

**INTERGOVERNMENTAL POLICY ADVISORY COMMITTEE**

**M E M O R A N D U M**

**IGPAC Recommendations and Comments on the US Submission for  
the WTO General Agreement on Trade in Services (GATS) Negotiations**

Submitted to the United States Trade Representative:  
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IGPAC members sincerely appreciate the USTR response of 6/30/05 to our memo of 5/25/05 on the updated US GATS submission. Since concerns about GATS negotiations are likely to intensify before and during the upcoming WTO Ministerial meeting in Hong Kong this December, IGPAC members would like this memorandum to serve three objectives:

- to offer IGPAC's perspectives and recommendations on general commitments and other issues, with a focus on domestic regulation, in preparation for upcoming GATS negotiations at the WTO Hong Kong Ministerial meetings, and
- to provide further clarification and context to assist USTR colleagues in understanding the IGPAC state/local perspective and concerns raised in our previous memo;
- through offering such clarification and perspective, to enhance USTR-IGPAC consultation on GATS and related trade policy issues in order to deepen state/local government impact while negotiations are underway.

As they are based on non-classified information, IGPAC intends to make these additional comments available to interested external parties, as have been the original IGPAC document and USTR response.

## **I. IGPAC Recommendations for GATS Negotiations**

IGPAC members note that the July 2005 WTO Report by the Chairman to the Trade Negotiations Committee on the Special Session of the Council for Trade in Services indicates that:

*"...On rules, progress has been reported on disciplines on **Domestic Regulation** and I believe that the Working Party on Domestic Regulation (WPDR) should be able to provide some elements for disciplines before Hong Kong. With respect to work on **GATS Rules**, a number of Members underlined the central importance they attach to a successful outcome on Emergency Safeguard Measures (ESMs). Others said that a candid evaluation of what could be achieved at this stage would be necessary. A few Members recalled their suggestions to facilitate the information exchange on **subsidies**. Views remain divergent with respect to work on **government procurement**." (emphasis added)*

This report heightens the interest of IGPAC members in on-going negotiations. IGPAC members request that the USTR share information on US negotiating positions, including a copy of the draft Ministerial Declaration for Hong Kong, in order to allow IGPAC members to provide input in a timely fashion. To that end, IGPAC also requests that the USTR make lead negotiators available to confer with members, via meeting or conference call, prior to the WTO Ministerial meetings in Hong Kong.

In preparation for such anticipated discussions and the negotiations in Hong Kong, IGPAC members would like the USTR to consider the comments and recommendations outlined below.

### **A. Process and Goals**

- IGPAC recommends that the USTR seriously consider the recommendations advanced by the paper "Services in a Development Round: Three Goals and Three Proposals" (Aaditya Mattoo, August 2005). The suggestion that non-discrimination be the focus of GATS commitments is appropriate for many circumstances (notable exceptions include environmental protection measures). Negotiations need to shift focus away from setting rules for non-discriminatory measures, as such efforts are technically, legally and politically complex, fraught with uncertain implications and risk constraining regulatory freedom. As the paper suggests, the focus on non-discrimination would "...reassure regulators that GATS commitments will deprive them *only* of the freedom to discriminate, and not limit their freedom in any other way. Where it is politically feasible and economically

desirable, Members can assume further, clearly separate, obligations with regard to non-discriminatory measures and regulations.”

- With respect to other WTO Members’ positions, IGPAC members would like to be advised as to whether the European Union, or any other Members, have asserted or represented that the continued existence of subfederal rule-making authority is a “burdensome” problem under GATS. If this issue has been raised, we would like to understand the USTR position in response.
- The options of limiting or withdrawing commitments need to be explored. GATS scheduling guidelines indicate that it is appropriate for countries to limit their commitments in successive negotiating rounds. Certainly, limiting a commitment is a less drastic and expensive option than withdrawing a commitment entirely. As the GATS negotiations evolve, the concerns and deficiencies highlighted by states and others could be effectively addressed by limiting commitments.
- On the topic of limiting US commitments, IGPAC members would like some specific information and clarification from the USTR:
  - Has the USTR has taken action to ensure that GATS National Treatment obligations would not apply to state and local taxation? WTO documents indicate that this topic has been under discussion, without resolution, since the mid-1990s. Congress was assured by then USTR Mickey Kantor that “state and local tax and subsidy measures covered by our reservations will be fully protected from challenge under the WTO.” (140 Cong. Rec. 11/30/94). The current round of negotiations offers an opportunity to include reservations that would rectify this seeming omission.
  - Does the reference to “U.S.-owned institutions” sufficiently safeguard subsidies for public institutions as opposed to privately owned institutions? Both the EU and Canada have listed horizontal limits on commitments, which exclude the supply or subsidy of a service in the public sector, while the US offer does not.
  - The initial 2003 US offer had language in the schedule of specific commitments, of tremendous importance to the American Library Association, to exclude “non-profit, public and publicly-funded entities.” Has this commitment limit to National Treatment actually been deleted from the 2005 offer?

## B. Procurement

- WTO documents indicate that the European Union delegation has proposed a framework under GATS for government procurement of services. IGPAC members would like to know what the USTR thinks of such proposals. If coverage of subfederal services procurement under the GATS is being contemplated, we would expect to be centrally involved in any and all discussions.
- Previous IGPAC reports on the procurement provisions of recent FTAs have recommended language designed to protect subfederal jurisdiction (see attachment A with excerpt from IGPAC CAFTA report). Such considerations might serve to inform GATS negotiators of IGPAC concerns.
- Procurement policy concerns are particularly sensitive given recent developments in Maryland, and their implications for states, such as New York and Washington, whose specified terms and conditions for their procurement offers may be interpreted to lack legal effect. This year, the Maryland legislature passed a law, over the Governor’s veto, to explicitly bar the executive from committing the state to trade agreements, such as the procurement provisions of the CAFTA-DR, without legislative consent. The USTR then decided to agree to the position of the CAFTA-DR countries, that Maryland’s procurement commitment could *not* be dropped from the agreement, as it was too late to do so.

- Some states have previously attached conditions to their procurement commitments to the Government Procurement Agreement and Free Trade Agreements, through letters from Governors to the USTR outlining specific terms, coverage and conditions. States have received assurances from the USTR in the past that such terms and conditions would be honored, even if the specific language were not included in the trade agreement itself.
- Given developments in Maryland and the risk of a procurement challenge from another country based upon the omission of subfederal terms and conditions, IGPAC recommends that this situation be corrected. IGPAC members would like USTR to ensure that any terms and conditions specified by states are included in the annex of the relevant trade agreement – GATS, FTAs and GPA. If such annexes cannot be contemplated, then states should be consulted about other options. In the absence of due recognition for their terms and conditions for inclusion, some states may decide to withdraw their agreement to be covered by procurement provisions.

