	■	■	■	■	■	■	■	■	■
Utah	■	■	■	■	■	■	■	■	■
Vermont	■	■	■	■	■	■			
Virginia									
Washington	■	■	■	■	■	■			
West Virginia									
Wisconsin	■	■	■						
Wyoming	■	■	■	■	■	■			



= Bound to government procurement rules

= Bound to government procurement rules despite state request to be withdrawn.

*Signatories to the WTO AGP include Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States.
**The U.S.-Colombia and U.S.-Panama FTAs were negotiated and signed by the Bush administration. However, these agreements have not yet been approved by the U.S. Congress.

Additional notes: The U.S.-Oman FTA, ratified by Congress in 2007, did not specify regional levels of government likely due to the inapplicability for Oman (as this country does not maintain multiple levels of governance), and has therefore been omitted from the chart above.

The U.S.-Korea FTA was negotiated and signed by the Bush administration, but has not yet been approved by the U.S. Congress. Korea's procurement chapter does not bind U.S. states. However, because Korea is an AGP country, 37 states that were bound to the AGP by governors are already required to offer Korean firms the same procurement opportunities as U.S. firms.

Annex 5

Trade-Agreement Threats to State Climate Change Policy

How to Avoid the Planetary Heat and Stop the WTO Chill

Creating effective policies to address the global climate emergency is one of our country's most urgent tasks. State governments are leading the way by committing to a wide variety of "green" policies, and to the notion that the adjustment to a low-carbon economy must be equitable to working families at home and abroad. Such state initiatives continue to play a crucial role in developing both national and international climate strategies.

But some backwards-looking corporations and politicians have turned to invocations of World Trade Organization (WTO) rules as a reason to halt decisive action on climate change. These obstructionists are the modern-day "climate change deniers" who, having lost the scientific argument, have turned to trade-pact attacks. Because the WTO contains such extreme regulatory limits, some of the claims are, sadly, legally accurate. However, the threats are relatively easy to deflate with information about how the WTO actually operates.

WTO Rules Have Been Modified Before to Address Global Crisis: It would be a mistake to fail to enact necessary climate legislation now. In the past, when WTO rules conflicted with global priority policies, nations negotiated changes to the pact. For instance, the 2001 "Doha Declaration on TRIPS and Public Health" was created to clarify WTO rules so as to allow for a global response to the HIV/AIDS crisis. Like that pandemic, global warming is a planetary emergency. Scores of WTO countries are seeking to implement the very same climate policies that are being attacked as WTO violations. Given the WTO's already shaky legitimacy, it is foreseeable that – rather than allow the institution to become a practical barrier to forward-looking climate solutions – a new Declaration establishing needed policy space on climate will be created.

It Takes Years for a WTO Challenge to Get an Initial Ruling: Even if a climate proposal violates WTO rules, a member country must formally challenge the policy for WTO action to be initiated. After a challenge is brought, it typically takes more than five years before issuance of a final WTO ruling, which could result in trade sanctions. Thus, the "way to go" is to ignore the threats, enact legislation, and see if it draws an actual challenge.

Sensitive Economic Sectors Can be Withdrawn from the WTO to Avoid Challenges: Another way to ensure that green-building, biofuel and other measures are protected from WTO challenge is for the U.S. government to withdraw key climate-related sectors like energy and construction from WTO coverage. In 2007, the Bush administration announced that it would withdraw "gambling services" from WTO coverage to avoid further challenges or sanctions, after the WTO ruled against the U.S. Internet gambling ban.

Climate Change Policies at Risk

Cap-and-Trade Policy Proposals: Cap-and-trade programs typically establish a limit on carbon emissions, and then auction off permits or allowances that entitle corporations and other entities to emit set amounts. Many countries are using cap-and-trade programs, yet the Bush administration used the

threat of WTO-incompatibility to chill the European Union's cap and trade proposal. Corporate interests made similar claims during the U.S. Senate debate on climate legislation. In the absence of a federal program, three U.S. regional initiatives, which together encompass nearly half of all states, currently lead the way in developing cap-and-trade programs. Unfortunately these exciting regional programs remain vulnerable to WTO challenges.

CAFE (Corporate Average Fuel Economy) Standards: Following California's lead to regulate tailpipe emissions, at least 13 states have pledged to adopt more stringent vehicle-emissions standards. Sounds reasonable, but under WTO "non-discrimination" rules, any method for calculating fleet-wide carbon emissions must not only treat foreign and domestic manufacturers the same, but must have the same *effect* on them in practice! This means that a foreign auto company could argue to the WTO that more stringent CAFE standards in the United States violate WTO rules even if the different effect is the result of a foreign firm's own marketing choices – for instance only selling large heavier cars here or cars with high-performance engines. In a 1994 European challenge, a GATT tribunal ruled against the U.S. CAFE standards using that exact logic.

Ban of Incandescent Light Bulbs: At least seven states initiated action to limit or ban incandescent light bulbs to promote the use of more energy-efficient light bulbs, before the federal government took action to phase out incandescents in 2007. But as a ban on a product is by definition the most "trade-restrictive" policy device, and WTO rules require use of the least trade-restrictive means to meet an environmental goal, this important energy-saving initiative could be challenged. Future state efforts to ban the use of energy-inefficient products may also run afoul of trade rules.

Renewable Portfolio Standards (RPS): Renewable portfolio standard (RPS) programs, like those already in effect in 26 U.S. states and D.C., require that a certain percentage of energy sold or consumed must come from renewable sources. Currently, U.S. "services incidental to energy distribution" are under WTO jurisdiction. Even if it applied equally to foreign and domestic plants, an RPS program could make it more difficult for a foreign energy provider (or a foreign firm operating an energy distribution system here) to sell their product in the U.S. market. If this happened, a "national treatment" or trade discrimination violation could be claimed.

Subsidies for Green Building and Production: From benefits for biofuel production, to money for retrofitting auto plants, to deploying energy-efficient technologies, concerned policymakers at all levels of government are thinking long and hard about how to ensure that climate legislation creates new "Green Collar" jobs. Various green measures could run afoul of the WTO's subsidies rules. But this can be fixed. For instance, a temporary WTO provision that expired in 2000 that allowed governments to fund environmental transitional assistance should be renewed and strengthened.

Excessive Foreign Investor Privileges Must Be Eliminated to Restore Policy Space for Addressing Climate Change: The North American Free Trade Agreement (NAFTA) and seven other U.S. free trade agreements (FTAs) covering a total of 14 countries provide foreign investors the right to demand compensation in foreign tribunals from the U.S. government for policies and actions that undermine their *expected future profits*. A variety of measures taken by state, provincial and municipal governments to protect the environment have been challenged by corporations as regulatory takings using NAFTA's Chapter 11. For instance, a Canadian mining company, Glamis Gold, pursued a $50 million dollar NAFTA claim against mining regulations promulgated by the State of California. California enacted these policies to safeguard the environment and indigenous communities from the impacts of open-pit mining and then was forced to spend considerable resources defending these policies against the NAFTA challenge for over six years before the case was finally dismissed.

Annex 6

Trade-Agreement Threats to Health-Care Policy

The World Trade Organization – Wrong Rx for Health Care?

Traditionally, trade agreements have dealt with trade in goods. Such pacts have focused on reducing trade barriers, such as border taxes (tariffs) and quotas, applied by the federal government at the border. In contrast, the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) establishes binding legal obligations limiting federal, state and local government policy regarding service sectors of our economy, including health services.

When the GATS was first negotiated, the United States made commitments to bind elements of its services economy, including health insurance, hospitals and other health care facilities, data services related to health records, pharmaceutical distribution services, and the construction of health-services related buildings to meet GATS' constraints. Congress approved the agreement with little discussion or understanding, in part because the deal was done using the "Fast Track" procedure that limits Congress' role and debate.

While health services can be provided across borders (diagnostic services provided over the phone, drugs purchased over the Internet, and more Americans traveling abroad to receive cheaper health services), GATS is not limited to setting rules about cross-border trade in services. Rather, it also sets rules about the health-care policies that federal, state and local governments can pursue domestically, and how foreign insurance, hospital and other health firms operating within the United States can be regulated. For instance, GATS rules prohibit government actions that place limits on the number of services suppliers "in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test." Under past WTO jurisprudence, banning, for instance, specialty hospitals, could run afoul of WTO rules given that in a GATS-covered service sector a regulatory ban has been interpreted to be a GATS-prohibited "quota of zero." Thus, GATS delves deeply into domestic regulatory issues that have little or nothing to do with the traditional concept of trade between nations. The GATS represents a 180-degree turn from the U.S. approach to health-care policy – away from regulating industries for the benefit of the consumer and toward regulating governments for the benefit of multinational firms and industries.

Unless the United States acts to take back the health-related services it committed to WTO jurisdiction in 1995 U.S. GATS commitments can limit the ability of federal and state governments to adopt innovative solutions to some of our most pressing health-care problems, including creating low-cost health-care alternatives for working families and addressing the high cost of prescription medicines.

State Health-Care Policies at Risk

Universal Health-Care Coverage: GATS makes plans for a national health-care program ("single-payer") and many state initiatives to improve access to health care much more difficult to achieve because a country cannot grant new public-service monopoly rights in a WTO-covered service sector without first compensating trading partners for lost business opportunities.

Bans on For-Profit Service Providers: Studies have shown that for-profit hospitals and dialysis centers have higher death rates than their not-for-profit counterparts, and for-profit hospices provide less care for the dying. Sixteen states have proposed banning for-profit provision of certain health services as part of larger health care reform and cost containment measures. Yet current GATS rules could subject such state initiatives to challenge as illegal trade barriers in WTO tribunals.

Preferential Tax Treatment for Nonprofit Hospitals: Most U.S. hospital services are provided by nonprofit institutions that enjoy tax-exempt status. If a foreign firm bought a chain of U.S. hospitals and decided to run them on a for-profit basis, it could demand the preferential tax treatment that domestic nonprofits are given because it provides identical or nearly identical services.

Prescription Drug Reform: The majority of U.S. states have Medicaid programs that utilize Preferred Drug Lists (PDLs), which encourage the use of medicines that are clinically effective and low cost. PhRMA, the powerful lobbying arm of U.S. drug manufacturers, and its international counterparts have attacked PDLs as overly burdensome trade "market access barriers."

State Licensing Requirements: All U.S. states have state-specific requirements for the licensing of insurance providers and hospitals. Most states now require insurance providers to include coverage for mammograms, for instance, but only a handful of states currently require coverage for Alzheimer's. Proposed GATS "disciplines on domestic regulation" may give U.S. trade partners grounds for bringing a WTO complaint against specific state licensing requirements (as well as state-by-state variation in policy) as "more burdensome than necessary to ensure the quality of a service."

Needs Testing: Thirty-eight states have GATS-prohibited "Certificate of Need" or "CON" laws for a variety of health-care facilities such as hospitals, outpatient clinics and nursing homes. For hospitals, CON laws are intended to bring oversight to the establishment of new hospitals construction, hospital expansions, and purchases of costly equipment which have been demonstrated to fuel skyrocketing health-care costs for consumers. The U.S. GATS schedule includes a carve-out for needs-testing policies under hospital services, but fails to include a similar carve-out under construction services for the construction of health-related buildings leaving open an avenue for a trade challenge of these important laws that needs to be closed.

Annex 7

Trade-Agreement Threats to State Higher-Education Policy

Higher Education – Public Good or Tradable Commodity?

To most Americans, higher education is considered a public good, an instrument of democratization, upward mobility, and equal opportunity. But to some, it is big business – an exportable and importable commodity. For-profit education services firms want trade agreements to set higher education policy that will promote their business goals.

Not only do major corporations see global "trade in educational services" or "transnational" or "borderless" education as a hot business opportunity, they see the World Trade Organization (WTO) as an essential tool to dismantle what they deem "barriers to trade" in educational services that limit their global profit-making opportunities.

