

November 15, 2005

The Honorable Rob Portman
United States Trade Representative
Executive Office of the President
Washington, D.C. 20508

Dear Ambassador Portman:

Pursuant to Section 2104 (e) of the Trade Act of 2002 and Section 135 (e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Intergovernmental Policy Advisory Committee on the US-Oman Free Trade Agreement.

IGPAC members have also taken this welcome opportunity to express some recommendations with respect to the overall process for federal/state/local trade policy consultation. Given the growing importance of these issues, the committee also requests that IGPAC's August 2004 submission on state-federal consultation be included as an addendum to this report.

Thank you for your consideration.

Sincerely,

Kay Alison Wilkie
Chair
Intergovernmental Policy Advisory Committee

The US-Oman Free Trade Agreement (FTA)

Report of the
Intergovernmental Policy Advisory Committee

November 15, 2005

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Intergovernmental Policy Advisory Committee

Advisory Committee Report to the President, the Congress and the United States Trade Representative on the US-Oman Free Trade Agreement

I. Purpose of the Committee Report

Section 2104 (e) of the Trade Act of 2002 requires that advisory committees provide the President, the Trade Representative, and Congress with reports required under Section 135 (e) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act of 2002.

The report of the appropriate sectoral or functional committee must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area.

Pursuant to these requirements, the Intergovernmental Policy Advisory Committee hereby submits the following report.

II. Executive Summary of Committee Report

State and local governments play a vital role in advancing America's global competitiveness. This goal is best served by embracing trade policy strategies that (1) yield significant economic gains for the country, (2) create open, transparent, and fair global markets, (3) invest in innovative research and technologies that create the industries and jobs of the future, (4) provide assistance to workers that are negatively impacted by technology and changing trade trends, and (5) engage, rather than isolate us from, the challenges of international competition in this increasingly interconnected world. IGPAC members, in principle, support the trade liberalization objectives of the US-Oman Free Trade Agreement, but continue to have reservations about investor-state dispute mechanisms and other elements contained in this agreement and previous FTA's . IGPAC members, would also like to take this opportunity to suggest some clarifications to certain provisions of the Agreement, and to specifically note that the FTA's objectives of economic growth, employment creation, sustainable development, and

market opportunities should be pursued in a manner consistent with constitutional and public policy obligations to state and local constituents. Consequently, IGPAC members believe firmly that this FTA—like all FTAs—should be drafted, implemented, and interpreted, to respect and give due consideration to existing state and local level regulatory, tax, and subsidy policies, and to the social, economic, and environmental values that those policies promote (see attached addendum on federal-state consultation in trade policy).

Statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect locally appropriate responses to the needs of our residents, should not be overridden by provisions in trade agreements. These concerns were reflected by Congress' inclusion of the “no greater rights” language in Trade Promotion Authority legislation. The principle that the United States may request, but not require, states to alter their regulatory regimes in areas over which they hold constitutional authority should be maintained. Full and effective coordination and consultation should include requesting authority from the appropriate state or local authority before a state or local rule, regulation, or statute is listed in a trade agreement, offer or other binding commitment. IGPAC would prefer a process that relies upon affirmative, informed consent from affected state and local entities, rather than negative opt-out.

The members of IGPAC also want to highlight the importance of the forthcoming WTO ministerial to state and local governments. Progress in market liberalization at the WTO would be of far greater importance to state economic development efforts than any individual FTA. However, the broad scope of these negotiations creates new challenges for state and local governments. Several IGPAC members are particularly concerned about ongoing efforts within the WTO, including recently released position papers, to impose trade disciplines on domestic regulation. Given the importance of these negotiations, IGPAC would like to reiterate its request to USTR that state and local governments be closely consulted prior to the WTO ministerial in Hong Kong.

The members of IGPAC also want to stress the importance of expanding America's trade promotion capacity as we expand our market access. Recent decisions by Congress to require the International Trade Administration (ITA) to raise additional revenue from service fees, combined with new infrastructure costs being shifted to ITA from the State Department, threaten to undermine the ability of small businesses to take advantage of new market opportunities in Oman and elsewhere.