### C. Transparency and Domestic Regulation

#### Introductory Comments

IGPAC and the Services Working Group have been researching WTO public documents on GATS negotiations related to Article III-Transparency and Article VI- Domestic Regulation, with a focus on the efforts of the Working Party on Domestic Regulations (WPDR). As such GATS general obligations apply to all levels of government, IGPAC members are concerned that some recent proposals could have a significant impact on state and local governments, notably the proposals to limit regulations to those that serve “national” policy objectives, given that GATS language calls for regulatory measures to be “based on objective and transparent criteria...”, and to be “not more burdensome than necessary to ensure the quality of the service.” As the 5/31/05 correspondence to the USTR from 29 state attorneys general indicated, state and local officials have stated that the least-burdensome discipline would “unacceptably encroach upon our states’ regulatory authority.”

The countries proposing the new disciplines on Domestic Regulation state that they do not intend to formulate the substance of regulations. However, the proposals on the table would have the “necessity” of a regulation be determined in relation to international standards. The presumption in the event of a dispute would be that a regulation’s conformity with an international standard would enable it to be accepted as “necessary.” Regulations that diverge from the international standard would be vulnerable to challenge as more burdensome than the international standard. Governments at all levels would be under pressure to adopt the international standard in order to decrease the risk of a WTO challenge.

Specific IGPAC concerns relating to GATS Domestic Regulation negotiations and proposals on transparency rules, necessity rules and procedural issues, are outlined below in some detail. Additionally:

- As the WPDR proposals, and GATS language overall, tend to lack clarity and specificity, their potential impact remains uncertain. IGPAC members intend our affirmative notification to:
  - assist the USTR in its upcoming negotiations by illustrating the distinctive, differentiated role of subfederal governments, which often do not operate in the same manner as federal governments;
  - suggest limitations to subfederal application of some proposals; and
  - identify what precisely is meant by various proposals in terms of states’ obligations.
- IGPAC encourages the USTR to continue to resist proposals by the EU and others that would implement

disciplines on Domestic Regulation as a general obligation. If there are ways that state and local governments can support such USTR positions, IGPAC members would like to provide assistance.

- IGPAC members suggest that subfederal representation be invited for inclusion on selected standard-setting bodies that the WTO recognizes for purposes of reasonableness, burdensomeness or least-trade restrictiveness under GATS and other WTO agreements. Some examples of areas of particular importance to states include: energy; health care (e.g. medical record privacy, facility licensing, staffing considerations), and wastewater treatment and recovery. Note that as state and local resources are limited, participation may not always be feasible – but should be welcomed if circumstances permit.

#### Status of GATS negotiations on Domestic Regulation

- Report of the chair on Hong Kong objectives. The chair of the GATS Council reported in July 2005 that he expects the Working Party on Domestic Regulations (WPDR) to make enough progress to report recommendations on disciplines on Domestic Regulation to the Hong Kong ministerial. The scope of these disciplines includes qualification requirements, technical standards and licensing requirements. The proposals before the WPDR would add to existing GATS provisions affecting a wide range of regulatory measures and would specifically target non-discriminatory regulations – regulations that are applied evenhandedly to both foreign and domestic companies.
- Increasing focus of the working party. In its September 2005 annual report, the WPDR stated that “negotiations on regulatory disciplines under Article VI:4 of the GATS gained momentum.” This statement is clearly confirmed by the extent of discussion in WPDR minutes on proposals from the EC, Japan, Switzerland, Mexico, India (along with Chile, Pakistan, and Thailand), Australia, Columbia, the Philippines (along with Brazil, Columbia, and the Dominican Republic) and the United States. In addition, WPDR delegations continue to submit examples of a wide range of domestic measures that be violations of the proposed new disciplines, such as Brazil’s suggestions that licensing requirements to ensure competition may violate the disciplines. Different regulatory requirements at the state level are repeatedly raised as examples of what needs to be disciplined.
- Even if a WPDR consensus is not imminent, the pace of substantive progress in the WPDR suggests that the time is ripe for meaningful consultations between USTR, IPGAC and interested state and local governments. As has been pointed out in the WPDR meetings, most of the regulations that would be affected by new disciplines are at the subfederal level.
- US focus on transparency. The United States contribution to the WPDR negotiations has been a paper on transparency, which has received considerable support and comment in the WPDR minutes. While it is available to all delegations of the WTO, the US paper on transparency is not public, however, and not available to IGPAC. Our references below to the US paper are all drawn from WPDR minutes, the most recent of which have not been released.
  - *Could USTR promote WTO transparency by making its transparency proposal available to IGPAC and the public?*
  - *Is it the USTR’s position that Domestic Regulation disciplines should be limited to transparency requirements?*

#### Overview of Proposals on “Transparency”

### Elements of transparency rules

The disciplines proposed for the Hong Kong Ministerial arise under Article VI:4 of the GATS agreement. Article VI:4 empowers the Council for Trade in Services to adopt disciplines to ensure that domestic regulations affecting qualification procedures, technical standards and licensing requirements are “based on objective and transparent criteria, such as competence and the ability to supply the service.” There are four general areas of potential transparency proposals: the establishment of contact points, transparency in the development of domestic regulation, transparency in the application and enforcement of regulatory measures, and transparency in licensing and qualification procedures.

#### Contact points

Contact points have already been established, and GATS Article III already mandates that members respond to other members’ questions in a timely manner. However, the established contact point system is not readily utilized by governments as a means of obtaining information. Lists of contact points are not frequently updated and often times, the individuals listed are not experts in domestic regulations. Several members have proposed disciplines increasing the role played by those contact points.

- The United States proposed a discipline requiring members to respond to the questions of “interested parties” (in addition to the questions of other members) through Article III inquiry points.
- Taiwan proposed a discipline requiring members to establish sector-specific inquiry points.
- *Would either of these disciplines increase state and local government burdens to respond to inquiries? If so, would the USTR propose to Congress that the federal government reimburse state and local governments for the additional costs?*
- *The EU has reported that there has only been one inquiry to its contact point. Do these contact points facilitate actual trade, or do they add an unnecessary burden?*

#### Process of making domestic regulations

- GATS Article III requires the publication of newly-adopted measures in a timely manner. Several members (not including the United States) have proposed disciplines that would also require the publication of the rationale behind new measures and of a regulatory impact assessment (“RIA”) of the costs associated with new measures. IGPAC members are concerned that these proposals, if implemented, could be a constraint to subfederal governments’ right to regulate.
  - *Would a discipline mandating the publication of RIA’s require members to address the question of whether the proposed measure is “no more burdensome than necessary?”*
    - *Would such a discipline require a regulatory agency to reveal that a measure is more burdensome than necessary?*
    - *Would such a discipline, in effect, incorporate “burdensome” principles as an element of transparency?*
  - *What is meant by “the rationale behind the new measure?” Would this include a statement of whether the measure addresses a legitimate government interest?*

- *Could the “rationale behind the new measure” be used in a dispute to challenge any regulatory impact that did not contribute to this specific rationale?*
  - *Would rationale publication and RIA disciplines apply to state and local executive, legislative and judicial actions in any way?*
  - *Have any Members conducted analyses of the potential impacts on government administrative processes? How would the USTR potentially implement these provisions?*
- Members have proposed disciplines that would require the publication of proposed measures prior to consideration so that interested parties would have a reasonable opportunity to comment.
- Several members have proposed disciplines requiring members to consider and respond to comments made by other members and interested parties.
  - Paragraph B.3(a) of the United States proposal includes a requirement that members respond to comments in writing.
- Several members have proposed disciplines establishing minimum waiting times between the publication of proposed measures and the consideration of proposed measures so that interested parties have an opportunity to comment.
- *How would these disciplines require that states change the way that they respond to the comments and concerns raised by domestic or international interested parties?*
- An OECD study found that governments world-wide had only made 55 notification reports to the Council for Trade in Services on measures affecting trade in services, as required by Article III:3 of the GATS.
- *Would these disciplines impose upon states a new or better-enforced notification requirement?*
  - *What levels of subfederal government would be held accountable to this notification requirement? County? City? Township?*

#### Enforcement of domestic regulations

Potential disciplines on transparency in the application and enforcement of domestic regulations include requirements that members publicize procedures for the review of administrative proceedings and ensure the independence of administrative tribunals from the agency exercising administrative authority.