At the behest of for-profit higher-education firms, the Bush administration proposed to submit the U.S. higher education "service sector" to comply with the broad policy constraints contained in the WTO's General Agreement on Trade in Services (GATS). This is a global pact designed to deregulate service sectors to the advantage of multinational firms. The GATS rules could jeopardize many basic policies, such as educational subsidies for public institutions, state licensing practices for higher education institutions, U.S. accreditation practices, wages and working conditions for U.S. educators, and more.
For instance, state licensing rules that attempt to weed out fly-by-night for-profit schools are considered sound policy domestically. However, if U.S. higher-education services were bound to comply with GATS rules, such policies could be challenged before international trade tribunals as overly burdensome "trade barriers" that limit foreign educational providers attempting to set up operations in the United States. For-profit education services firms argue that to create an effective "global market" in higher-education services, many such domestic educational policies must be dismantled using trade agreements as a form of preemption.

In the United States, higher-education institutions are regulated by states. For the most part, state leaders, public and nonprofit education institutions, and students have been unaware of the attempt to drag higher-education policy under WTO jurisdiction, and have been dangerously disengaged. Unless interested parties weigh in, the U.S. higher-education system could be transformed from a "public good" to a "tradable commodity" in a global services market. The Bush administration negotiation document offering to sign up the higher-education sector to WTO constraints must be withdrawn by the new administration to safeguard this sector from the following threats.

State Higher-Education Policies at Risk at WTO

Domestic Educational Subsidies: The WTO's GATS "National Treatment" rule requires that public-sector funding must be shared on an equal basis between foreign institutions and domestic institutions unless public funds are specifically exempted from the terms of the agreement. The United States has attempted to safeguard certain domestic subsidies in a broadly worded exemption to its higher-education proposal, but it is unclear if this language would actually protect subsidies for public and nonprofit institutions.

U.S. Accreditation Policies: Unlike many other WTO signatory countries, the United States has offered virtually unlimited commitments in "cross-border" educational services. This would inundate U.S. accrediting bodies with requests to accredit overseas distance-learning schools. U.S. trade negotiating documents only include language that the U.S. purports will safeguard the U.S. accreditation system in a footnote of dubious legal consequence.

State Licensing Requirements: State licensing of higher-education institutions is based on a large number of factors: standards to ensure financial stability and quality of educational providers and appropriate curricula; faculty qualifications; appropriate library resources and physical plant; needs tests to weed out duplicative programs; and more. Under new proposed "disciplines on domestic regulation," individual state policies as well as state-by-state variation in policy could be challenged in WTO tribunals as "more burdensome than necessary to ensure the quality of a service."

Efforts to Police Fraudulent Operations: While "borderless higher-education" presents for-profit providers new business opportunities, the challenges presented to regulators are extreme. Topping this list are concerns about fraud. While policing fraudulent institutions is difficult domestically, it is exponentially more difficult across borders or in the online realm. Many policies that U.S. states maintain or may pursue to protect students from scam artists could be considered GATS violations.

Wages and Working Conditions for Educators: The implications for educators if U.S. higher-education policy were bound to the WTO are also worrisome. New technology combined with unfettered cross-border supply of educational services is likely to generate further downward pressure on wages for educators. GATS negotiations also touch on our immigration policy. One such proposal would increase and lock in temporary U.S. visas for foreign educators. This is part of a global corporate effort to harmonize professional qualification requirements across borders.

Annex 8

Trade-Agreement Threats to Local Land-Use Policy

Should Retailers Be in Charge of City Planning?

As communities across the United States and elsewhere are increasingly successful in their efforts to limit "big-box" and chain-store expansion through transparent and accountable measures at the local level, Wal-Mart and other retailers have pursued rules at the World Trade Organization (WTO) that threaten to undermine, or at the very least chill, these local laws. These rules are part of the General Agreement on Trade in Services (GATS).

GATS is one of the 17 major "Uruguay Round" agreements administered by the WTO. When nations originally signed on to the GATS in 1994, national governments agreed to ensure that all levels of government conformed to the agreement. Even though there was little consultation with state or local governments about the implications of the GATS for state and local regulatory authority, the GATS is now federal law that applies to authorities at all levels of government.
The GATS rules apply to those service sectors that nations sign up to the agreement. In 1994, the United States signed up its retail and wholesale distribution to GATS rules, along with its hotel and restaurant sector. Unlike many other countries, U.S. negotiators at the time failed to exempt state and local land-use laws that limit the location, number, size or design of service businesses. Therefore, land-use ordinances that limit the number of chain stores, the height or size of buildings, hours of operation, development along coastlines, or require an economic-impact analysis for large retailers could be at risk under the GATS.

Regardless of the reason for putting limitations on chain stores or "big-box" stores – be it community aesthetic, heavy traffic, refusal to offer fair wages and benefits to employees, or environmental impact – there is likely to be a GATS violation standing in the way of new policies should that business be foreign-owned.

Common Land-Use Laws at Risk

Limits on the Height or Size of Buildings: Store size caps are in place across the country from Maine to Hawaii, and Alabama to Florida. These common policies, such as a 2008 Portsmouth, Rhode Island measure (which bars stores over 45,000 square feet and imposes additional standards on those 25,000 square feet or more) could be challenged under the GATS, because these restrictions reduce the value of the service asset and total quantity of service output.

Economic Impact Analyses: Weighing the potential impact of new development enables local officials to make the best decisions for their communities. Maine, for instance, enacted the Informed Growth Act in 2007, requiring a comprehensive economic-impact study for all proposed retail stores larger than 75,000 square feet. The law specifies that a land-use permit may be issued only if the analysis shows that the store would not have an "undue adverse impact" on the local economy. Similar bills have been proposed in California, Oregon and New Jersey. Although vital for sound public-policy decisions, these analyses are still liable to be considered "economic needs tests," which are in violation of the GATS. If a foreign-owned firm is involved, such policies could be challenged at the WTO.

Limits on Chain Restaurants and Stores: Many cities, counties and states are fighting to preserve their unique character by placing limits on the number and design of formula restaurants and chain stores. The town council of Chesapeake City, Maryland unanimously enacted an ordinance in September 2007 requiring design standards for formula businesses in the "general commercial zone," and altogether prohibiting them in the village center and waterfront district. If such a policy resulted in a foreign-owned firm not being allowed to establish a store or restaurant, it could be challenged at the WTO which forbids quotas in the service sectors in which a country has taken WTO commitments.

Limits on Development in Ecologically Sensitive Areas or Coastlines: Westfield, Indiana rejected a proposed Wal-Mart, citing the negative environmental impact of paving over of 450,000 square feet of "rolling, wooded land" and the location's proximity to sensitive wetlands. Such bans on development in environmentally sensitive areas are prohibited by the GATS if a country committed the relevant service sector to WTO – and the United States made commitments for retail. If a foreign-owned store were involved, such actions could be challenged at the WTO.

Hours of Operation Rules: In Des Moines, Iowa, a 24-hour, seven-days-a-week Wal-Mart Superstore was blocked because of the nighttime noise, traffic and quality-of-life concerns of nearby residents. The store could have been built if it limited its hours from 8 a.m.-10 p.m. Restrictions based on hours of operation could be considered GATS-illegal efforts to limit the quantity of a service output or the total number of persons employed at a service operation. If a foreign-owned store was involved, such actions could be challenged at the WTO.

Annex 9

Trade-Agreement Threats to Toxics Regulations

Should Trade Rules Get in the Way of Public Safety?

Prompted by the absence of an effective U.S. federal chemical regulatory policy that could protect consumers and the environment from the multiple threats posed by toxic chemicals, many states have stepped into the vacuum. From Maine to Hawaii, states are taking action to restrict certain plastic additives (and other dangerous substances) contained in children's toys and an array of other products. Industries are attacking these much needed consumer and environmental protections, claiming that the laws violate U.S. obligations under trade agreements.

Indeed, over-reaching rules in the World Trade Organization (WTO) agreements, the North American Free Trade Agreement (NAFTA), and other NAFTA-style pacts conflict with some key initiatives state legislators are creating to safeguard the public against toxic chemicals. This shows how desperately the existing "trade" rules need reform.

For instance, the WTO contains a general prohibition on "quantitative restrictions" i.e. a *ban* of a particular chemical or product. Even bans on toxic chemicals that apply equally to domestic and imported goods are only considered WTO-legal if they meet certain absolute limits on regulation. These include a provision stating that federal and state measures must be based on international standards. Among the recognized standards are those set by the industries in question! **Unfortunately, under WTO rules, international standards serve as a ceiling – rather than a floor – for policies.** Policies taking precautionary actions that *improve* upon poor international standards are subject to challenge. Plus, domestic toxic rules relating to product characteristics, labeling, and packaging are required to be "no more trade-restrictive than necessary" to achieve their purpose. This very subjective standard would be judged by a WTO dispute resolution tribunal comprised of trade experts with no toxics regulatory expertise.

The WTO also contains "most favored nation" obligations, which prohibit treating products imported from one WTO country differently than goods from other countries. This conflicts with policies focusing on products from countries with known problems with lead and other toxic chemicals. The rules also require that "like products" produced domestically and offshore be treated the same, but defining a "like product" is highly subjective. This would be decided by a tribunal of trade experts, who might consider bans on certain baby bottles (for instance) to be discrimination against a "like product," if less toxic alternative bottles were allowed.

Because of rules like these, anti-toxics campaigners have long had to battle against industry use of trade threats, such as those aimed at chilling toxics bans, policy innovations and the search for nontoxic alternatives. Interests who oppose improved safety standards loudly tout how countries, states and localities could be subject to trade challenges if they institute precautionary health and environmental policies that require changes in production processes or design. State legislators need to push back on this usurpation of their authority as democratically elected state officials and demand changes to trade agreements. This would allow them to appropriately address new and emerging hazards in the absence of federal leadership.

State Public-Health Policies at Risk

We need to alter our existing trade rules so that critical public health policies, like the restrictions on toxics below, are not vulnerable to challenge in closed-door trade tribunals. Even though in practice actual trade challenges take years to play out, industry often uses the threat of a challenge to chill innovation.

States Tackle BPA in Baby Bottles: Recently, significant concerns have been raised about the safety of bisphenol-A (BPA) a chemical used in the creation of clear, hard plastics. Scientists have found that BPA may present complications for healthy human development, with links to early puberty, prostate effects, and breast cancer. A recent investigation also shows a connection between BPA and higher rates of heart disease, diabetes, and liver abnormalities. Studies showing BPA leaching from heated baby bottles has led many groups to call for a complete ban on the use of the chemical in baby bottles, sippy cups, water bottles and other food and beverage containers. Legislators in California, Connecticut, Hawaii, New Jersey, New York, Maine, Maryland, Massachusetts, Minnesota and Pennsylvania quickly responded to the threat by proposing elimination of BPA from key consumer products.

States Douse Ubiquitous Flame Retardants: Polybrominated diphenyl ethers or PBDEs are a type of chemical flame retardant used in a wide array of household products, including fabrics, furniture, and consumer electronics. PBDEs are associated with adverse effects on neurodevelopment, reproductive health, and endocrine function. PBDEs are similar to PCPs. They are persistent organic pollutants that bioaccumulate in the environment, in the food chain and in human tissue. Their presence in human breast milk has been skyrocketing in recent years. Since safer alternatives are available, nearly a dozen states have restricted the use of certain PBDEs.

Massachusetts to Require the Use of Safer Alternatives: Massachusetts is taking an innovative and more comprehensive approach to the problem. Pending legislation in the state targets 10 known toxics and requires the removal of toxic chemicals from products when safer chemicals or processes exist. This precautionary approach could also face trade challenge if, in choosing a safer alternative, the state inadvertently favors a similar or “like” product from one WTO member country over another.