IGPAC members appreciate that the USTR involved this and other advisory committees in consultations during the FTA negotiation process. However, as with previous FTA's, many IGPAC members feel that they did not receive—due to highly compressed comment periods—sufficient opportunity to make their perspectives known to negotiators, nor the opportunity to consult with negotiators sufficiently early in the process to influence certain key provisions of the FTA. This is particularly true given that the accelerating pace of trade negotiations and dispute litigation is beginning to strain the limited resources available at the state and local level for trade policy analysis.

Several IGPAC members expressed concern about the inclusion of investor state dispute settlement in the Oman agreement. While the recent ruling in the *Methanex* dispute, established an important precedent for safeguarding important principles of federalism and state sovereignty that concern IGPAC, investment disputes such as the NAFTA Chapter 11 arbitration claim filed by Grand River Enterprises Six Nations Ltd., that implicate state and local regulations continue to trouble IGPAC members. While IGPAC is aware that these types of challenges can not directly overturn local, state, or federal laws, IGPAC would prefer to limit the circumstances in which these types of challenges may be raised, not the least because these types of challenges impose significant demands on state agencies' time and resources. Moreover, the possibility that state or local laws may be challenged (by way of an action against the United States) is itself a chilling factor for those governments when they determine what legislative and regulatory actions they should undertake. Thus, they continue to believe that it is critical to better clarify and limit the extent to which these agreements can have an effect upon their authority. One simple measure to better allow state and local governments to assist the federal government is for the federal government to commit itself to seeking compensation for legal costs, including staff time, incurred by states and localities in assisting the federal government with defending cases where state or local laws have been challenged. In the *Methanex* dispute, for instance, the federal government was awarded full payment of the millions of dollars in fees and costs that it had incurred, but no similar request was made for those same types of expenses that were incurred by the state of California.

As the US and Omani governments work to implement this FTA, as well as collaborate on the creation of a broader Middle East Free Trade Area, IGPAC members would like to offer their support for remaining engaged with our federal and subcentral counterparts in the trade policy dialogue, and for collaborating on trade capacity building efforts and mutually beneficial trade development initiatives.

III. Brief Description of the Mandate of the Intergovernmental Policy Advisory Committee

Established by the United States Trade Representative (USTR), pursuant to Section 135(c)(2) of the Trade Act of 1974 (19C. 2155(c)(2), as amended, the Federal Advisory Committee Act (5 C. App. II) and Section 4(d) of Executive Order No. 11846 dated March 27, 1975, the Intergovernmental Policy Advisory Committee (IGPAC) is charged with providing overall policy advice on trade policy matters that have a significant relationship to the affairs of state and local governments within the jurisdiction of the United States.

IGPAC consists of approximately 35 members appointed from, and reasonably representative of, the various states and other non-federal governmental entities within the jurisdiction of the United States. These entities include, but are not limited to, the executive and legislative branches of state, county, and municipal governments. Members may hold elective or appointive office. The Chair of the Committee shall be appointed by the US Trade Representative, and members shall be appointed by, and serve at the discretion of, the US Trade Representative for a period not to exceed the duration of the IGPAC charter. The US Trade Representative, or the designee, shall convene meetings of the Committee.

IGPAC's objectives and scope of its activities are to:

- Advise, consult with, and make recommendations to the US Trade Representative and relevant Cabinet or sub-Cabinet members concerning trade matters referred to in 19 C. Section 2155(c)(3)(A).
- Draw on the expertise and knowledge of its members and on such data and information as is provided it by the Office of the US Trade Representative.
- Establish such additional subcommittees of its members as may be necessary, subject to the provisions of the Federal Advisory Committee Act and the approval of the US Trade Representative, or the designee.
- Report to the Trade Representative, or the designee. The US Trade Representative or the designee will be responsible for prior approval of the agendas for all Committee meetings.

The United States Trade Representative, or the designee, will have responsibility for determinations, filings, and other administrative requirements of the Federal Advisory Committee Act. The Office of Intergovernmental Affairs and Public Liaison of the Office of the Trade Representative will coordinate and provide the necessary staff and clerical services for IGPAC. IGPAC Members serve without either compensation or reimbursement of expenses.