- *Do state administrative tribunals enjoy this degree of independence from administrative agencies? If not, this discipline might require substantial bureaucratic reorganization to ensure compliance. IGPAC urges the USTR to consult extensively with state attorneys general on this question.*

#### Licensing and qualification procedures

- Current GATS requirements are designed to ensure that licensing standards are made publicly available and that applicants are informed of the outcome of their application in a timely manner.
- Several countries have introduced proposals designed to insure that licensing requirements do not procedurally discriminate against foreign service suppliers.

- *Would disciplines on licensing procedures require agencies to more thoroughly explain reasons for rejecting licensing applications than in the past?*

### The US transparency proposal

The United States recently introduced a comprehensive proposal on transparency to the working party on domestic regulations. At the February meeting of the WPDR, members had an opportunity to address the United States proposal.

- *Does the following summary, which is gleaned from WODR minutes, accurately reflect the US proposal?*
- *Will the USTR make the US proposal available to IGPAC and the public?*

### Elements of the US proposal

- Contact points. The US proposed to expand inquiry points to respond to inquiries from “interested persons,” as opposed to responding only to governments.
- Publication requirements. The United States proposes to:
  - expand the publication requirement to be accessible to “interested persons.”
  - expand the type of information that must be publicized to include: “information about processing deadlines, rights of appeal, and notification with regard to violations of the terms of a license,” and
  - require publication of measures in “plain language.”
- Advance notice and comment. United States proposes to require governments to provide notice and respond to comments made by all interested persons, not just other members.
- Licensing procedures. The United States proposal requires members to establish horizontally - applicable, clear, and publicly available licensing procedures. The proposal mandates prompt notification (within a reasonable period of time), notification of applicants of the status of their applications, and, when applicable, providing applicants with the reasons for denial.
  - *Would the requirement for horizontally applicable licensing procedures require harmonization of differing procedures at the state level? At the local level, their nationally or within a state?*

### Themes of the WPDR responses

- Several members expressed concerns that the proposed disciplines would be excessively burdensome for developing countries, and that the proposal was not sufficiently flexible to account for differences in regulatory capacity between developed countries and developing countries.
- Several members asked whether the proposed disciplines were so broad as to include measures adopted by legislative bodies (and not just administrative agencies).
  - *How would the proposed transparency disciplines affect the legislative process at the state level?*
- The EU expressed concern that the proposed disciplines were so broad that they exceeded the scope of Article VI of the GATS.

## Coverage of transparency rules

### Scope of sectors covered – general options

#### General obligation – all service sectors

- European Commission – The EC proposes potential “common elements” (*i.e.* potential general obligations) for future disciplines on licensing procedures. However, the EC is not opposed to pursuing these disciplines on either a horizontal (all committed sectors) or sector-specific basis.
- Japan – The transparency portions of the Japanese proposal (but not all elements of domestic regulation) apply to “all service sectors in line with the coverage of GATS Articles III and VI:2.”
- Mexico – Mexico seeks to promote its FLMS (Federal Law on Metrology and Standardization) as a regulatory model. It covers all sectors as a general obligation.
- United States – The United States proposes general transparency, licensure, and prior notice and comment regarding “measures of general applicability.”

#### “Horizontal” coverage – all committed sectors

- Switzerland – The transparency portions of the Swiss proposal cover committed sectors (horizontal). However, Switzerland is not opposed to pursuing either general obligations or sector-specific commitments.
- United States – The United States proposes obligations with respect to responding to “interested persons” within the scope of specific commitments.

### Scope of sectors covered – U.S. proposal

The United States delegation explains the scope of the U.S. proposal as follows:

- “Horizontal coverage – all committed sectors. “Part A, which was the establishment of a new requirement with respect to “interested persons,” was restricted to specific commitments.”
- General obligation – all service sectors. “Part B, however, on publication, together with Part C on licensure, was based more on Article III, and was not restricted only to specific commitments. Regarding prior notice and comment, the delegation said it clearly concerned regulations of general application, and did not deal with legislation or laws, which would present a problem in many countries.”

## Proposals on “necessity”

## Elements of “necessity” rules

As noted above, IGPAC members concur with the 29 attorneys general, who stated that the proposals to implement the “no more burdensome than necessary” discipline would “unacceptably encroach upon our states’ regulatory authority.” Without detracting from this position, we have a number of questions about the status and meaning of proposals before the WPDR.

### No more burdensome than necessary

- Burden v. trade-restrictiveness. A growing number of countries are supporting implementation of the “necessity” discipline with proposals to the WPDR, for example:
  - “Not more trade-restrictive than necessary to fulfill legitimate national policy objective” (Switzerland; Accountancy Disciplines)
  - “Not more burdensome than necessary to fulfill a national policy objective.” (Japan)
  - “Not with the effect of creating unnecessary barriers to trade in services, and... a restriction on the supply of services.” (EC)
  - “Not restrict trade more than is necessary for attaining a legitimate objective.” (Mexico)

The U.S. delegation has not openly opposed or questioned the basic “necessity” proposals. *Does USTR discern a substantive difference between the “burdensome” language in comparison with the “least-trade-restrictive” language? Does USTR have a position on either version?*

- Diversity of subnational regulations. Federalism is a target of at least some participants in the WPDR. Among the examples of measures that violate the “necessity” discipline are sub-federal measures that are different from federal standards or different from one state to the next.
- National v. subnational policies. Throughout the WPDR minutes, WPDR delegations are quoted as emphasizing that the “right to regulate” applies only to national policy objectives, as distinguished from sub-national objectives.