Annex 10

Trade-Agreement Threats to Financial Service Sector Reregulation

To Rescue Main Street, We Need to Curb the WTO

Foreclosed homes. Lost jobs. Collapsing banks. The greatest government involvement in the economy in generations. While these headlines dominate the news, a root cause of this crisis has largely been ignored: over the last several decades, the U.S. government and corporations have pushed extreme financial deregulation worldwide using "trade" agreements and international agencies.

Starting in the late 1970s, the U.S. government and corporations pushed to redefine "finance" from a service that supports the real economy to a tradable commodity whose flow across borders should be uninhibited. Starting in the late 1980s, they successfully pushed for financial services to be included in "trade" negotiations, including those establishing the World Trade Organization (WTO). "The sector was truly unique in that respect, and there is little doubt within the trade policy community that financial sector support in the European Union and the United States was a determining force in concluding the FSA [WTO Financial Services Agreement]" notes a study posted on the WTO's own website ("Financial Services and the WTO: What Next?").

The WTO rules require deregulation – and lock-in – of financial services that countries "liberalize" under these terms. This includes simply banning many common forms of financial regulation, even if such policies were to apply to domestic and foreign firms. U.S. government and corporate efforts in trade negotiations complemented the domestic lobbying to weaken and eventually repeal the New Deal's system of banking regulation. For instance, the Glass-Steagall Act created a firewall between commercial and investment banks to prevent the former from speculating with consumers' savings. But the U.S.' 1997 FSA commitments noted an intent to change Glass-Steagall to conform with WTO rules. The Gramm-Leach-Bliley Act, which did so, passed in 1999 – the year the FSA went into effect.

Many people still assume trade pacts are about traditional matters, such as tariff cuts. In fact, the WTO requires its members – including the United States – to conform domestic policies to a broad *non-trade* deregulatory agenda. Few in Congress read the legislation that implemented the WTO in 1994, much less the pact's actual 900-page text. Congress didn't even get a vote on the expanded U.S. financial service deregulation commitments contained in the subsequent WTO FSA. But if any country's laws fail to comply with WTO rules, these can be challenged before foreign tribunals and the country subjected to indefinite trade sanctions until policies are changed to meet WTO dictates.

Now, while Congress works to reregulate banks and other financial firms, it must confront how the WTO locks in domestically and exports internationally the model of extreme deregulation that caused the global economic crisis. In other words, we must change the WTO rules to fix our current economic crisis.

Stiglitz UN Commission Calls for Reform of WTO's Regulatory Ceiling

The United Nations Commission of Experts, chaired by Nobel Prize winning economist Joseph Stiglitz, noted that: "The framework for financial market liberalization under the Financial Services Agreement of the General Agreement on Trade in Services (GATS) under the WTO and, even more, similar provisions in bilateral trade agreements may restrict the ability of governments to change the regulatory structure in ways which support financial stability, economic growth, and the welfare of vulnerable consumers and investors."

The Problem: Overreaching "Trade" Agreement Rules

So-called "trade" agreements – both existing and proposed – limit the domestic-policy options lawmakers can pursue in areas that are not trade related. The WTO enforces 17 different agreements, only a handful of which relate to tariffs and quotas – the traditional terrain of "trade policy." Others limit subsidies governments can provide to green industries, forbid domestic economic stimulus funds from being directed to domestic workers and firms, set parameters for how our health-care system is managed, and even constrain how our federal and state governments can expend our tax dollars in government procurement. (The North American Free Trade Agreement and similar pacts contain analogous provisions, and also empower foreign investors to sue governments directly for violating certain rules.)

One of the most controversial WTO agreements is the General Agreement on Trade in Services (GATS), which sets out rules for how countries can regulate their economies' "service sectors." What's a service? Basically anything you can't drop on your foot, from banking to energy, education to healthcare. The WTO Secretariat was unusually direct in describing the GATS' implications: "*Governments are free in principle to pursue any national policy objectives* ***provided the relevant measures are compatible with the GATS.***"

One of the most controversial service sectors covered by the GATS is finance. When many countries initially rejected the extreme banking, securities and insurance deregulation pushed by U.S. and European governments and corporations, additional negotiations were launched after the WTO was established to push for deeper commitments. In all, over 100 countries have WTO financial services commitments.

The United States and other rich countries also committed to even greater deregulation by adopting an additional WTO agreement, called the "Understanding on Commitments in Financial Services." When all was said and done, the United States was bound to extremely broad WTO obligations to stay out of regulation of "banking," "other financial services," and "insurance." Consider just one sector that has been a focus of considerable attention as a source of the financial meltdown. In the expansive WTO category called "Trading of Securities and Derivative Products and Services Related Thereto," the only specific carve-out listed by the United States regarding the regulation of derivatives is for onion futures – really.

Taken as a whole, the WTO's limits on financial service sector regulation are expansive. These rules not only guarantee foreign financial firms and their products access to U.S. markets but also include numerous additional rules that limit how our domestic governments may regulate foreign firms operating here:

No new regulation: The United States agreed to a "standstill provision" which requires that we not create new regulations (or reverse liberalization) for the list of financial services bound to comply with WTO rules. **Translated out of GATS-ese, this means that the United States has bound itself not to do what Congress, regulators and scholars deem necessary – create new financial service regulations.**

Certain forms of regulation banned outright: The United States agreed that it would not set limits on the size of financial firms, the types of financial service one entity may provide or the types of legal entities through which a financial service may be provided in the broad array of financial services signed up to the WTO. These WTO rules conflict with countries' efforts to put size limitations on banks (so that they do not become "too big too fail") and to "firewall" different financial services (a policy tool used to limit the spread of risk across sectors).

Treating foreign and domestic firms alike is not sufficient: The GATS Market Access limits on U.S. domestic regulation apply in absolute terms. In other words, even if a policy applies to domestic and foreign firms alike, if it goes beyond what WTO rules permit, it is forbidden. And, forms of regulation not outright banned by these rules must not inadvertently "modify the conditions of competition in favor

of services or service suppliers" of the United States, even if they apply identically to foreign and domestic firms. Might aspects of the Wall Street bailout eventually "change the conditions of competition" in favor of U.S. firms? Other WTO members have begun reviewing just this very question.

No bans on new financial service "products": The United States is also required to allow all foreign financial firms operating here "to offer in its territory any new financial service," a conflict with proposals to limit various risky investment instruments, such as types of derivatives.

Other non-discriminatory domestic regulations also subject to review: GATS subjects policies of general application that may affect service sector firms to review, with WTO tribunals empowered to determine if they are "*reasonable*", whether they "*could not reasonably have been expected*" and whether licensing and qualification requirements and technical standards limit foreign firms' access.

The WTO "Doha Round" Would Require Further Financial Deregulation

Even as Congress works to reregulate financial firms, U.S. trade negotiators are working to complete a WTO expansion called the "Doha Round." The Bush administration led a push to *expand* financial deregulation through this Round, which started in 2001. Unless the Obama administration takes speedy action to remove outrageous new deregulation measures from the negotiating table, this Bush trade-policy hangover will blight attempts to remedy the financial crisis. Among the Doha Round threats:

A new agreement setting additional constraints on domestic regulation. It seems unimaginable that, in the current context, WTO negotiations would be underway to establish an agreement imposing additional limits on regulation. But that is exactly what a "GATS Working Party on Domestic Regulations" is now completing for adoption through the Doha Round. It could empower WTO tribunals to second-guess governments on the subjective question of whether policies are really necessary, or if less trade-restrictive means to meet policy goals could be employed.

How WTO Commitments Are "Scheduled"

During WTO negotiations, countries list the financial service sectors, if any, they agree to bind to various GATS rules, through a process called "scheduling." Countries' schedules are charts that list specific sectors – separated into two large categories called "Insurance" and "Banking and other financial services." Securities and derivatives come under the second category. Countries' schedules also list whether a specific sector or subsector will be bound to comply with the GATS Market Access rules and/or the National Treatment rules with respect to four WTO-designated modes of service delivery. The GATS rules cover every conceivable way in which a service may be delivered: Mode 1 is cross border trade in services, such as online banking by a consumer one country with a bank in another; Mode 2 is consumption abroad of a service, such as travel overseas to establish a bank account; Mode 3 is commercial presence – a foreign bank setting up operation in a new country (Mode 3 is why GATS has been called an investment agreement); Mode 4 is movement of natural persons across borders to deliver services, for instance an accounting firm in one country sending staff to work in another. Countries also list exceptions to commitments in these charts plus a special list of Most Favored Nation exceptions, and write headnotes to list additional commitments and exclusions.

A new agreement imposing limits on accountancy sector regulation. Already completed and slated for adoption as part of the Doha Round is an agreement establishing new "disciplines" to restrict non-discriminatory regulations in the accounting sector. Arthur Andersen, of Enron accounting scandal fame, helped formulate this text. These rules will put pressure on governments to deregulate the accountancy sector, rather than better regulate it, as was called for in the G-20 Communiqués. WTO countries are under pressure to submit additional financial sectors to WTO and its expansive regulatory limits. **The Bush administration signed onto a Doha Round "Financial Services Collective Request" making such demands. Instead of removing us from this more-of-the-same demand, Obama trade official Ron Kirk has said the U.S. insists on more such commitments.**

The Solution: Shrink or Sink (and Ignore) the WTO!

Unfortunately, WTO rules *do* limit the policy space nations' need to address the financial crisis, and this must be changed. However, in the interim we cannot allow the WTO to chill needed reform. Here's a blueprint for change.

First, do no further harm: no financial deregulation in the WTO Doha Round. Demands for nations to add financial sector commitments and new regulation-limiting agreements must be jettisoned.

Fix existing WTO rules to remove financial deregulation requirements and add safeguards for economic stability policies: The changes needed are straightforward. The issue is whether the political will exists. The needed changes include removing automatic *deregulation* requirements from WTO service sector *liberalization* rules and adding a meaningful safeguard to protect prudential policies.

It takes years for a WTO challenge to get an initial ruling, so act now: Unless policymakers understand how the WTO operates, important policy initiatives may be chilled. Even if a new financial service regulation or bailout proposal violates WTO rules, a WTO country must formally challenge the policy for WTO action to be initiated. After a challenge is brought, it typically takes more than five years before issuance of a final WTO ruling, which could then result in trade sanctions. Thus, the "way to go" is to ignore the threats, enact legislation, and see if it draws an actual challenge.

WTO Rules Have Been Modified Before to Address a Global Crisis:
In the past, when WTO rules conflicted with global policy priorities, nations negotiated changes. The 2001 "Doha Declaration on TRIPS and Public Health" countered WTO drug-patent rules' limits to a global response to the HIV/AIDS crisis. Like that pandemic, the financial crisis is a global emergency. Scores of WTO countries are seeking to implement the very financial stabilization policies that could be attacked as WTO violations. The WTO's already shaky legitimacy gives a clear indication that the necessary changes to the WTO's extreme deregulation requirements can be made. Moreover, because so many countries face the same WTO problems, such changes are both politically likely and foreseeable.

Annex II

U.S. Model Bilateral Investment Treaty: Repeating NAFTA's Mistakes

Shortly after the Obama administration arrived in 2009, the State Department established a special committee to review the model that the Bush administration had employed since 2004 to negotiate bilateral investment treaties (BITs). BITs are treaties that must obtain Senate supermajority approval which in the past have contained provisions similar to the investment and financial service chapters of free trade agreements (FTAs) such as the North American Free Trade Agreement (NAFTA). The United States and other developed countries typically have implemented BITs with developing countries. However now, the Obama administration is considering a BIT with China – a net capital exporting country that is not only a recipient of U.S. outbound foreign direct investment, but also has existing and aspires to greater future acquisition of U.S. property, including for natural resource exploitation, service sector and manufacturing facilities. The prospect for a China BIT – as well as BITs being considered with other major emerging economies such as India and Russia – has made the review of the U.S. BIT model especially critical.