IV. Negotiating Objectives and Priorities of the IGPAC

Members of the IGPAC would like to express their gratitude to their USTR colleagues for their ongoing commitment to expand participation by state and local government representatives through the Intergovernmental Policy Advisory Committee on Trade (IGPAC) during the US-Oman Free Trade Agreement (FTA) negotiations.

IGPAC members affirm that America's economic growth and prosperity are best served by embracing trade policy strategies that:

- yield significant economic gains for the country;
- create open, transparent, and fair global markets;
- invest in innovative research and technologies to foster commercialization into the industries and jobs of the future;
- provide assistance to workers that are negatively impacted by technology and changing trade trends, and
- engage in, rather than isolate us from, the challenges of international competition in this increasingly interconnected world.

Because the FTA meets many of these criteria, as a general principle, IGPAC members support this agreement's trade liberalization objectives, with the recognition that those objectives must be carried out in a manner consistent with constitutional and public policy obligations owed by the federal government to state and local entities. Consequently, the FTA should accord consideration for existing state and local level regulatory, tax, and subsidy policies, and the social, economic, and environmental values those policies promote. Statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect locally appropriate responses to the needs of our residents, should not be overridden by provisions in trade agreements. These concerns were reflected by Congress' inclusion of the "no greater rights" language in Trade Promotion Authority legislation. The principle that the United States may request, but not require, states to alter their regulatory regimes in areas over which they hold constitutional authority should be maintained.

Full and effective coordination and consultation should include requesting authority from the appropriate state or local authority during the policy formulation and negotiation process, before a state or local rule, regulation, or statute is listed in a trade agreement, offer or other binding commitment. In general, IGPAC would prefer a process that relies upon affirmative consent from fully informed, involved and affected state and local entities, rather than for them to be required to opt out of proposed coverage.

Background and Context

State and local government entities are at the front lines of the international marketplace: both by assisting businesses to engage in global competition through trade development assistance; and by working to mitigate the impact of technological change and trade dislocations on communities, businesses and workers through varied adjustment, training and assistance programs. States have typically been innovators in international economic development work that fosters increased export activity by small and mid-sized firms. Though businesses may turn first to private sector contacts for trade assistance, research shows that the transaction costs of providing trade development assistance to small and medium-sized businesses generally outweigh the benefits for most private sector service providers. Hence, federal, state and local government trade assistance plays a key role in filling this need by providing information, technical assistance, referrals, alliance-building and facilitative guidance to smaller firms lacking the internal resources to develop

export expertise on their own. Still, the specific export and job creation/retention benefits from informational, capacity-building trade development assistance services remain difficult to measure. Moreover, many state and local trade development efforts are constrained by limited resources and competition from other budgetary priorities.

State and local governments have generally supported multilateral, regional and bilateral efforts to expand market access, both for local businesses reaching out to global markets, and for international investors engaged in the local economy and creating employment. By strengthening rules-based international trade and investment systems, and making the investment process more transparent both in the US and abroad, the ability of all parties to expand trade is enhanced. As trade liberalization efforts progressed in recent decades, however, their coverage and scope have increasingly extended beyond the federal-level, increasing the impact on state and local-level laws, practices and regulations.

Following the approval of Trade Promotion Authority in August 2002, the USTR is to be commended for expanding the IGPAC, and for consulting with states and others on a wide array of trade agreements under negotiation. Still, in recent years, concerns such as the following have emerged:

- Given the comparative newness of states' involvement in international trade agreement negotiations, and in their implementation and dispute resolution, states often lack a clearly defined institutional structure with experienced staff dedicated to handling requests from trading partners, federal agencies and other interested parties, and for articulating the state's position on trade issues. Despite the absence of a clear structure for federal-state trade policy consultations, the dialogue has gradually intensified and the role of state policy-makers has increased, as has the involvement of other interested parties. State and local governments, and the associations that represent them, have worked over the past two years to overcome this challenge by building alliances with outside legal advisory groups and hiring new staff. However, the demands for trade policy analysis, generated by new FTA negotiations and dispute litigation, are growing far faster than the ability of the state and local government community to add new analytical capacity.
- Though the State Point of Contact system was meant to create a clear conduit for two-way communications, the structure has not met expectations for a variety of reasons. Most would agree that a broader and deeper range of contacts with diverse state entities, and particularly with those bearing regulatory and legislative authority, needs to be created and maintained by the USTR. Further, requests from the USTR for information and comments related to agreements being negotiated need to allow sufficient time for an informed and meaningful state/local response in order to influence the initial development and articulation of US positions.
- The challenge faced by state and local governments in accurately evaluating the impact of trade on state economies is significant as well: international trade and investment data at the state level are insufficient; and reporting on the results of trade agreements at the state/local