### Quality of service

- Excluded policy objectives. Our general question about the “quality of service” element of the “necessity” discipline is: *Which policy objectives are excluded when measures may only ensure quality of the service?* We illustrate our concern with the following list of examples, which are common regulatory objectives that are not necessarily focused on the consumer of a service or upon the qualitative aspects of a service.
  - Regulation of utilities, transportation or financial services
    - Stability of the regulated firm
    - Service obligations for rural areas, inner-city neighborhoods or other areas where the cost of providing the service may be higher and perhaps not even profitable
  - Land use and environmental protection
    - Zoning limits or bans on development to protect coastal areas or wetlands
    - Prohibitions on desalination facilities to protect coastal areas
    - Reclamation mandates for extraction industries or construction in coastal zones
  - Economic policy
    - Affirmative action preferences for small business, minority business or other disadvantaged businesses

- Antitrust policies that limit anticompetitive concentration of service providers in a local market
- Regulation of insurance companies
  - Anti-discrimination measures that prohibit insurance companies from excluding coverage based on genetic history of breast cancer or other diseases
- Ambiguity of quality v. quantity. Rate-setting raises the question of whether measures that seek to regulate service providers, internalize certain costs, or keep rates affordable are related to the quality of the service. *Is affordability an aspect of quality?*

### Coverage of necessity rules

The scope of proposed disciplines under Article VI:4 is determined by two things. The first is the definition of each type of measure that the article covers – qualification requirements, technical standards, and licensing requirements. The second is the range of sectors to which the proposals apply – all service sectors (a general obligation), committed sectors (“horizontal” scope), or selected individual sectors.

Definition of measures covered. The range of domestic policies that would be covered by GATS disciplines will be most directly shaped by the definitions of the terms set out in Article VI:4. The proposals to date raise significant insights and questions, and these proposals are further informed by the general scope of the GATS, as interpreted by the WTO Appellate Body in the early GATS disputes.

#### Proposals to date

- Qualification requirements. Some proposals limit the scope of “qualification requirements” to individual professionals, while others do not.
  - *Does USTR have a position on limiting the scope of “qualification requirements”?*
  - *Qualification requirements are a key component of procurement policies. We see no text within GATS that would exclude procurement from the scope of disciplines under Article VI:4. Does USTR see any legal basis for excluding procurement?*
- Technical standards. The Swiss proposal defines technical standards broadly to include (a) both characteristics and performance of a service, and (b) non-government standard setters that do not act under delegated government authority.
  - *Does USTR have a position on limiting the scope of “technical standards”?*
- Procurement qualifications and technical standards. Qualification requirements and technical standards are key components of procurement policies. We see no text within GATS that would exclude procurement from the scope of disciplines under Article VI:4. In a June 2005 communication to the Working Party on GATS Rules, the EC stated its positions that disciplines under GATS Article VI would apply to government procurement of services. In addition, GATS provides no thresholds to limit application of proposed disciplines to procurement contracts below a certain level, or procurement at the municipal level of government.
  - *Does USTR intend that procurement policies be covered by the new disciplines?*
  - *Does USTR see any legal basis for excluding procurement?*
- Licensing requirements. The EC proposal defines “license” broadly to include (a) licenses, authorizations, and permits, and (b) and automatic authorization procedures.

- *Does USTR have a position on limiting the scope of “licensing requirements”?*

### General scope of GATS

The WTO Appellate Body has held that GATT and GATS can overlap in the case of certain measures. In *European Communities – Bananas III* (2000), the WTO Panel held that since tariff quotas on wholesale bananas affected the cost of goods procured and distributed by operators, they had an indirect affect on the supply of wholesale services and were thus covered under the GATS.

In *Canada – Certain Measures Affecting the Automotive Industry* (1997), the WTO Appellate Body refrained from determining whether import duty exceptions on cars affect wholesale trade suppliers in their capacity as service providers. However, the Appellate Body confirmed that "even if a company... performs other functions related to the production, importation, distribution and processing of a product, to the extent that it is also engaged in providing 'wholesale trade services' and is therefore affected in that capacity by a particular measure of a Member in its supply of those 'wholesale trade services', that company is a service supplier within the scope of the GATS."

- *To be covered by Article VI:4, must a measure directly affect conditions of competition for a service, or does Article VI:4 cover indirect affects as well? For example, the United States recently offered to make a GATS commitment in the sector for pipeline distribution or bulk storage of gasoline. California has banned the gasoline additive, MTBE, to avoid the risk of groundwater pollution. Would Article VI:4 disciplines cover California's ban on MTBE because the ban affects distribution or bulk storage of gasoline?*

### Scope of sectors covered

- Proposed coverage. Various countries have pegged their proposals on “necessity” disciplines at different levels of sector coverage. For example:
  - General obligations – all service sectors: EC and Mexico
  - Horizontal coverage – all committed sectors: Switzerland
  - Selected sectors – annex or reference papers: Japan
  - *Does the USTR have a position on these proposals?*
- USTR positions. In the past, USTR has supported or proposed a range of sector-specific proposals that include elements of the disciplines on Domestic Regulation. These include the accountancy disciplines, the reference paper on telecommunication services, and a proposal to develop a reference paper on energy services.
  - *Does USTR still support its proposal to develop a reference paper on energy services?*
  - *Are there other specific sectors that USTR believes are candidates for commitments to an annex on domestic regulation or reference paper?*

### Procedural questions on Domestic Regulation

- GATS Council authority. Regarding delegation of WTO authority to the Council on Trade in Services (GATS Council).
  - What is the relationship between powers of the GATS Council under GATS Article VI:4 to implement disciplines on Domestic Regulation as compared with art. X:5 of the Agreement Establishing the WTO, which requires super-majorities to amend part II of GATS or its annexes?

- Specifically, does USTR consider implementation of GATS disciplines on Domestic Regulation to be amendments of GATS within the meaning of article X:5 of the WTO Agreement?
- Congressional action. IGPAC members would like to understand whether there will be a need for congressional action.
- Are the WPDR negotiations to implement disciplines under GATS Article VI:4 part of the “single undertaking” of the Doha Round?
  - If so, does that mean that USTR will submit the results of WPDR negotiations for congressional approval as part of implementing legislation for the Doha Round?
  - If the WPDR negotiations are not part of the Doha Round, then is USTR nonetheless obligated to submit the results of WPDR negotiations for congressional approval?
  - What kind of timing does the USTR foresee for consultations with Congress and states regarding these negotiations?

## **II. Clarifications to Previous IGPAC Memo and USTR Response**

### **A. Introduction**

IGPAC members considered the USTR assertion that: “...the GATS clearly respects the sovereign right of WTO members to regulate services and to introduce new regulations, as detailed below. Domestic laws, regulations, qualification requirements and other standards that apply to domestic service suppliers will also apply to foreign service suppliers, so federal, state, and local governments fully preserve their right to regulate.”

- IGPAC would note again, however, there are plainly areas in which many of the ever-growing number of trade agreements impose requirements for *review of regulatory measures* that do not comport with the *standards used in domestic law*. Those problems may, as the USTR has stated, be negotiated around in the GATS by excepting certain types of services from coverage under those laws, or by specifically stating an intention to continue applying certain laws. Absent such negotiating specificity, however, IGPAC continues to believe that it cannot be fairly said that the GATS does not impose limits on regulatory authority applicable to foreign suppliers that do not exist with respect to regulation of purely domestic providers. Moreover, the recent Internet gambling case illustrates the problems that can arise with attempting to use exceptions as a way to protect a general power to regulate. It can readily occur that too few laws are listed as exceptions, or that inclusion of a particular sector has wider implications than were originally thought, and then the regulatory authority *is* subject to the serious limitations that are created by the global commitments created by the GATS. In our view, it would be more appropriate to ensure that the basic structure of the GATS does not impose limits that routinely impose on standard regulatory authority.