The special BIT review committee submitted a report in September 2009 for consideration by Obama administration officials coordinated through an interagency process that included State, the U.S. Trade Representative's office (USTR) and other executive branch agencies. The review process was arduous and ultimately there was a clear divide between the committee members representing corporate interests (who supported greater rights for foreign investors than granted in U.S. law) and the committee members representing unions and environmental groups and several academic experts (who sought to repair the overreaching BIT foreign investor privileges and their private enforcement outside of domestic courts). The latter bloc proposed various reforms aimed at addressing the worrying NAFTA foreign investor cases that have demonstrated the ways in which the current BIT model can undermine core domestic health, environmental, land use, and other policies.

Unfortunately, leaks from the interagency process suggest that Obama administration officials have dismissed some of the key reform proposals from labor and environmental advocates and legal scholars on the subcommittee, such as eliminating the investor-state arbitration system altogether and replacing it with a state-state dispute resolution system that does not give foreign investors greater rights than U.S. citizens. Moreover, it appears that significant changes to narrow the definition of covered investments and the standard for compensation for expropriation – necessary repairs to avoid foreign investors being granted greater rights than provided under the U.S. Constitution – have also been thrown off the table. Such reforms also have been supported by a majority of House Democrats who have cosponsored the Trade, Reform, Development, Accountability and Employment (TRADE) Act.

Why is it critical that the Obama administration replace the past BIT model? A brief review of some of the NAFTA Investment Chapter 11 cases highlights the risks associated with extending NAFTA-style foreign investor rights and their private enforcement – especially to countries like China that are home to many corporations with investments in the United States that could easily launch investment suits against the U.S. government using the new rights.

The NAFTA Chapter 11 Track Record

Foreign investors have succeeded eight times in NAFTA tribunals and have been awarded over $200 million. There are currently 60 cases pending against NAFTA member countries. A few of the cases filed under NAFTA's Chapter 11 "investor-state" provisions include:

Metalclad v. Municipality of Guadalacazar, Mexico: In 1997, a U.S. firm challenged a Mexican municipality's refusal to grant a construction permit for a toxic waste facility unless the firm cleaned up existing toxic waste problems that had caused the facility to be closed when it had been owned by a Mexican firm. Metalclad also challenged establishment of an ecological preserve on the site by a Mexican state government. In 2000, a tribunal ruled that the denial of the construction permit and the creation of an ecological reserve were tantamount to an "indirect" expropriation. The Mexican government was ordered to pay the California-based Metalclad company $15.6 million in compensation – an enormous sum relative to Mexico's environmental protection budget.

S.D. Myers v. Canada: U.S. company S.D. Meyers sought compensation because its "right" to treat Canadian PCB waste in its Ohio facility was halted by Canada. Canada, acting in compliance with the Basel Convention, a multilateral environmental agreement that encourages nations to treat toxic waste domestically, stopped the toxic trade before the United States did, although both signed the treaty. In 1998, S.D. Myers filed a NAFTA suit claiming discrimination and was awarded $5 million in damages by a NAFTA tribunal.

Loewen vs. Untied States: In 1998, a Canadian funeral home conglomerate challenged Mississippi state court jury's damage award in a private contract dispute and various rules of civil procedure relating to posting bond for appeal – claiming the state court's very conduct was a NAFTA violation that deserved $725 million in damages. The underlying state court case involved a local funeral home that claimed Loewen engaged in anti-competitive, predatory business practices in breach of contract. The tribunal ruled in favor of Loewen on the merits. Thankfully, Loewen's bankruptcy lawyers reincorporated the firm as a U.S. entity – destroying the necessary foreign investor status and thus the case was ultimately dismissed in 2003, the claim dismissed on procedural grounds.

Methanex v. United States: In 1999, the Canadian corporation that produced methanol, a component chemical of the gasoline additive MTBE, challenged California's phase-out of the gasoline additive, which was contaminating drinking water sources around the state. The company claimed $970 million in damages. In 2005, the claim was dismissed on procedural grounds. The tribunal ruled that it had no jurisdiction to determine Methanex's claims because California's MTBE ban did not have a sufficient connection to the firm's methanol production to qualify Methanex for protection under NAFTA's investment rules. The tribunal ordered Methanex to pay U.S. $3 million in legal fees, but those funds were not shared with the California attorney general office that assisted with the case.

Glamis Gold v. United States: In 2003, the Canadian mining company filed a $50 million dollar NAFTA claim seeking compensation for a California law requiring backfilling and restoration of open-pit mines near Native American sacred sites. The firm used its U.S. subsidiary to acquire federal mining claims. It sought to obtain approval from the state and federal governments to open an environmentally-destructive open-pit cyanide heap leach mine. Instead of complying with state policy for such mines and completing its application, Glamis filed a NAFTA claim. After millions were spent in legal defense by the federal and state governments, the case was ultimately dismissed.

Grand River Enterprises v. United States: Aspects of the 1998 tobacco settlements between 46 U.S. states and major tobacco companies were challenged by a Canadian tobacco company as arbitrary and unfair. The settlements recoup public monies spent to treat tobacco-related illnesses, fund educational programs and restrict marketing directed at children, which has resulted in a drop in the rate of U.S. teenage smoking. The case is still pending.

CANACAR v. United States: A group of Mexican truckers filed a NAFTA Chapter 11 suit after Congress took action in 2009 to cancel a Bush administration pilot program allowing 26 Mexican carriers full access to U.S. roadways. Even though Mexican carriers cannot own U.S. carriers and have no real property or business in the United States, the claimants created a novel argument that due to the fact that they pay certification fees to the Federal Motor Carrier Safety Administration they have an "investment" in the United States and qualify as "investors" and should be compensated, possibly in the billions, in damages. This case is pending.

Ethyl v. Canada: A U.S. chemical company challenged the Canadian environmental ban of the gasoline additive MMT. Initially, Canada objected to the NAFTA suit, claiming that the MMT ban was not a "measure" covered by NAFTA Chapter 11 and that Ethyl had failed to wait the requisite six months after the ban was passed and implemented before filing a claim. A NAFTA panel rejected Canada's jurisdictional claims, clearing the way for the case to move forward on the merits. Shortly after this initial ruling, the government of Canada decided to settle and payed $13 million in damages and legal fees to Ethyl.

Apotex v. United States: A Canadian generic drug manufacturer sought to develop a generic version of the Pfizer drug Zoloft (sertraline) when the Pfizer patent expired in 2006. Due to legal uncertainty surrounding the patent, the firm sought a declaratory judgment in federal court to clarify the patent issues and give it the "patent certainty" to be eligible for final FDA approval of its generic upon the expiration of the Pfizer patent. The court declined to resolve Apotex's claim and dismissed the case in 2004, and this decision was upheld by the federal circuit court and the U.S. Supreme Court. Because the courts declined to clarify the muddled patent situation, another generic competitor got a head-start in producing the drug. In 2008, Apotex challenged the court decisions as a misapplication of U.S. law and a violation of its NAFTA investor protections. The company is demanding $8 million in damages and the case is pending.

Pope and Talbot v. Canada: A U.S. timber company challenged the Canadian implementation of the 1996 U.S.-Canada Softwood Lumber Agreement. On April 2001 a tribunal dismissed claims of expropriation and discrimination, but held that the rude behavior of the Canadian government officials seeking to verify the firm's compliance with the lumber agreement constituted a violation of the "minimum standard of treatment" required by NAFTA for foreign investors. The panel also stated that a foreign firm's "market access" in another country could be considered a NAFTA-protected investment.

Annex 12

The TRADE Act: A Path Toward a New Trade and Globalization Model that Safeguards States' Rights

TRADE Act Provisions of Special Interest to States

The Trade Reform, Accountability, Development and Employment (TRADE) Act was introduced by Rep. Mike Michaud (D-Maine) in June 2009 in the House of Representatives with 106 original cosponsors and in the Senate in December 2009. This landmark legislation offers a path toward a new globalization policy that can harvest the benefits of trade without undermining the principles and practice of American democracy, including our systems of federalism and checks and balances. The TRADE Act:

- Sets forth in detail what future good trade agreements must and must not include;
- Requires the review and remedy of certain major existing trade agreements;
- Provides groundbreaking new protections for state sovereignty, recognizing that existing "trade" pacts have inappropriately encroached into states' domestic non-trade policy space;
- Describes a new presidential trade negotiating process to replace Fast Track that dramatically improves federal-state consultations by providing states with authority to determine to which investment, service sector and procurement regulatory terms in trade pacts states will be bound.

Replacing "Fast Track" Trade Promotion Authority with a New Process that Gives States and Congress a Greater Role in Determining Agreements' Contents: The Fast Track authority President Bush won by one vote in 2002 expired in 2007. President Bush sought new Fast Track powers, but thanks to efforts by many state and federal officials, this request was rejected. Under Fast Track, Congress delegated away its constitutional authority to set trade terms to the executive branch. Moreover, the legislature was limited to merely voting "yes" or "no" with no amendments and limited debate on finished agreements *after* they had been signed and entered into by the president. While Fast Track's design strictly limited Congress' role, it completely *excluded* any meaningful role for states in trade policymaking, despite the array of non-trade regulatory issues under state authority that today's "trade" pacts affect. The end of Fast Track offers a rare opportunity for state legislators and Congress to work together to devise a new system of presidential trade authority – one that provides states with meaningful consultation about provisions of trade agreements that limit state regulatory authority. The TRADE Act lays out such a new process, which explicitly empowers states with the right to determine to what investment, procurement and service sector regulatory terms they will be bound during the course of negotiations. It also ensures that Congress votes on agreements *before* they are signed, thus ensuring that negotiating objectives set by Congress are met.

Stops International Preemption of State Regulatory Authority by Trade Agreements: The TRADE Act lays out a new model for federal-state consultation regarding how states are – or are not – bound to certain non-tariff provisions. In contrast to the current system under which federal negotiators simply bind states to comply with service-sector and investment rules without consultation. The TRADE Act establishes that **states would be bound to procurement, investment, and service provisions of future trade agreements *only* when states have been *fully* consulted and have given consent**. Further, the TRADE Act's services, investment and procurement provisions make it clear that public interest priorities including human rights, labor, health, safety and environmental

standards that apply equally to domestic and foreign goods and firms could no longer be subject to trade challenges as "non-tariff barriers." Under the trade agreements the TRADE Act envisions, states could implement common state purchasing policies such as "Buy-Local" policies that encourage local economic development, or ban lead or dangerous plastic additives in children's products without fear of a trade challenge.

Reestablishes State Authority to Regulate Domestic – and Foreign – Service Sector Firms: The TRADE Act also includes provisions that would reestablish states' authority to regulate foreign service-sector firms operating within their territory the same way domestic firms are regulated. This includes safeguarding local control of land-use and development policy by prohibiting "market access obligations" existing in current pacts that give special rights to foreign firms and their governments to challenge zoning, hours of operation, or other rules that limit the number or size of service providers including "big-box" retail stores.

Shields States from Costly Investor-State Battles: States have spent enormous sums of taxpayer dollars defending public health, environmental and land-use policies against foreign-investor challenges in trade tribunals. This is a privilege given to foreign investors under the current NAFTA-style trade agreements. Foreign investors have succeeded eight times with NAFTA Chapter 11 claims, and foreign tribunals have ordered $204.91 million in public funds to be paid in compensation to foreign investors by governments. Three lawyers from the California Attorney General's office worked on the MTBE NAFTA case supporting the federal lawyers but never received any compensation for their time, even though federal lawyers received $3 million in compensation. The investment provisions of the TRADE Act ensure that future trade agreements will not permit such challenges by foreign investors against domestic regulatory policies.

