



March 24, 2003

Ambassador Robert Zoellick
U.S. Trade Representative
1724 F Street, N.W.
Washington, DC 20006

Angela Z. Monson
State Senator
Oklahoma
President, NCSL

Gary S. Olson
Director, Senate Fiscal Agency
Michigan
Staff Chair, NCSL

William T. Pound
Executive Director

Dear Ambassador Zoellick:

The National Conference of State Legislatures (NCSL) supports international trade agreements that generate jobs and economic growth in our communities, provided that the agreements respect the constitutional and traditional authority of state and local governments. NCSL is concerned that negotiations are proceeding under the General Agreement on Trade in Services (GATS) without a full understanding of the impact of GATS on state and local authority. NCSL's present concerns include:

- **Local monopolies** -- Will GATS affect state authority to grant or re-regulate local monopolies?
- **Coverage of public services** -- Are public services (*e.g.*, municipal power or water agencies) covered by GATS?
- **Domestic regulation** -- Will GATS affect domestic regulation generally, even in sectors where the United States has yet to make a specific commitment?
- **Specific commitments** -- Will specific sector commitments by the United States affect state and local authority over services that are traditionally regulated by states or provided by local governments (*e.g.*, health facilities, insurance, licensing of attorneys and other professionals, sewerage, water and electricity)?

NCSL and state legislatures are willing to contribute to the work of USTR in assessing the potential impact of GATS on domestic lawmaking. NCSL would welcome the opportunity to consult with USTR staff on the above questions and study the pending GATS proposals before they are tabled. We note that the European Union's negotiating documents are now public, and they reveal that many topics of state and local legislation are on the bargaining table. It would be most helpful to have the same U.S. documents so that legislatures can focus their input to your office.

We recognize that the USTR staff works under tremendous time constraints, so we offer the following concerns to clarify our general questions about the GATS. We would most appreciate a written response, unless you have other documents that address our questions.

1. **Local monopolies.** While many states have deregulated or privatized electric or water services, many others have chosen to retain their local monopolies. Regardless of which

Washington

444 North Capitol Street, NW, Suite 515
Washington, D.C. 20001
Phone 202.624.5400 Fax 202.737.1069

Denver

7700 East First Place
Denver, Colorado 80230
Phone 303.364.7700 Fax 303.364.7800

Website www.ncsl.org

path they have taken, state legislatures value their autonomy to decide on their optimal mix. If the United States makes a specific commitment in a sector such as electricity or water, GATS provides that future decisions to “grant” monopoly power would require the United States to offer “compensatory adjustments” in its schedule of commitments. Failure to do so would subject the United States to a claim for arbitration if any member of the WTO complains about either the grant of monopoly or the compensatory adjustment.

- a. In addition to grants of power to operate new monopolies, does this GATS provision also apply to state approvals and conditions on acquisition of an existing monopoly by another utility company?
 - b. How would this compensatory adjustment process work if a state decides to re-regulate or reinstate monopoly powers, should it decide that an experiment in privatization has not worked?
- 2. Coverage of public services.** GATS covers government-provided services if the services are “commercial” or if they are procured with “a view to commercial resale.” The WTO Secretariat has taken the position that merely charging ratepayers for a service is all it takes to make the service “commercial,” regardless of whether the charge is for a profit.
- a. Is there any unambiguous interpretation of which public services are commercial and which are not?
 - b. If GATS coverage remains ambiguous, how could the USTR provide safeguards in the negotiating process to carve out public services from the GATS rules for general obligations as well as specific commitments?
- 3. Domestic regulation.** GATS now requires domestic regulation to be transparent and objective. In addition, the EU seeks to implement the GATS rule that domestic regulations must be “no more burdensome than necessary to assure the quality of a service.” Most state utility commissions regulate rates, operations and acquisition of utility companies under broad powers to protect the “public interest.”
- a. Is the “public interest” sufficiently objective to avoid a GATS conflict?
 - b. Does the scope of “public interest” (which usually includes consumer protection, fair competition, economic development and environmental protection) exceed the narrower objective of assuring the quality of a service under GATS?
 - c. Does the least-burdensome test under GATS limit regulatory authority in comparison to the “public interest” or “rational basis” tests used by U.S. courts?
 - d. Do the provisions on domestic regulation apply to government regulation of all sectors, including those where the United States has not yet made a full commitment under market access and national treatment (e.g., alcoholic beverage distribution, education, water services, etc.)?
- 4. Specific commitments.** The EU has requested the United States to make a “specific commitment” to follow the GATS rules on national treatment and market access limits in a variety of sectors, including energy and water services among others.
- a. The GATS rule on national treatment prohibits measures that give an advantage to domestic firms that is not also available to foreign firms. Many states provide subsidies or tax-exempt financing to publicly owned utilities. Some states provide tax incentives to private utilities, but only for investments located within the state. Would either of these examples be in conflict with GATS commitments to provide full national treatment?

- b. The GATS rule on market access prohibits quantitative limits on the number of service suppliers, the number of employees, the value of transactions or assets or the legal structure of a service provider. A number of states have adopted Renewable Portfolio Standards (RPS) that require electric utilities to use a minimum level of renewable energy technologies. A majority of states require health facility operators to obtain a certificate of need for spending on new construction or large-scale technology purchases. Would either of these examples be in conflict with GATS commitments to provide full market access?

The National Conference of State Legislatures believes that international agreements that liberalize the world trading and investment system are essential to American prosperity but that they must first be harmonized with traditional American law and values of constitutional federalism. Great care must be exercised to protect state laws and authority from unjustified challenges that will predictably result from the broad language of trade agreements. In general, federalism protections consistent with NCSL's policy on Free Trade and Federalism, attached for your review, must be included in the agreement and its implementing legislation.

Thank you for this opportunity to raise our concerns. Should you have any questions about NCSL's position or concerns or wish to further solicit NCSL's input on specific items, please do not hesitate to contact Jeremy Meadows in NCSL's Washington office at 202-624-8664 or by e-mail at jeremy.meadows@ncsl.org. NCSL looks forward to supporting your work to safeguard domestic governing authority while enhancing international trade opportunities in the GATS process.

Sincerely,



Sharon Weston Broome
Representative, Louisiana House of Representatives
Chair, NCSL Standing Committee on Economic Development,
Trade & Cultural Affairs Committee

CC: Senator Chuck Grassley, Chair, Senate Finance Committee
Senator Max Baucus, Ranking Member, Senate Finance Committee
Congressman William M. Thomas, Chair, House Committee on Ways and Means
Congressman Charles B. Rangel, Ranking Member, House Committee on Ways and Means