### **B. Government Regulation**

With respect to GATS recognition of the right of governments to regulate, and IGPAC concerns with respect to “government-provided services (e.g. energy, water, health, education, or public safety); potential privatization of such services; state/local regulation of monopolies; state/local regulation of professional services and other services sectors; government procurement; subsidies, and such sensitive areas of regulation as energy, water, zoning and land use controls,” the USTR suggested that GATS preamble language recognizes “the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives...”

- IGPAC would note that, while the precatory language in the preamble is useful, plainly it is the actual language of the agreement that controls. It is those specific provisions that concern IGPAC members for the reasons set out in more detail elsewhere in our memoranda.

The USTR states that the GATS in no way requires privatization or deregulation of any sector or public service, and expressly recognizes the authority of *national governments* to supply services, to maintain public monopolies in any service sector they designate, and even to create new monopolies. The USTR thus asserts that the GATS does not inhibit the freedom of state and local governments to regulate services activities and to provide services to their citizens.

- Initially, of course, the government may maintain monopolies pursuant to Article VIII – but may *not* do so, for any sector in which it has made a specific sector commitment. GATS provisions specify that once a country schedules a commitment, the Market Access rule prohibits governments at all levels from operating monopolies or setting limits on the number of service providers or service operations, including quotas. Thus, the government must choose between withdrawing a sector completely from the market access commitment, or being barred from using well-accepted tools of management in a sector such as certificate of need programs or the like. Moreover, in view of the breadth of the services contained in a given sector, it is quite possible that the government may wish to regulate service provider numbers differently in different areas of the sector, yet the market access commitment applies to the entire sector. Finally, the protection for services provided by the government itself is defined in a way that creates as many questions as it answers and that provides little guidance to governmental entities attempting to determine whether they can rely on that provision to protect their actions.
- Creating a more nuanced approach might be accomplished by using yet another form of exception, i.e., listing specific laws in an appendix. That approach would still have at least two major flaws: first, it would risk omitting certain laws inadvertently and thereby leave those areas subject to the standard commitment (where the laws at issue are those of 50 states and numerous jurisdictions, it becomes quite likely that some measures will be overlooked and, hence, excluded from protection, absent very broad blanket exceptions); and second, even with such exceptions, it would freeze the government’s regulatory approach at its status when the GATS was signed. If a government had not chosen to use a particular regulatory approach at that time, it would then be barred from instituting such measures, even in a wholly non-discriminatory fashion. Nothing in domestic law imposes such an inflexible, one-way mechanism on legislative actions, nor should the GATS process. It is a fundamental aspect of good legislation and agreements that the default case should be the one of broadest and clearest application. Exceptions should be exactly that – limited departures from the norm.

### C. Consultation Period regarding US GATS Submission:

The USTR staff asserted that three weeks was a reasonable period of response time, since it had consulted extensively in past months with relevant federal and state regulatory authorities and other interested parties in formulating the proposal, few services sectors were involved, and no changes to state or federal law were being sought.

- IGPAC concerns about the consultation process go beyond the timeframe or whether the USTR’s request sought changes in current law. Rather, our concerns go to 1) with whom the consultations occurred and 2) whether all of the relevant state/local considerations are known to USTR negotiators and those interested parties being consulted. IGPAC has frequently commented on deficiencies of the current State Point of Contact system, and has suggested additional efforts in order to actively involve state governments. In this case, we

understand the consultations prior to the issuance of the formal offer were primarily with a variety of professional groups, but not necessarily with state governments as such.

- Regardless of which parties were informed, the equally relevant question is what information were they given and what were they asked to agree to or comment upon. To the extent that the USTR was merely seeking confirmation of the current status of various state laws, such groups could obviously give that information. However, as mentioned earlier, the combination of sector commitments with exclusions for existing laws creates a one-way ratchet. That effect with respect to existing legislation is an anomaly – state governors and legislatures do not normally assume that their actions can forever tie the hands of future governments. Thus, being asked to confirm the existence of certain laws dealing with treatment of foreign entities, or even a willingness that those laws be identified and offered as part of our national GATS offer, takes on a very new meaning if government officials fully understand that they cannot readily amend those laws or withdraw commitments. IGPAC members remain concerned that the explanations provided to state and local governments by the USTR may not be sufficient. It is critical for the support of current and future agreements that all parties consulted on these matters fully understand the irrevocable nature of the commitments to which they are committing current and future state governments.

#### D. Consultation in WTO dispute settlement

The USTR detailed its policy and practice to notify and involve states in WTO dispute settlement proceedings challenge particular state or local laws and regulations, and to place the US at the forefront in seeking more openness and transparency in WTO proceedings.

- IGPAC gratefully acknowledges the efforts made by the USTR and the State Department in these matters, and appreciates the consultations in the cases brought to date. Our comments were intended to ensure that such efforts remain the legally binding norm for all future agreements.

#### E. GATS Negotiating Principles

IGPAC members would like to clarify our intent in raising “core principles” in the context of GATS negotiations. It was not meant to suggest that the USTR necessarily disagreed with some or all of the language stated therein; it was merely meant to underscore the basic principles from which IGPAC operates, and to note places where it is critical that such principles be included in the negotiations. On the specific points, we note as follows:

##### 1. Information on Commitments by State

- IGPAC members are fully aware of the information publicly available on WTO and USTR websites on GATS and other trade agreements. IGPAC has repeatedly suggested that the USTR take action to improve and restructure the presentation of information on states’ GATS commitments, recommending that state officials be provided a state-by-state summary of commitments, listed by industry sector within each state. If the USTR intent is to engage and inform state decision-makers about the GATS, the presentation format used by US negotiators needs to allow such state officials to see all relevant detail about a given state’s commitments in one document or spreadsheet. Currently, state officials must peruse the WTO language in more than 100 separate service sectors to see whether or not there may be a relevant commitment. While this recommended re-formatting would require a substantial effort by the USTR or another federal agency partner such as the Department of Commerce, it would be extremely helpful for states’ review and understanding of GATS commitments. It is recommended that the USTR work with DOC to include resources to implement this request as part of the budgeting process.

## 2. Investment Provisions

- IGPAC is fully aware that there is no specific “investment chapter” in the GATS. However, mode three of the GATS includes services provided “*by a service supplier of one Member, through commercial presence in the territory of any other Member.*” That presence would in most cases clearly constitute the same sort of “investment” as is being dealt with in the “investment chapters” in other agreements. Thus, to the extent that any commitments are made with respect to that mode of service, we believe it is reasonable to refer to them by the shorthand of “international investment provisions.” Further clarification about how GATS mode three commitments relate to BIT and FTA investment provisions would be helpful.
- While we recognize that the absence of a private right of action for investors to bring arbitrations directly against a signatory relieves some of the procedural concerns, that does not eliminate the substantive issues with respect to the agreements being proposed during the GATS negotiations. The basic issue that IGPAC and others have often raised with the USTR is the need to focus first on discrimination, not market access. It is essential to ensure that the limits placed on the ability to regulate activities by foreign service providers should not differ or exceed those with respect to domestic service providers. We do not believe that is currently the case, as we discuss further below.
- Moreover, our point about the *Methanex* and *Mondev* cases was not that expropriation language, as such, is in the GATS. Rather, the point was that overly *generalized* language can be fraught with ambiguities that can raise issues that were not intended; a situation that could be rectified by taking greater care during negotiations to draft more specific and clear language.