Reinforces NCSL Position that Negotiations Should Use "Positive List" Method: Current NAFTA-style trade agreements use a "top-down" or "negative list" structure. This means that policy in every sector of the U.S. federal and state service economy are committed to comply with trade- agreement constraints *unless* an exception is written into the agreement before it is passed. The same goes for investment policy for all sectors, and all procurement contracts over a certain dollar threshold. The top-down system means states must convince federal negotiators to carve out a particular sector or service – which to date federal negotiators have refused to do even when requested. The TRADE Act switches the presumption by requiring future agreements be negotiated using a "bottom-up" approach, which would require that states – and the federal government – explicitly list which service, investment and procurement sectors will be covered by the agreement. This is the system used in certain World Trade Organization agreements, proving it is entirely feasible.

Annex 13

National Conference of State Legislatures' Free Trade and Federalism Policy

Trade that Protects State Sovereignty

The National Conference of State Legislatures (NCSL) believes that trade has the potential to improve the livelihoods of Americans and thus supports efforts to expand U.S. exports through well-crafted international trade agreements. However, NCSL also believes that these agreements must be harmonized with traditional American values of constitutional federalism. In particular, reservations can be made to trade and investment agreements that limit preemption of state law and that preserve the authority of state legislatures. Further, implementing legislation for trade and investment agreements can and should be crafted to include protections for our constitutional system of federalism. These measures, among others, are necessary to ensure that international trade agreements do not adversely impact state budgets or constrain state regulatory authority. Without them, NCSL will be unable to support such trade and investment agreements.

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 arbitrary and unreasonable standards of discrimination against foreign commerce, similar to that employed by the GATT panel in the so-called Beer II decision. In order to better safeguard state sovereignty, the USTR should be guided by the following recommendations in all trade negotiations.

First, 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.

Second, NCSL encourages the Office of the United States Trade Representative (USTR) to utilize the "positive list" approach for making services, procurement, and investment 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 and would avoid the kind of serious problems we now face in the area of internet gambling. A "negative list" approach commits the United States to implement trade disciplines on all covered sectors unless areas or state laws are specifically exempted in the annexes of the agreement. USTR should acquiesce to a "negative list" approach only as a last resort. If the federal government agrees to a "negative list" approach, then the annexes listing exemptions should retain the unbound sectors and the limits of U.S. commitments that exempt state laws.

Following appropriate consultations with USTR, the states must be able to set and adjust their commitments – a right the states have and which USTR has repeatedly

recognized. USTR should therefore make clear to trade negotiating partners that U.S. states retain the ability to make adjustments to commitments regarding state-level services, procurement, and investment policies. Finally, 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 the Intergovernmental Policy Advisory Group (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

Following the passage of the North American Free Trade Agreement (NAFTA) in the 1990s, several foreign investors have used the "investor-state" provisions of that agreement to attack state laws and state court decisions before an international tribunal. By providing access to international investment arbitration by foreign investors, NAFTA and various related Free Trade Agreements (FTAs) provide greater procedural rights for review of claims against U.S. law and policy than would be provided to a U.S. investor under similar circumstances. Consequently, the decisions of these tribunals have had an adverse impact on state sovereignty and federalism. Unfortunately, the "no greater rights" language in the 2002 Trade Promotion Authority (TPA) has been interpreted to cover only substantive rights. The ability of foreign investors to bring claims in front of an international investment tribunal, as opposed to through the U.S. courts, is clearly a greater procedural right than that enjoyed by U.S. investors; and NCSL is concerned that these tribunals, because they are frequently unfamiliar with U.S. federalism and jurisprudence, would in any case provide foreign investors with greater substantive rights. At present such language is not inserted into the operational text of investment chapters of these trade agreements, but rather, is only found in the preamble. NCSL will only support a grant of presidential trade negotiating authority if such a grant of authority includes a "no greater procedural or substantive rights" mandate. NCSL is committed to working with USTR and other federal agencies as they interpret and apply "no greater procedural or substantive rights" language to trade-agreement negotiations.

Trade-agreement implementing language must include provisions that deny any new private right of action in U.S. courts or before international dispute resolution panels based on international trade or investment agreements. Implementing legislation must also include provisions stating that neither the decisions of international dispute resolution panels nor international trade and investment agreements themselves are 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, the federal government defend state laws as vigorously as it defends federal law.

The federal government retains the power to sue a state to enforce international trade agreements. However, NCSL urges 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 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. Specifically, the federal government must indemnify the states for costs incurred relating to trade challenges and ensure that the federal government will not seek to use administrative measures (such as withholding of payments) to compel compliance or to pay a damage award.

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.

Additionally, state Offices of Attorney General must be fairly compensated by the federal government for the time and expense associated with defending against a foreign investor claim. The absence of such a requirement has led to a kind of "unfunded mandate," such as was experienced by the California Department of Justice during its preparations for defense in the NAFTA "Methanex" case.

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 directly affected by today's international commercial agreements. It is imperative that the USTR and other agencies consult with state legislators and NCSL prior to the outset of trade negotiations in order to ensure that both the negotiators and state legislators are aware of any state laws, policies, or programs that may be impacted by a negotiated agreement.

In general, NCSL remains 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 work with IGPAC and looks forward to full and active participation in this body. We are also encouraged by USTR's move away from solely relying 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.

NCSL notes that a number of states have created oversight committees or state commissions that study the impact of international trade agreements on the state's economy and regulatory authority. It is appropriate for USTR to consult with these state-level bodies.
NCSL also notes the proposal put forward by

IGPAC in August 2004 for the creation of a standing federal-state commission on international trade. IGPAC also proposed: 1) trade policy capacity with resources relevant to state level concerns; 2) information sharing between USTR and states and trade policy dialogue between states; 3) improvement of trade data and analysis; 4) discussion of procurement from the state perspective; 5) improvement in the state/federal trade development partnership; and 6) assessment of the costs and benefits assessment of the costs and benefits of federal trade development funding allocated to agriculture, industries, services and technologies. NCSL strongly supports the content of this proposal, the outline of which has been included in recent IGPAC reports to USTR regarding new free trade agreements. NCSL requests that USTR provide a statement of its position on the IGPAC proposal or a written response detailing USTR concerns regarding aspects of the standing commission proposal. It is unfortunate that this good-faith effort by IGPAC to model possible new approaches to federal-state consultation has been ignored.

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 governors to make similar commitments to several FTAs being negotiated at the time.

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. Unfortunately, current FTAs could prohibit state and local governments from passing new laws favoring local suppliers in government contracts for goods and services and bar governments from imposing technical specifications in its public contracts if those specifications pose an "unnecessary" barrier to trade. The agreements' national treatment rules will prohibit governments from favoring local suppliers, even when there are good social and economic development reasons to do so. The agreements' rules on technical specifications and supplier qualifications could allow foreign companies to ask their home government to challenge procurement rules designed to achieve social or development goals, such as incorporating living wage provisions and environmental quality standards into the production of goods and services, assistance to minority-owned firms, and local purchasing preferences. NCSL encourages USTR to ensure 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.

It is unacceptable that state legislatures are not being consulted regarding GPA and other procurement-related issues. Under most state constitutions, the legislature has substantial power to enact spending measures and to set procurement policies. NCSL demands that USTR consult with state legislatures about state procurement practices. USTR should only be able to bind a state to an international procurement agreement following formal consent from the state legislature. We are particularly troubled by the recently negotiated U.S.-Korea FTA, which by reference binds all GPA states to the additional provisions negotiated under the procurement chapter of that agreement.

Services

Services constitute an important and growing segment of the American and 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. Prior, during, and after service sector-related negotiations, USTR must undertake consultations with state legislatures, where policies about government-provided services, regulation of monopolies, provision of essential services (such as energy, water, health, education, transportation, or public safety), or privatization are set. Consultation with state legislatures 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. We are particularly concerned about the inclusion of higher education, which the United States has proposed to subject to WTO jurisdiction in the context of the Doha Round. This proposal may have consequences for state higher education subsidies and other state regulatory policies related to higher education that should be carefully examined before the sector is committed. The WTO gambling suit illustrates the dangers of committing service sectors without a thorough vetting by appropriate state officials.

Regulation of gaming interests ranging from lotteries to horseracing has long been a prerogative of the states, and state policymakers have chosen vastly different approaches as they balance varying public morals, revenue, land-use, and other considerations. As the World Trade Organization Dispute Resolution Body has ruled that the United States did make a commitment covering gambling under "other recreational services," that the United States is in violation of that commitment, and that the United States has failed to comply with its ruling, NCSL appreciates USTR's invocation of GATS article XXI to withdraw the U.S. commitment and calls on USTR to consult effectively, meaningfully, and timely with the states as USTR negotiates compensatory concessions to our trading partners. Further, NCSL endorses the use of article XXI to withdraw other commitments under GATS that may run counter to state policy, regulatory, or police authority.

Adjusting to Free Trade

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

- to ensure that the funding for TAA programs is sufficient to meet current and future needs;
- to expand benefits eligibility to service-sector and agricultural workers impacted by trade;
- to work with NCSL and state legislatures to ensure that TAA programs are flexible to suit different states' needs;
- to engage in aggressive outreach to ensure that workers, employers, and communities are informed of the benefits of the TAA program and are able to effectively utilize the program;

- to ensure that adversely affected workers are provided the full income support, training, reemployment services and other services and benefits to which they are entitled, and that claims for such benefits are reviewed expeditiously and objectively;
- to simplify procedures for determining TAA eligibility; and
- to refrain from modifying TAA in any way that would jeopardize the program's mandate to help trade-affected workers who have lost their jobs as a result of increased imports or shifts in production out of the United States.

In general, the federal government should work with the states and 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

NSCL recognizes that many developing countries do not have the institutions or capacity to implement and enforce the numerous obligations assumed under an FTA. NCSL supports federal efforts to fund programs to assist in building the trade capacity and trade-agreement compliance of developing countries. Moreover, NCSL recognizes that developing countries need additional assistance to help them take advantage of opportunities created by trade in order to alleviate poverty. We therefore support federal funding for infrastructure and rural development so that any benefits of trade may be more broadly shared. Funds should also be directed to ensure that laws and institutions related to labor and the environment are improved and strengthened.

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 legislatures in order to represent their interests and the American public in trade negotiations while protecting and preserving American constitutional principles.