level is scant. There is no information by state on services or merchandise imports; no detailed data on services exports and decreasing information on merchandise exports at the zip code level (given the discontinuation by the US Dept. of Commerce of the Exporter Location data series); and limited, delayed and highly aggregated international investment information. The challenges of assembling national, not to mention subcentral, information on procurement contracts and merchandise and services trade render reporting on specific trade agreement results quite problematic for the US and other countries. These data gaps make it difficult to conduct an informed analysis of the specific costs or benefits of trade liberalization for a given industry or location.

- Legal experts in all branches of government at the state and local level are examining the evolving impact of deepening trade liberalization on federalism, as interpretations of trade agreements during trade disputes brought by investors, trading partners and others impact the historically established state-federal division of power and responsibility (e.g. Chapter 11 of NAFTA). Recent developments in trade disputes impacting federal and state jurisdictions, such as the NAFTA Chapter 11 arbitration claim filed by Grand River Enterprises Six Nations Ltd. seeking compensation related to the tobacco Master Settlement Agreement, are troubling to IGPAC members. While aware that such challenges do not directly overturn state or federal laws, the demands on state agencies' resources for legal preparation and policy response remain significant. Several IGPAC members are also concerned about the implications of the WTO negotiations on domestic regulation taking place in advance of the Hong Kong ministerial. IGPAC encourages USTR to work closely with state and local governments in advance of the ministerial.

The benefits of trade liberalization and its short, medium and long-term costs and benefits continue to be debated by academics, government leaders and the general public. Our increasing and intensifying globalization is occurring ever more rapidly, with factors of production more mobile and international interconnections more profound than ever before. Resulting advances in technology and productivity are having a major impact on employment trends in a variety of sectors and professions. Given the disparate trade flow impacts, those communities, businesses and workers gaining from greater international market access tend to be less visible, while those challenged by global competition tend to suffer disproportionately, evoking understandable public concern and calls for greater government intervention. Some industrial and agricultural sectors facing import competition may effectively organize for protection or special treatment, while other sectors may suffer more comparatively given their lack of connections and clout to gain preferential treatment. Additional factors often placing US smaller businesses at a competitive disadvantage are the substantial budgets and sophisticated export assistance infrastructure of our major trading partners -- at regional, federal and sub-central levels. Though American awareness of the importance of effective trade development efforts has grown, greater attention to these matters will be crucial in upcoming years.

Recommendations:

Given this climate, it has never been more essential for international trade agreements, and the federal, state and local trade policy discussions surrounding these agreements, to be effective at opening markets and expanding the benefits of trade for US firms and workers. Bolstering the global competitiveness of the country's growth engine, small and mid-sized firms and their workforces, is at stake. Collaborative state/federal efforts for deepening international trade policy dialogue and fostering creative trade development strategies can help address this need.

IGPAC recommends that the Trade Promotion Coordinating Committee (TPCC), the Trade Policy Review Group (TPRG) and the Trade Policy Staff Committee (TPSC) be expanded or reconfigured to include state and local government representation (e.g. interested IGPAC members, designated State Points of Contact for the USTR, other relevant agency officials) and private sector representation. Issues for the attention and action on the part of a newly expanded trade promotion and trade policy consultative process might include:

- Establishing and fully funding a formal, regularly scheduled mechanism for US federal-state trade policy consultations in light of the increasing state role in trade policy formulation, negotiation and dispute resolution. Consultations would address trade and investment agreement negotiations that may impact state laws and practices, implementation issues, and any state-related issues raised by ongoing or prospective disputes. . To be most effective and inclusive, this consultative mechanism would:
 - need a structure with sufficient budgetary support and resources to develop essential institutional capacity;
 - build upon the annual National Forum on Trade Policy (started by North Carolina in December 2003 and being supported by Centers for International Business Education and Research around the nation); and
 - be informed by best practices of trading partners, such as the Canadian federal-provincial model for trade consultations (C-Trade).