## 3. Domestic Regulation

USTR assertions that nothing in the GATS that removes the right of federal, state or local governments to regulate services activities are well understood by IGPAC.

- However, it would seem that we need to clarify further for USTR colleagues our core concern about regulatory activities: i.e. that the “not more burdensome than necessary” language in Article VI is plainly inconsistent with the US standard of review of regulations. And, while we understand that the language is not fully binding as yet, the Article binds its signatories to strive to implement such language. We assume the USTR intends to abide by the commitments that the US has already made in the GATS as to the way in which it should negotiate on specific proposals. If so, then the current GATS negotiations now underway related to “domestic regulation” surely have the potential to at least “affect” the way in which governments regulate industry within their borders. Similarly, the provision that licensing standards should not be a restriction on the supply of the services ignores the fact that some domestic licensing schemes do intend exactly such a restriction.
- Moreover, protections in Article XIV are all subject to the overriding limitation that “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.” Initially, the need to defend against an “as applied” standard opens up a vast panoply of potential objections (such as occurred in *Methanex*, where a nondiscriminatory ban on MTBE was challenged as being, in reality, a way of discriminating between US ethanol and Canadian methanol). The latter provision suggests that any measure that “restricts trade in services” cannot be allowed, even if it otherwise meets all of the requirements of the subsections of Article XIV. Since there are many proper police and regulatory measures that do indeed intend to restrict certain forms of trade in services, this limitation inherently overrides the rest of Article XIV in significant ways.

- As IGPAC has indicated previously, at a minimum, this language creates a cloud of uncertainty over *any* state measure – a cloud that can be used to pressure the state away from enacting certain measures. Thus, it is simply not correct to say that “nothing in the GATS prevents state and local authorities” from exercising their normal regulatory authority. That is true, perhaps, in a legalistic sense – i.e., the GATS, like other trade agreements, puts direct obligations and limitations on the federal government. We are well aware of that fact and that, as a practical matter, this does cushion the effect of the GATS provisions. But, state and local governments also have to recognize that it is an equally real problem that meaningful problems and consequences may arise from enactment of language that conflicts with GATS obligations that have been undertaken. State and local governments do not typically ignore the commitments of the United States on the assumption that they can get away with it. They can, and should, be expected to live up to commitments made on their behalf, so it is critical for them to understand what the drafters of these agreement do expect to be proper and improper forms of regulations.
- The United States, in turn, is obligated, under Article I(d)(3)(ii) to ensure the observance of the commitments made by the United States by its state and local governments. Indeed, WTO implementing legislation authorizes the Executive Branch to sue states in federal court to enforce the GATS, using a burden of proof as to whether a state or local law “is inconsistent with the agreement in question.” The potential for preemption under trade agreements is a concern for state and local governments as, unlike in cases of domestic preemption, only the federal government has been granted standing by Congress. Beyond preemption, federal enforcement options might involve withholding federal funds or permission needed by states. It is such potential real-world consequences that IGPAC has attempted to foresee and analyze in these comments.

#### F. The WTO Gambling dispute

The USTR held extensive consultations with states throughout the course of the WTO gambling dispute, including a working group open to participation by state officials and state gambling authorities to assist in the preparation of the case and to mount a vigorous, successful defense. The USTR pointed out that the Appellate Body threw out all of Antigua’s challenges to U.S. state laws as we requested, and that the dispute ended with no adverse finding against any state law.

- In deciding the recent Antigua & Barbuda challenge of US internet gambling laws, the WTO made several findings of particular importance to state and local governments. Although the WTO ruling noted that the US had not intentionally made a commitment on gambling services, the ruling asserted that the vague and unclear US language in its schedule of commitments consisted of an actual commitment on all gambling services. This ruling leads IGPAC members to question whether other US language on other committed sectors, such as financial services, health facilities, business and professional services, and services incidental to distribution of energy, is sufficiently clear so as to avoid other unintended consequences.
- The WTO ruling also found that a complete ban on internet gambling would be prohibited, as it amounts to a “zero quota.” Indeed, the USTR’s own briefs urged the WTO to consider that governments “cannot effectively exercise the “right to regulate” services that are the subject of a commitment if they lack any power to prohibit services within a sector ...” Given such developments, that imply certain, potential and unpredictable limits on government regulatory power, IGPAC concerns are warranted.
- While the WTO ruling dismissed claims against state laws, such dismissal occurred because Antigua & Barbuda had failed to brief the state issues – which would seem to leave such state laws open to future challenges. It is IGPAC’s understanding that the challenges were thrown out by the WTO panel solely because they lacked specificity and details about the problems with any specific state law. The determination plainly did *not* attempt

to reach any conclusions about the validity of those state laws. To the contrary, our assumption is that, to whatever extent valid challenges were asserted as to federal laws, those same challenges could undoubtedly be extended to similar state laws. Those representing the interests of state and local governments cannot afford to be complacent about these issues when it is plainly possible for another litigant to do the work that Antigua did not do in preparing its case.

While mentioning that the Appellate Body found that the US made a GATS market access commitment gambling services, the USTR confirmed that this commitment does not prevent the enforcement of laws to protect the public from organized crime and other dangers associated with internet gambling. The USTR does not foresee any possible circumstance in which the federal government would seek to compel a state to authorize gambling as a result of a WTO dispute settlement decision. Since the WTO ruling rejected challenges to state measures, the USTR asserts that the report provides no basis for reaching conclusions about how future hypothetical cases might affect state laws or regulations, and that the ruling reaffirmed the right of the United States and all WTO members to regulate gambling.