Adopted August 2007, Expires August 2010

End Notes

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3. This figure covers the period through 2008, before the recession led to a collapse of both imports and exports. Bureau of Economic Analysis, "U.S. International Trade in Good and Services." Available at: http://bea.gov/newsreleases/international/trade/trad_time_series.xls. Accessed on Dec. 10, 2009.
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13. Zogby International, October 2008. Available at: http://www.zogby.com/news/X-IAD.pdf.
14. Mary Gatta, Heather Boushey, and Eileen Appelbaum, "High-Touch and Here-to-Stay: Future Skills Demands in Low Wage Service Occupations," National Academies' Center for Education, June 2007.
15. Leaders from both parties and from manufacturing industry have called for a reinvigorated manufacturing policy. See Reps. Donald Manzullo (R-Ill.) and Tim Ryan (D-Ohio), April 19, 2007 press release; "U.S. Steel Industry Salutes Men and Women in Uniform," SteelWorks, Nov. 8, 2007. Warren Buffet has proposed a balanced trade scheme, in "America's Growing Trade Deficit is Selling the Nation Out from Under Us: Here is a Way to Fix the Problem," Fortune Magazine, October 2003. Some CEO's have joined together to form the Horizon Project to press for more balanced trade. More information available at: http://www.horizonproject.us/main.cfm?s=horizon. Even some former trade negotiators are pressing for more balanced trade policy. Economist Josh Bivens likens globalization to a "chronic recession" requiring a vigorous policy response: Everybody Wins Except for Most of Us: What Economics Teaches About Globalization (Washington, D.C.: EPI Publications 2009). Robert Cassidy negotiated China's accession to the WTO for the USTR. He now believes that our trade policies need a complete overhaul and the "long term stable growth of the economy will require that the export sector outperforms the rest of the economy." "Remarks by Robert B. Cassidy, Director, International Trade and Services, Kelly Drye & Warren LLP," Jan 27, 2009. Available at: http://epi.3cdn.net/2d2afb535cb430dc2e_vim6b90r6.pdf. Accessed Dec. 10, 2009.
16. Renato Ruggiero, former Director-General of the World Trade Organization, speech to the United Nations Conference on Trade and Development, Oct. 8, 1996.
17. Michelle Sager, One Voice or Many? Federalism and International Trade, (New York: LFB Scholarly Publishing LLC, 2002), at 94.
18. National Conference of State Legislatures' Labor and Economic Development Committee, "Free Trade and Federalism" Policy, 2007. Available at: http://www.ncsl.org/StateFederalCommittees/LaborEconomicDevelopment/PolicyPositionsLaborampEconomicDevelopment/tabid/16166/Default.aspx#free. Accessed Dec. 10, 2009.
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20. House Resolution 121, State Rep. Merika Coleman, Alabama House of Representatives, March 29, 2007.
21. Senate Resolution 8, State Sen. Dave Hansen, Wisconsin State Senate, June 26, 2007.
22. Peru FTA signed April 12, 2006; Colombia FTA signed Nov. 11, 2006; Panama FTA signed June 6, 2007; Korea FTA signed June 30, 2007.
23. As described below, some states' policies require prior informed opt-in consent with respect to binding states to conform their non-trade regulatory policies to trade agreement service sector and investment rules. Most of these states laws did not go into effect until the most recent agreements had already been signed. (Hawaii's law went into effect on July 10, 2007, Rhode Island's on Oct. 30, 2007, Minnesota's on May 12, 2008, and Maine's on June 12, 2009.)
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26. Response to a Texas Fair Trade Coalition Questionnaire, March 3, 2008. Available at: http://www.citizen.org/documents/TXFairTrade-CoalitionObama.pdf. Accessed Dec. 10, 2009.
27. United Nations, "Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International and Monetary System," Sept. 21, 2009 at 82.
28. See Alan Beattie, "Washington's Waning Way: How Bail-Outs Poison a Free Market Recipe for the World," Financial Times, Sept. 28, 2008.
29. National Association of Insurance Commissioners, "AIG: Conversation Should Stay Focused on the Facts," NAIC Press Release, Sept. 18, 2008. From the press release: "Although AIG is generally known to the public as the world's largest insurer, in truth, AIG is a financial services conglomerate. American International Group, Inc., is a financial holding company that owns 71 U.S.-based insurance entities and 176 other financial services companies throughout the world. These include banks, securities firms and non-U.S. insurers, along with other related businesses like premium finance companies. The 71 state-regulated insurance entities are not the problem. They are all financially sound or, in insurance regulatory terms, solvent and fully able to pay claims presented by policyholders and claimants. The problem lies with the AIG financial holding company that is subject to federal regulatory oversight by the U.S. Office of Thrift Supervision (OTS). The AIG financial holding company took on more risk than they could handle when investing in collateralized debt instruments, such as credit derivative swaps on mortgage-backed securities. It is important to note that these types of investments are financial products, not state-regulated insurance products. When the U.S. housing markets experienced a downturn, these risky investments lost lots of money for the AIG financial holding company."
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31. Letter from Sean Dilwig, Wisconsin Insurance Commissioner, to Rep. Paul Kanjorksi (D-Pa.), Aug. 30, 2008. On file with Public Citizen.
32. Letter from Dolores Kelly, Chair, Committee on Communications, Financial Services, and Interstate Commerce, National Conference of State Legislatures to Rep. Paul Kanjorski (D-Pa.)and Ranking Member Rep. Deborah Pryce (R-Ohio), House Committee on Financial Services, July 9, 2008. Available at: http://www.citizen.org/documents/HR-5840-NCSLletter.pdf. Accessed Dec. 10, 2009.
33. For the 2009 list of U.S. trade barriers see: http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_144160.pdf. The discussion of insurance is on page 87.
34. Todd Tucker and Mary Bottari, "Santa's Sweatshop: Made in DC with Bad Trade Policy," Public Citizen Report, December 2007. Available at: http://www.citizen.org/documents/Santas%20Sweatshop.pdf. Accessed Dec. 10, 2009.
35. House Bill 8, "Lead Containing Products-Prohibition," Del. Jim Hubbard, Maryland Legislative Assembly, Dec. 3, 2007.
36. Lisa Rein, "Pr. Geo.'s Delegate Rankles Chinese Government," The Washington Post, June 23, 2008. Available at: http://blog.washingtonpost.com/annapolis/2008/06/pr_geos_delegate_rankles_chine.html?nav=rss_blog. Accessed Dec. 10, 2009.
37. WTO Technical Barriers to Trade Agreement, Article 3.2. Available at: http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm. Accessed Dec. 10, 2009.
38. For more information on how this notification system works for manufactured products see the National Institute of Standards and Technology (NIST) webpage at: http://ts.nist.gov/Standards/Information/tbtmotif.cfm. NIST is the designated point of contact which generates and receives notifications under the WTO's TBT agreement. The U.S. Department of Agriculture's Foreign Agricultural Services generates and receives notifications under the WTO's Sanitary and Phytosanitary (SPS) Agreement. More information is available at: http://www.fas.usda.gov/itp/OSTA_IRSD/WTO_SPS_Committee_Enquiry_Point.asp.
39. House Bill 56, "Phthalates and Bisphenol–A – Prohibitions – Toys and Child Care Articles," Maryland Del. Jim Hubbard, Maryland Legislative Assembly, Jan. 9, 2008.
40. See National Toxicology Program, U.S. Department of Health and Human Services' Center for the Evaluation of Risks to Human Reproduction, "NTP CERHR Monograph on the Potential Human Reproductive and Developmental Effects of Bisphenol A," NIH 08-5994, September 2008. Available at: http://cerhr.niehs.nih.gov/chemicals/bisphenol/bisphenol.pdf. Accessed Dec. 10, 2009.
41. See Work Group for Safe Markets (coalition of U.S. public health and environmental NGOs), "Babies Toxic Bottle: Bisphenol A Leaching from Popular Baby Bottles," Work Group Report, February 2008. Available at: http://www.chej.org/BPA_Website.htm. Accessed Dec. 10, 2009.
42. 42 Letter from China WTO/TBT National Notification and Enquiry Center, Standard and Regulation Researching Center "Comments on USA Notification G/TBT/N/USA/346 Phthalates and Bisphenol-A-Prohibitions-Toys and Child Care Articles, H.B. 56," to Maryland Del. Jim Hubbard, May 7, 2008.
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45. Senate Bill 256, "Disposal of Electronic Waste," State Sen. Virginia Lyons, Vermont Senate, 2007-2008. Available at: http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/bills/intro/S-256.HTM. Accessed Dec. 10, 2009.
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47. Letter from State Sen. Margaret R. Rotundo and State Rep. John L. Patrick, Maine Citizens Trade Policy Commission, to Ambassador Susan C. Schwab, United States Trade Representative, April 22, 2008.
48. Maine Citizen's Trade Policy Commission Meeting Summary, May 16, 2008. Available at: http://www.maine.gov/legis/opla/ctpc-may162008mtsum.pdf. Accessed Dec. 10, 2009.
49. Letter from Tiffany M. Moore, Assistant U.S. Trade Representative for Intergovernmental Affairs and Public Liaison, to State Sen. Margaret R. Rotundo and State Rep. John L. Patrick, Maine Citizens Trade Policy Commission, May 19, 2008. Available at: http://www.maine.gov/legis/opla/ustrlettermay192008.pdf. Accessed Dec. 10, 2009.
50. WTO Technical Barrier to Trade Agreement, Articles 2 and 3 (excerpted). Full agreement can be accessed here: http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm. The key excerpts include: 2.9.2 [Members shall] notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account; 3.2 Members shall ensure that the technical regulations of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 9.2 and 10.1 of Article 2, noting that notification shall not be required for technical regulations the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned.
51. See e.g. WTO, Agreement Establishing the World Trade Organization. Article XVI-4. "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."
52. WTO, General Agreement on Trade in Services, Article I-3.
53. WTO, Agreement Establishing the World Trade Organization, Article XVI-4.
54. NAFTA, Article 105. WTO rules require each country to "take such reasonable measures are may be available to it" to ensure sub-national compliance. See WTO, Uruguay Round Agreement, "Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994," at 13. Available at: http://www.wto.org/english/docs_e/legal_e/10-24_e.htm.
55. WTO, Dispute Settlement Understanding, Article 8. "Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member."
56. Public Citizen. "Fatally Flawed WTO System," Public Citizen Fact Sheet, December, 2009. Available at: http://www.citizen.org/documents/WTODisputesSummaryOnePagerwtables.pdf. Accessed Dec. 10, 2009.
57. WTO, Dispute Settlement Understanding, Article 22. This article sets forth the procedures for "Compensation and the Suspension of Concessions" when a WTO signatory country has not complied with a WTO ruling. The obligation on signatory federal governments to ensure subfederal compliance is discussed below.
58. For instance, when the Bush administration placed temporary tariffs on imported steel in 2002, the European Union responded by "pulling out the electoral map" and placing retaliatory tariffs on products from regions of the United States where they thought President Bush was electorally vulnerable, targeting farm products from the Midwest and textiles in the Carolinas. See David Sanger, "A Blink from the Bush Administration," The New York Times, Dec. 5, 2003. Available at: http://www.nytimes.com/2003/12/05/us/a-blink-from-the-bush-administration.html. Accessed Dec. 10, 2009.
59. GATT preceded, and is now administered by, the WTO.
60. GATT, "United States — Measures Affecting Alcohol and Malt Beverages: Report of the Panel," DS232/R-396/206, March 16, 1992. Available at: http://sul-derivatives.stanford.edu/derivative?CSNID=91610002&mediaType=application/pdf. Accessed Dec. 10, 2009.
61. For instance, the European Commission issues an annual list of U.S. regulatory policies at the federal, state and local levels that they consider trade barriers. On this list are many state policies with historical antecedents long preceding the WTO, such as state regulation of insurance and "alcohol control" states. A high-level forum called the Transatlantic Economic Council has also been developed to discuss the elimination of such "trade barriers" on both sides of the Atlantic. For the 2009 list of U.S. trade barriers see, http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_144160.pdf.
62. GATS Article XVI prohibits "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test." Monopolistic state lotteries could be challenged as trade barriers, once any state privatizes these services as many states are discussing. Indian gambling could be considered an exclusive service supplier arrangement and bans on certain types of gambling would be prohibited "zero-quotas."
63. See Letter from Utah Attorney General Mark Shurtleff and 28 other state attorneys general to USTR Rob Portman, May 31, 2005. On file with Public Citizen.
64. On Dec. 17, 2008, USTR confirmed that the United States had reached an agreement in the GATS Article XXI process with Canada, the EU and Japan. The agreement involves U.S. commitments to maintain liberalized markets for warehousing services (excluding services supplied at ports and airports), private technical testing services, private research and development services, and postal services relating to outbound international letters. See U.S. Trade Representative (USTR), "Statement on Internet Gambling," USTR Press Release, Dec.17, 2008.
65. GATS Article XVI explicitly prohibits limitations on the number of service suppliers in the form "of an economic needs test."
66. In 2007, State Sen. Joe Simitian introduced S.B. 412 (the "Liquefied Natural Gas Market Assessment" bill) in the California legislature. It would have required an LNG needs assessment ,but it did not pass. In Oregon, H.B. 2015, "The LNG Public Protection Act," was introduced by State Rep. Chuck Riley in 2009. It would require a needs assessment (among other things) prior to LNG terminal approval.

67. Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000). The Supreme Court narrowed lower court rulings which had delved into broad issues of states' rights in the international commercial sphere to rule against the Massachusetts law on narrow preemption grounds related to Congress' establishment of policy on the Burma trade issue.
68. David Marchick, State Department Deputy Assistant Secretary, Testimony before the Maryland House of Delegates Committee on Commerce and Government Matters, Annapolis, March 25, 1998. Maryland House Bill 1273 on Floor March 25, 1998, Senate Bill 354 on Floor Mar. 31, 1998. See also Ken Silverstein, "Nigeria Deception," Multinational Monitor, 1998. Available at: http://www.thirdworldtraveler.com/Transnational_corps/NigeriaDeception.html. Accessed Dec. 10, 2009.
69. UNCITRAL, "Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America," March 11, 2004. Available at: http://www.state.gov/documents/organization/30961.pdf. Accessed Dec. 10, 2009.
70. UNCITRAL, "Final Award of the Tribunal on Jurisdiction and Merits, Methanex Corporation v. the United States of America," Aug. 3, 2005. Available at: http://www.state.gov/documents/organization/51052.pdf. Accessed Dec. 10, 2009.
71. UNCITRAL, "Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, Glamis Gold Ltd. v. the Government of the United States," Dec. 9, 2003.
72. ICSID,"Decision on hearing of Respondent's objection to competence and jurisdiction, The Loewen Group, Inc. and Raymond L. Loewen v. United States of America," Case No. ARB(AF)/98/3, Jan. 5, 2001.
73. UNCITRAL, "Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, APOTEX, Inc. v. the Government of the United States," Dec. 10, 2008.
74. Luke Eric Peterson, "U.S. Investor Threatens First Ever Health Care Suit," Embassy Canada's Foreign Policy Newsweekly, Sept. 17, 2008.
75. E.g., the WTO's Disputes Settlement Understanding refers to the rights and roles of "Members," which are the national governments who are signatories to the agreement.
76. See Uruguay Round Agreements Act (Public Law 103-465), Section 102, Dec.
77. Office of the U.S. Trade Representative, "State Government and Free Trade Agreements: A New Sub-Federal Reciprocity Approach That Preserves State Sovereignty and Provides Direct Benefits to States," Feb. 24, 2005. Available at: http://ustraderep.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file46_7283.pdf. Accessed Dec. 10, 2009.
78. For example, the state of Maryland, in agreeing to be bound by the WTO's procurement agreement, requested that laws giving preferences for recycled products and selective purchasing laws targeting South Africa and Namibia, among other policies, be listed as exceptions to the state's commitment because they violated the clear terms of the agreement. No such exceptions were listed in the WTO procurement agreement's text.
79. See Letter to Ambassador Robert Zoellick from Washington Governor Gary Locke, June 17, 2004, and Letter to Governor Gary Locke from Ambassador Robert Zoellick, Aug. 13, 2004. Available at: http://www.citizen.org/trade/subfederal/states/articles.cfm?ID=11548. Accessed Dec. 10, 2009.
80. See Letter to Ambassador Robert Zoellick from National Conference of State Legislatures, Jan. 19, 2005. Available at: http://www.citizen.org/documents/NCSL_Procurement_Letter_0105.pdf
Accessed Dec. 10, 2009.
81. National Conference of State Legislatures' Labor and Economic Development Committee, "Free Trade and Federalism" Policy, 2007. Available at: http://www.ncsl.org/StateFederalCommittees/LaborEconomicDevelopment/PolicyPositionsLaborampEconomicDevelopment/tabid/16166/Default.aspx#free.
82. IGPAC was created by a 1984 addition to the Trade Act of 1974, 19 U.S.C. §2114c(2)(A)(ii), for the purpose of consultations on matters affecting the regulatory authority and procurement of nonfederal governments.
83. Congress first established the private-sector trade advisory committee system as part of the 1974 Trade Act that also established Fast Track and has modified the system a number of times since. It is the primary mechanism by which the USTR consults U.S. exporting businesses on trade. Currently, the system encompasses five policy advisory committees; six technical advisory committees on agriculture issues; and 16 industry advisory committees. While a separate federal law, the Federal Advisory Committee Act, requires balance on all U.S. advisory committees, trade advisory committees are notably lacking in balance. Multiple lawsuits have been pursued just to get one environmental representative on a few key committees, such as those dealing with chemicals, paper and wood.
84. Todd Tucker and Lori Wallach, The Rise and Fall of Fast Track Trade Authority, (Washington, D.C.: Public Citizen 2008).
85. Mary Bottari and Lori Wallach, Federalism and Global Governance: A Comparative Analysis of Trade Agreement Negotiation and Approval Mechanisms Used in U.S. and Other Federalist Governance Systems (Washington, D.C.: Public Citizen 2008). This comparative analysis will provide useful reference points for the foreseeable U.S. debate regarding what form of presidential trade authority should replace Fast Track.
86. In Canada, ongoing federal-provincial consultations over trade take place in large part at the Federal-Provincial-Territorial Committee on Trade (C-Trade), which meets at the level of senior officials on a quarterly basis, at a minimum. In addition to the quarterly meetings, C-Trade participants confer by telephone on a weekly, or even daily, basis. Provinces can place subjects on the agenda for a C-Trade meeting, and more importantly C-Trade participants acting on behalf of provinces have the authority to veto the plans of federal trade negotiators when it comes to matters under provincial jurisdiction.
87. See Consortium for Energy Efficiency State and Local Government Purchasing Initiatives," dated 2000-2008. Available at: http://www.cee1.org/gov/purch/purch-main.php3. Accessed Dec. 10, 2009.

88. Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. Also see Annex 4 for list of states bound to other agreements.
89. For instance, for the U.S. subcentral entities in the WTO's AGP the procurement threshold for 2006-2007 period was $526,000 for goods and services, and $7,407,000 for construction services.
90. See Letter to Pennsylvania Governor Ed Rendell from U.S. Trade Representative Robert Zoellick, Jan. 5, 2006. Available at: http://www.citizen.org/documents/USTR_to_Pennsylvania.pdf. Accessed Dec. 10, 2009. The letter stated the United States was in the midst of negotiations with Australia, Morocco, the five Central American nations (CAFTA), the five nations of the South African Customs Union and 34 countries in the Western Hemisphere regarding the Free Trade Area of the Americas.
91. See Tracy Taylor, Legal Counsel, Office of Program Research Washington State House of Representatives, "The Legislature, the Governor, & International Trade Agreements: An Analysis of Washington Law," Dec. 2004.
92. WTO, "Agreement on Government Procurement," Article 6.1, 6.2.
93. WTO, "Agreement on Government Procurement," Article 8(b).
94. Labor and Economic Development Committee, "State Divestment Legislation," National Conference of State Legislatures. Available at: http://www.ncsl.org/standcomm/sclaborecon/statedivestbills.htm. Accessed Dec. 10, 2009.
95. Labor and Economic Development Committee, "State Divestment Legislation," National Conference of State Legislatures, April 9, 2008. Available at: http://www.ncsl.org/standcomm/sclaborecon/statedivestbills.htm. Accessed Dec. 10, 2009.
96. Public Citizen interviewed 50 state officials in 2008, the vast majority expressed support for the creation of a formal opt-in mechanism. These results are discussed in section 5 and 6 of this Guide.
97. Harry Freeman, "The Role of Constituents in U.S. Policy Development Towards Trade in Financial Services," in Alan Deardoff and Robert Stern, Constituent Interests and U.S. Trade Policy, (Ann Arbor: University of Michigan, 1999).
98. For more on this complex topic please see, "Trade Agreements Cannot Be Allowed to Undermined Needed Financial Services Regulations," Public Citizen's Fact Sheet. Available at: http://www.citizen.org/documents/FinanceReregulationFactSheetFINAL.pdf.
99. The 100 service sectors the United States committed to the GATS are contained in a "schedule" document which can be tricky to read and understand. To help, Public Citizen has created a database of U.S. GATS commitments – with the WTO jargon translated into plain English (www.citizen.org/GATSdirectory). We also have a key that will help you decipher the actual U.S. commitments (www.citizen.org/GATSglossary).
100. Negotiations were underway in the WTO Working Party on Domestic Regulation (WPDR) as part of the Doha Round which would have applied new "disciplines" not included in the original GATS agreement that limit the domestic regulatory authority of governments in all service sectors bound to comply with the GATS. The mandate of the WPDR is to restrict licensing requirements and procedures, qualification requirements and procedures, as well as technical standards, to those that are "no more burdensome than necessary to ensure the quality of a service." A WTO tribunal would be the ultimate arbiter of what constitutes "a burden" to foreign commercial interests. The proposed new WTO regulatory constraints would place a broad swath of services law and regulation at risk of trade challenge in service sectors bound under current U.S. commitments or proposed to be bound in the new round of negotiations. This includes licensing, qualifications and technical standards for: a variety of professionals (including investigation and security services, lawyers, accountants, engineers, architects and more); certain hospitals (and nurses and doctors within those hospitals); certain mining operations; energy utilities; big-box stores and other large retail establishments; certain hazardous waste disposal facilities, incinerators and landfills; highly controversial liquified natural gas (LNG) terminals and tank farms; certain wastewater treatment facilities; institutions of higher education; banks; insurance providers; TV and radio stations; building and construction permits for a wide array of construction projects; transportation licenses for rail and road, and many more.
101. Public Citizen interview with William Waren, Forum on Democracy and Trade, Dec.
102. Andrea Foster, "Colleges, Fighting U.S. Trade Proposal, Say It Favors For-Profit Distance Education," Chronicle of Higher Education, Jan. 18, 2002.
103. Memorandum, "U.S. offers under the General Agreement on Trade in Services (GATS) negotiations-Request for information from states by Friday, February 21, 2003," to State Single Points of Contact (SPOCs) and Intergovernmental Policy Advisory Committee (IGPAC) from Assistant U.S. Trade Representative Christopher Padilla, Jan. 17, 2003. Available at: http://www.citizen.org/documents/USTRgatsmemo.pdf.
104. See Letter to U.S. Trade Representative Rob Portman from Maine Governor John Baldacci, April. 5, 2006. On file with Public Citizen.
105. WTO, General Agreement on Trade in Services, Article XVII.
106. WTO, General Agreement on Trade in Services, Article XVI.
107. WTO, General Agreement on Trade in Services, Article I-3.
108. U.S. Census Bureau News, "Household Income Rises, Poverty Rate Unchanged, Number of Uninsured Down," Press Release CB08-129, Aug 26, 2008.
109. Center for American Progress, "Health Care in Crisis: 14, 000 Losing Coverage per Day," Center for American Progress Report, Feb. 19, 2009. Available at: http://www.americanprogressaction.org/issues/2009/02/health_in_crisis.html.
110. Mary Bottari and Todd Tucker, "Presidential Candidates' Key Proposals on Health Care and Climate will Require WTO Modifications," Public Citizen Report, February 2008.
111. Under the WTO's W/120 Service Sector Classification system the category relates United Nations CPC prov entry "services incidental to energy distribution" (88700). The quote in the text is that section's explanatory note.
112. See WTO Background Note by the Secretariat, "Energy Services," WTO Document S/C/W/52 9 September 1998.