- IGPAC is concerned about the foundation of these conclusions. The US was able to succeed in this case by showing that it had a *national* commitment to regulating and/or barring internet gambling, so that there was a viable “public morals” position on that issue. To the extent, however, that it appeared that some forms of remote gambling were allowed (on horse racing) while internet gambling was not, the Appellate Body did find that there was a problem. We believe that the concerns raised about a lack of complete uniformity in applying a principle across the board are likely to cause similar problems with respect to sub-federal laws. There are clearly broad and diverse opinions among states about the “public morality” of gambling. Nevada and Utah are adjoining states, yet they have a wide dichotomy in public views about whether to allow gambling and how to regulate such activities. Both are united, however, in the conclusion that such issues should be settled at the state level. The issue confronting us all is uncertainty about whether the WTO would allow such a range of “public morals” policies within the same signatory party. Absent precedent, no one yet knows, and IGPAC members remain unconvinced that the Appellate Body’s decision clearly and unambiguously protects each state in setting its own “public morals” standard.
- IGPAC remains gravely concerned about how the inclusion of gambling as a covered service will affect the special treatment that states are *required* by federal law to give to Native American tribes. In some states, *only* Indian tribes are allowed to have gaming operations, licensed as single-service providers. How does that monopoly comport with the bar on market access limitations? Can states apply a public morals exception while allowing tribes, without standing under GATS, to run gambling operations -- when other sovereigns, with standing under GATS, cannot? We respectfully maintain that it would seem to make more sense for the federal and state government authorities to analyze these issues and their potential implications sooner rather than later, ideally before possible future challenges. While the Appellate Body’s decision plainly does not address every possible issue, it offers substantial guidance, and its analysis of federal laws would seem applicable to the same issues should they arise in state laws.
- Other uncertainties following this case include: whether Congress will take action to amend the Interstate Horse Racing Act to comply with the WTO ruling; and, if not, whether Antigua & Barbuda’s response may include the withdrawal of trade commitments to honor US intellectual property rights.
- IGPAC is not alone in expressing concerns about this case. Attorneys general from 29 states wrote the USTR on May 31, 2005:  
*“The prospect of [future] WTO challenges to [state-level gambling] prohibitions should alone be sufficient to give U.S. negotiators enormous motivation to use the current GATS negotiations to secure*

*a rule change that makes explicit the right of a WTO signatory to ban undesirable activity in a GATS covered sector.”*

## G. US Sectoral Commitments

### Energy

- Regarding state regulation of energy services, IGPAC appreciates the USTR’s commitment that no new access is being offered to electrical power services, whatever may have been the state of discussions in the past. Our positions are stated for the benefit of the USTR in responding to any requests for such commitments in the future and in deciding whether to consider making such commitments. The same applied generally with respect to the clarifications and assurances given by the USTR with respect to the other sectors discussed briefly in our comments. The recent media and Congressional controversy about allowing CNOOC to purchase Unocal suggests that there is indeed a real-world question about whether there will be any distinction in the energy sector between foreign and domestic owners. As to whether the proposals will affect the ability of states to regulate, we simply note the points made above; we are concerned not merely with whether there is a formal bar on regulations but also whether, as a practical matter, such regulations may be subject to challenge which may discourage their enforcement or even their initial enactment.

### Education and Library Services

- IGPAC appreciates the USTR’s consideration of our input on “affirmative action” concerns, and that the phrase “in accordance with domestic law” was inserted as a means of capturing the same intent.
- IGPAC would like to understand more fully the USTR assertion that GATS provisions would not interfere with an institution’s autonomy or its admissions policies. For example, if there were a bar on admitting some or all foreign students to some or all programs, would that not be a problem because the sector is excluded, or because all such requirements are exempted?
- IGPAC would also like to understand whether the reference to “U.S.-owned institutions” sufficiently safeguards subsidies for public institutions as opposed to privately owned institutions. Both the EU and Canada have listed horizontal limits on commitments, which exclude the supply or subsidy of a service in the public sector, while the US offer does not.
- On a related issue, the initial 2003 US offer had language in the schedule of specific commitments, of tremendous importance to the American Library Association, to exclude “non-profit, public and publicly-funded entities.” This commitment limit to National Treatment seems to have been deleted from the 2005 offer. IGPAC would appreciate clarification.

### Security Matters

- Regarding the IGPAC suggestion that the United States introduce a new horizontal reservation for homeland security, we remain concerned about the scope of the existing GATS provision, Article XIVbis, which protects the right of all WTO Members to take measures regarding essential security and applies to all obligations of the agreement. However, as written, the article seems to restrict the measures to protect its “essential security interests” to those that relate to the supply of services for military establishments, to measures relating to nuclear materials, and to measures taken during war or emergency. Perhaps these examples were meant to be cited as examples and not as definitions. Similarly, “war” and “emergency” may be broad enough to cover the continuing security issues faced in the “war” on terrorism, although we are somewhat skeptical that such a war, which may never end, was envisioned by the drafters of that terminology. If the words “including those homeland security and national security considerations...” were added at the end of paragraph (b), before the three subsections, this would certainly make the intent clearer.

## Privatization, Deregulation and Water

- IGPAC's only reference to privatization was in introductory comments about issue areas warranting careful assessment of the potential GATS impact on state decision-making. IGPAC members understand that nothing in the GATS requires privatization, until a country makes a commitment in a sector. Once such a commitment is made, the GATS either requires compliance with the prohibition on single-service providers, or it imposes other duties that may affect "privatized" services in the context of "public-private partnerships." The difference between treatment of government services, monopolies, procurement, water supply and similar activities carried out by private entities makes it critical for governments to consider the GATS in deciding *whether* to privatize those activities.
- One specific concern: under Environmental Services, the US has consented to expand the scope of "sewerage services" to "wastewater services," and has committed to those services that are "contracted by private industry." IGPAC would appreciate clarification on this ambiguous language, as it could mean that public-private partnerships or other forms of privatization in the US are now covered by GATS. We recognize and appreciate the fact that the USTR has not yet offered any commitments in such areas.

## **III. Conclusion**

IGPAC members and the Services Working Group have an appreciation and generally accurate understanding of the USTR's positions and of the current status of GATS negotiations. It would seem that our divergent approaches arise from different views of the potential for concern. While we fully comprehend the USTR's emphasis on the relatively benign results of trade agreement disputes impacting states to date, IGPAC members have the responsibility to be aware and expressive regarding potential risks as well as benefits. There is no guarantee that the relatively low number of cases brought to date will continue. A number of the decisions to date have been made on the basis of narrow, technical issues, that could readily be avoided in future cases. The lack of clarity and uncertainty in many of GATS provisions in themselves are sufficient to put constraints on the freedom with which legislators feel they may act.

IGPAC would appreciate being able to review the draft Ministerial Declaration for Hong Kong in order to provide input in a timely fashion. IGPAC members suggest that GATS negotiations and other trade agreements strive: 1) for requirements that are sufficiently limited and consensual that they *can* be applied across the board (non-discrimination is such a policy, limits on numbers of providers are not), and 2) for *clarity* in the provisions to which parties agree. Since ambiguities in the existing language have been brought to light, it should be possible in the next round to either *eliminate the ambiguity*, or *eliminate the requirement*, in the event that no consensus can be reached on the given requirement. If these two touchstones are used, we believe any agreements reached are far less likely to continue to raise concerns for governmental entities.

As previous IGPAC reports have made clear, state and local governments typically support trade liberalization and the expansion of market access. IGPAC has also emphasized the critical need for safeguarding federalism through greater consultation between federal and state governments during the formulation of trade policies, negotiation of trade and investment agreements, resolution of trade disputes, and implementation of trade development programs (IGPAC recommendations 8/5/04). We look forward to pursuing these goals with active USTR support.