113. Idaho State Rep. George Eskridge, Chair, "Interim Report: GATS and Electricity," Working Group on Energy & Trade Policy, March 25, 2005.
114. Orly Caspi, "GATS & LNG Facility Siting in California: Case Study of Proposed Trade Rules on Domestic Regulation," Harrison Institute for Public Law, Georgetown University Law Center, June 16, 2000.
115. Letter from Mike Duke, Executive Vice President Wal-Mart Stores, Inc, to Ambassador Zoellick, Comments with Respect to Doha Multilateral Negotiations and Agenda in the World Trade Organization, dated May 1, 2002.
116. GATS Article XIII reads "Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale." While most government procurement is excluded by this article, procurement for services that will be resold are not. Thus, state contracts for toll-road services (i.e., services charged to the customer) are likely covered by the GATS.
117. This total includes the award issued to Ethyl Corp., S.D. Myers Inc., Pope and Talbot Inc., Metalclad Corp., CEMSA, Archer Daniels Midland Co., Cargill Inc., and Corn Products International. Corn Products International has filed a request for correction and interpretation of the $58.386 million award issued by tribunal in August 2009. This request is still in process. ICSID, "Case Details: Corn Products International, Inc. v. United Mexican States," ICSID. Accessed Dec. 10, 2009. Available at: http://icsid.worldbank.org/ICSID/FrontServlet.
118. UNCITRAL, "Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, Glamis Gold Ltd. v. the Government of the United States," Dec. 9, 2003.
119. Golden Queen Mining Corp, "Environmental Issues and Status of Approvals and Permits," Golden Queen website, accessed Dec. 1, 2009. Available at: http://www.goldenqueen.com/enviro.htm.
120. UNCITRAL, "Final Award Before the Arbitral Tribunal Constituted Under Chapter 11 of the North American Free Trade Agreement, Glamis Gold Ltd. v. the Government of the United States," June 8, 2009, at 354. Available at http://www.state.gov/documents/organization/125798.pdf.
121. See e.g. NAFTA Article 1139: "Investment means: (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise."
122. According to one observer "The US wanted an investor-state disputes mechanism in AUSFTA. This would have allowed US companies to challenge some Australian laws on the basis that they were inconsistent with AUSFTA and harmful to company profits. This would have effectively tied the Australian government's hands behind its back when it comes to making laws that could affect US companies. Under an investor-state disputes process, complaints would be heard by a panel of experts in an international tribunal, closed to the public. A strong campaign against AUSFTA used examples from the North American Free Trade Agreement (NAFTA) of companies challenging local laws. The campaign succeeded in keeping an investor-state disputes mechanism out of AUSFTA." See Jemma Bailey, "Australia-US Free Trade Agreement – Fair Trade or Foul?" Fighting FTAs website, September 2007. Available at http://www.fightingftas.org/spip.php?article36.
123. See e.g. NAFTA Article 11.5 or CAFTA Article 10.5.
124. See e.g. NAFTA Article 11. 2 or CAFTA Article 10.3.
125. See e.g. NAFTA Article 11.9 or CAFTA Article 10.6.
126. See e.g. NAFTA Article 11.9 or CAFTA Article 10.8.
127. See e.g. NAFTA Article 11.10 and 11.39 or CAFTA Article 10.7 and 10.28.
128. Letters from these groups and others can be accessed at: http://www.citizen.org/trade/subfederal/inv.
129. The investment chapters of NAFTA and the FTAs cover all sectors not explicitly excluded in a "negative list." Among the U.S. exceptions is one for existing subfederal laws that do not comply with specific National Treatment (1102, 1202), Most-Favored Nation Treatment (1103, 1203), Local Presence (1205), Performance Requirements (1106), and Senior Management and Board of Directors (1107) rules contained in NAFTA's investment chapter and in its chapter on cross-border services.
130. National Conference of State Legislatures' Labor and Economic Development Committee, "Free Trade and Federalism" NCSL Policy, 2007.
131. Response to Oregon Fair Trade Campaign Candidate Questionnaire. Available at: http://www.citizenstrade.org/positions.php.
132. UNCITRAL, "Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Pope & Talbot Inc. and the Government of Canada," June 26, 2000, at 37; ICSID, "Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, Metalclad Corporation v. the United Mexican States," Aug. 25, 2000, at 28. The Metalclad panel stated that expropriation under NAFTA "includes not only open, deliberate and acknowledged takings of property such as outright seizure or formal or obligatory transfer of title in favor of the host state, but also covert or incidental interference with the use of property which has the effect of depriving the owner in whole or in significant part of the reasonably-to-be-expected economic benefit of the property."

133. Vicki Bean, “Does an International Regulatory Takings Doctrine Make Sense?” New York University Environmental Law Journal 11:1: 35-48, (2002).
134. ICSID, “Decision on hearing of Respondent’s objection to competence and jurisdiction, The Loewen Group, Inc. and Raymond L. Loewen v. United States of America,” Case No. ARB(AF)/98/3, Jan. 5, 2001.
135. Sandra Day O’Connor, “Federalism of Free Nations,” New York University Journal of International Law and Politics Fall 1995-Winter 1996.
136. Conference of Chief Justices International Agreements Committee, “Resolution 26: Regarding Provisions in International Trade Agreements Affecting the Sovereignty of State Judicial Systems and the Enforcement of State Court Judgments,” 56th Annual Meeting, July 29, 2004.
137. This includes: ADF Group: Tribunal found that the basis of the claim constituted “government procurement” and therefore was not covered under NAFTA Article 1108. Starting with CAFTA, FTA investment chapters have included foreign investor protections for aspects of government procurement activities; Canadian Cattlemen for Fair Trade: Claim dismissed on procedural grounds. Tribunal ruled that the cattlemen did not have standing to bring the claim because they did not have an investment in the United States, nor did they intend to invest in the United States; Loewen Group: Claim dismissed on procedural grounds. Tribunal found that Loewen’s reorganization under U.S. bankruptcy laws as a U.S. corporation no longer qualified it to be a “foreign investor” entitled to NAFTA protection; Methanex: Claim dismissed on procedural grounds. The tribunal ruled that it had no jurisdiction to determine Methanex’s claims because California’s MTBE ban did not have a sufficient connection to the firm’s methanol production to qualify Methanex for protection under NAFTA’s investment chapter and Mondev: Claim dismissed Mondev’s claims on procedural grounds, including its expropriation claim were time-barred because the dispute on which the claim was based predated NAFTA.
138. ICSID “Award Before the Arbitral Tribunal Constituted Under Chapter 11 of the North American Free Trade Agreement, Metalclad Corporation v. the United Mexican States,” Case No. ARB(AF)/97/1, Aug. 30, 2000. Available at: http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Metalclad/laudo/laudo_ingles.pdf.
139. UNCITRAL, “Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America,” March 11, 2004. Available at: http://www.state.gov/documents/organization/30961.pdf.
140. Steven Chase, “Tobacco Firm Warns ‘Mild’ Cigarette Ban May Violate NAFTA,” Globe and Mail, March 16, 2002.
141. Physicians for a Smoke-Free Canada, “New tobacco packaging shows need for stronger laws,” Press Release July 31, 2007. Available at: http://www.smoke-free.ca/eng_home/news_press_July31-2007.htm.
142. UNCITRAL, “Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement,” Melvin J. Howard, Centurion Health Corporation, Howard Family Trust vs. The Government of Canada,” Jan. 5, 2009. Available at: http://www.state.gov/s/l/c29884.htm.
143. UNCITRAL, “Notice of Arbitration Under the U.N. Commission on International Trade Law and the North American Free Trade Agreement.” Apotex v. the United States of America, Dec. 10, 2008. Available at: http://www.state.gov/documents/organization/115447.pdf.
144. UNCITRAL, “Final Award of the Tribunal on Jurisdiction and Merits, Methanex Corporation v. the United States of America,” Aug. 3, 2005. Available at: http://www.state.gov/documents/organization/51052.pdf.
145. UNCITRAL, “Submission on Costs of Respondent United States of America, Methanex Corporation v. the United States of America,” May 19, 2004. Available at: http://www.state.gov/documents/organization/34641.pdf.
146. UNCITRAL, “Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, Crompton Corp. v. Government of Canada” Nov. 6, 2001. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/ pdfs/CROMPTON-CORP.pdf. UNCITRAL, “Notice of Arbitration under the UNCITRAL Arbitration Rules and the North American Free Trade Agreement, Dow Agrosciences LLS vs. Government of Canada,” March 31, 2009. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/DowAgroSciencesLLC-2.pdf.
147. Letter from Utah Attorney General Mark Shurtleff and 28 other state attorneys general to U.S. Trade Representative Rob Portman, May 31, 2005.
148. Senate Bill 401 “International Trade Agreement - Procurement Rules,” Sens. Paul Pinsky, Gwendolyn Britt, et al., Maryland General Assembly, April 11, 2005.
149. Dominican Republic-Central America Free Trade Agreement, Article 9-16
150. House Bill 6885, “An Act Relating To Public Property and Works–State Purchases,” State Reps. Edith Ajello, Arthur Corvese, Grace Diaz, et. al, Rhode Island General Assembly, June 23, 2006. In a similar sequence of events, Governor Donald Carcieri vetoed the bill and the Rhode Island legislature overrode his veto. Rhode Island became the second state to mandate that the state legislature – not the governor – has the power to bind the state to comply with trade agreements.
151. House Bill 30, “Relating to International Trade Agreements,” State Rep. Roy Takumi, Hawaii House of Representatives, 2007-2008. Although Governor Lingle vetoed the legislation, Hawaii legislators successfully overrode the veto by a wide margin.
152. H.F. 3722, 116J.976. (Minn. 2008). Available at: http://www.citizen.org/documents/StatutoryTradeLanguage.pdf.
153. Maine Fair Trade Coalition interview with State Rep. Sharon Treat, June 17, 2009.
154. LD 1257, “An Act to Require Legislative Consultation and Approval Prior to Committing the State to Binding International Trade Agreements,” State Rep. Sharon Treat, Maine House of Representatives, 2009. Available at: http://www.citizen.org/documents/PUBLIC385.pdf.
155. AB 1276, Assembly Member Nancy Skinner, California State Legislature, 2009. Can be downloaded from: http://www.assembly.ca.gov/acs/acsframeset2text.htm.

156. AB 2754, "Jobs, Trade and Democracy Act," Assemblyman Joseph Egan and State Sen. Loretta Weinberg, New Jersey Legislature, 2009. Available at: http://www.njleg.state.nj.us/2008/Bills/A3000/2754_I1.htm.
157. For more detail on these matters, see Todd Tucker and Lori Wallach, The Rise and Fall of Fast Track Trade Authority, (Washington, D.C.: Public Citizen, 2009).
158. Public Law 93-618 § 102(e)(1).
159. The House responded to Bush's exercise of this aspect of Fast Track by reasserting Congress' constitutional prerogatives and removing the 60-day mandatory vote requirement from the agreement. This was possible because, as a technical matter, the pre-set floor-vote procedures aspect of Fast Track is a "rule" of the House and Senate, which the chambers can change by majority vote. (This was a necessary compromise for the Fast Track floor-consideration rules to be constitutional.) However, such a rule change has only occurred in this one instance in the history of Fast Track. The various trade-authority delegations have also contained procedures for Congress to take an agreement off the Fast Track through the passage of disapproval resolutions. For various reasons described below. These procedures have been largely ineffectual. For more information on disapproval resolutions, see Forbes, 2008.
160. Public Law 93-618 § 135.
161. Public Citizen, "Trade Advisory Committees: Privileged Access for Polluters, Public Citizen Report, December 1991. Labor was mentioned in the statute and a labor advisory committee was established. In the 1984 Fast Track (Public Law 98-573 § 306(c)(2)(A), a new advisory committee was added for representatives of state and local governments and their associations. Lawsuits in the 1990s resulted in the establishment of a Trade and Environment advisory committee, but it was comprised of equal numbers of industry- and environmental-group representatives, deadlocking its reports and eventually causing some of the environmental representatives to resign. See MH, 2003.
162. Public Law 107-210 § 2104(a).
163. House Resolution 121, State Rep. Merika Coleman, Alabama House of Representatives, March 29, 2007.
164. Senate Resolution 8, State Sen. David Hansen, Wisconsin State Senate, June 26, 2007.

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