## ATTACHMENT A

### **Procurement Comments and Recommended Terms and Conditions for State Response**

(excerpt from 3/19/04 IGPAC Report on CAFTA)

#### Government Procurement

IGPAC members generally support the goal of improving transparency and increasing fair market access in government procedures and regulatory decisions that are related to procurement, while preserving the independent authority of state and local governments to adopt legislation, standards and procedures consistent with their experience and interests. IGPAC members understand that sub-central, i.e. state, government procurement is covered by this Agreement as specified in Annex 9.1, Section C and other Annex notes to Chapter 9, and that local government procurement is neither covered in the CAFTA nor in the World Trade Organization (WTO) Government Procurement Agreement (GPA). Regarding the coverage of state procurement in CAFTA, certain provisions in Chapter 9 related to the procurement process call for clarification, as detailed below.

IGPAC members would welcome representation from the National Association of State Procurement Officials (NASPO: a member organization consisting of the state purchasing directors for the centralized procurement organizations in each state) so that the Committee report would more formally include their expertise. Given the technical complexity and procedural sensitivity of the procurement process, state-level procurement expertise offers guidance on specific terms and conditions, implementation feasibility and background on potential conflicts with existing law. Many NASPO members are familiar with the World Trade Organization (WTO) Government Procurement Agreement (GPA), whose subcentral procurement provisions are similar to those in the CAFTA. To the extent that the USTR seeks to obtain the voluntary participation and informed consent of additional state government entities in international procurement agreements, the involvement of state procurement officials is critical. Moreover, with respect to the implementation phase of this or any other trade agreement covering procurement at the subcentral level, IGPAC members would recommend that the USTR and other federal agencies make a concerted effort to communicate to impacted state entities in all branches of government the content of relevant provisions in order to advance understanding, effective administration and compliance.

Regarding procurement provisions in Chapter 9 of the CAFTA, IGPAC members support the basic intent of expanding market access through increasingly fair and open bidding processes. IGPAC members would also note that coverage of state procurement in the CAFTA only pertains to those subcentral entities that have affirmatively offered to include their procurement in the CAFTA and other FTAs. Some state governments that are not covered by the WTO GPA may be unable or unwilling to comply with certain specific requirements, given potential conflict with state rules, regulations, laws and the exigencies of a particular procurement. In reflecting issues that may arise for states, especially those states not presently covered by the WTO GPA, IGPAC members endorse the following recommendations provided by NASPO's expert review of CAFTA Chapter 9:

- Article 9.5 (Time Limits for the Tendering Process – requiring public notice of not less than 40 days, or not less than 10 days under some conditions): This CAFTA agreement provision should be clarified with respect to alternative time limits. Some states' bids are published for shorter time frames, for example from 2 to 4 weeks (less than the 40 calendar days specified in the CAFTA text, and not meeting conditions listed as necessary to reach the reduced 10 day time frame, i.e. the absence of qualification requirements or publication of an annual notice of intended procurements). In some urgent cases, states may need bids back in 2 to 5 days -- a time frame that may be inconsistent with the 10 day minimum in the text. Also note that e-procurement tools have allowed many states to accelerate the tendering process, while improving efficiency and international market access to the procurement opportunity.

- Article 9.6 (Tender Documentation – requiring that all criteria for contract awards be published in the tender): The provisions in article 9.6.1 should be clarified as to the definition of tendering documentation. There is agreement that all information used to evaluate bids should be documented prior to the receipt of bids to ensure a fair evaluation process. However, various state laws do not always require that all of the detail, especially in very complex RFP procurements, needs to be included in the tendering document. Some state laws provide for a general description of the evaluation process in the tendering document and an evaluation packet, which may be a separate document from the tendering document. Some state laws may have similar requirements, for example: "A best value determination must be based on the evaluation criteria detailed in the solicitation document. If criteria other than price are used, the solicitation document must state the relative importance of price and other factors." Although similar in concept, the proposed CAFTA language appears to hold states to a higher standard by requiring "all cost factors" and "weights" in the tendering document. NASPO and IGPAC recommend clarification of this article to more clearly define the scope of tender documentation, focusing on the intent of fair and open competition without constraining the specific mechanics used to accomplish that intent.
- Article 9.10 (Awarding of Contracts – requiring tender submissions in writing): It is recommended that section 9.10.1 be clarified, since this requirement appears contrary to e-procurement activity on the part of some states and would also appear to contradict CAFTA's definition of "in writing" in article 9.17.
- Article 9.12 (Non-Disclosure of Information – regarding the non-disclosure of certain confidential information): This article needs clarification, in light of the fact that many states have Freedom of Information Legislation (FOIL) requirements that may be consistent with the intent but not the letter of the CAFTA text. For example, some states provide that the only business-related data that can be protected from disclosure as non-public must meet the legal standard of "trade secret" -- a stricter test than the definition here. In addition, the last phrase, "...that provided the information to the Party." should be clarified to include "...that provided the information to the Party or to the entity or to the reviewing authority."

IGPAC members comprehend that the text negotiated by federal parties for the CAFTA, the WTO GPA and other international agreements covering subcentral procurement may not include detailed language on the terms and conditions duly specified by each state entity. Still, state governments reserve the right to condition their agreement to accept the proposed procurement language based not only on the terms of the final agreement and implementing legislation, but also upon the inclusion of terms and conditions such as the following in their acceptance letters:

- Agreements to be included may be withdrawn upon a subsequent decision by the appropriate legislative and executive offices;
- State procurement written and on-line publications will be recognized as meeting relevant requirements;
- Federal officials will provide necessary resources and assistance to impacted agencies for procurement trade agreement implementation and compliance;
- Amendment of inconsistent state or local laws to conform with the obligations being undertaken depends upon approvals by the relevant legislative, administrative and executive bodies;
- In the event that a contract award is disputed by a foreign bidder, the procurement process will not be impeded or delayed, thereby preserving public interest and safety;
- In the event of a dispute settlement adverse to the US due to the actions of a state or local entity, such entity will not be held liable to compensate the US for any costs or sanctions imposed under the dispute settlement;
- Any substantial changes to the types of commitments covering state and local procurement contained in this agreement, future agreements, and the WTO Government Procurement Agreement will not be deemed as being within the scope of agreements currently provided to the USTR without providing such entities an opportunity for full review and a new decision on inclusion;

- Existing state and local exceptions to coverage will be maintained, including but not limited to:
  - all existing or future preferences and practices benefiting small, minority and women-owned businesses;
  - procurement contract awards made to state or local companies due to tie-bids;
  - procurement of transit cars, buses and related equipment, steel, coal, autos, and printing services, and
  - requirements designed to encourage economic development for the purpose of alleviating economic distress and to promote environmental quality.

Currently, public awareness of the implications of “outsourcing” or “offshoring” has been heightened as some US employment shifts overseas and across borders – while popular awareness of the benefits of international investment and foreign affiliate employment to the US economy seems less evident. A wide array of proposals under review by state and local elected officials could potentially limit international procurement market access. Given this context, IGPAC members suggest that the USTR, the US Department of Commerce Export Assistance Centers, and other relevant federal agencies, provide technical assistance to actively encourage US firms to access newly opened procurement markets under this agreement.