The creation of this type of consultative federal-state trade policy infrastructure is critically important to bridge the trade policy gaps that currently exist between the manner in which federal agencies currently view varied state processes, and states' understanding of the scope of federal requests – as well as the gaps that exist between federal agency needs and expectations, and states' capacity to respond in an effective fashion.

- Increasing awareness by state officials of the recent and on-going efforts on the part of USTR and other TPCC federal agencies to proactively discuss trade issues with national associations of state officials exercising regulatory functions (e.g. National Association of Attorneys General, National Association of Insurance Commissioners, National Association of State Procurement Officials, etc.). Particularly with respect to GATS, national associations of state regulators such as the National Association of Regulatory Utility Commissioners should play an important role in USTR consultations with states, given the vast scope of these negotiations, the number of agencies and sub-sectors involved, and complexity and range of services regulations. It would be helpful for the federal-state trade policy consultation process to foster links between the national associations' experts in trade law and

state trade contacts, and among federal negotiators and federal/state/local agency contacts with expertise in the given issue area.

- Establishing a clear priority for federal support of high technology manufactured goods and services exports. This would build on a foundation of increased federal funding for research and development in emerging sectors such as biotechnology, nanotechnology, photonics, advanced materials, and other innovative technologies. US support for the infrastructure of advanced R&D and for the commercialization of new technologies has never been more crucial to our nation's economic survival in this century's globally competitive context. Such support, along with an educational system preparing the technology workers of the future, would spur the US economy to generate high paying, high value-added employment. Some US trading partners, Singapore, for example, have multi-year plans to strategically target industrial development, devoting significant resources to accelerate their comparative advantages. In confronting the challenges of this century, the US has as much to learn from our global trading partners as they do from us.
- Assessing the comparative costs and benefits to the federal budget and US economy, particularly in terms of employment creation/retention and trade value, of the allocation of resources and trade protections to agricultural commodities, technology research and development, industrial goods, manufactured products, and services sectors.
- Collecting and disseminating better national, state, regional and zip-code level data on merchandise and services exports and imports, and on international investment flows, deploying mapping technologies and other tools to better inform analysis and planning. Such data would make it possible to benchmark state/federal trade performance against other major trading partners and regions with successful trade development agencies (e.g. Canada, European Union, Japan) by conducting regular evaluations of measured performance, program outcomes, and customer satisfaction at the sub-central level. Having entities such as the TPCC agencies conduct empirical analysis and report on the trade development capacity and resources of selected trading partners would be an essential aspect of this benchmarking process.
- Encouraging TPCC federal agencies to: deepen the state/federal trade development partnership; prioritize support by overseas posts for state-led trade initiatives in global markets; increase cooperation in domestic trade development program delivery; and integrate further Eximbank trade finance and delegated authority activities with those of states and the private sector, improving small firms' awareness of and access to trade financing. Successful collaboration by federal agencies with state, local, public and private sector economic development partners should be acknowledged and rewarded.
- Substantially transforming, expanding and fully funding the Trade Adjustment Assistance program, perhaps renamed as the "Technology" or "Workforce Adjustment Assistance" program (TAA or WAA). A transformed workforce adjustment and retraining program could more effectively prepare our nation's future workforce for confronting and mastering

this century's employment challenges. In the past just as in the present, the complex interactions of economic and industrial factors are more often the cause of employment dislocations than trade-related import competition alone. Many manufacturing and services industries are transitioning through wrenching adaptations to technological change, automation advances and productivity gains, in an intensely competitive global context. The significant job losses occurring in some sectors result from broad trends transcending time and borders. A reconstituted Technology or Workforce Adjustment Assistance effort, beyond aggressively implementing existing TAA provisions (e.g. wage insurance, job-search and relocation aid, health insurance), needs to create initiatives for continuous training, skill enhancement and other assistance (e.g. fully portable health and pension benefits, asset-value insurance, tax incentives for companies' increased on-the-job training), offering a comprehensive safety net to cushion the adaptation of impacted workers and their communities. Such efforts, in addition to appropriately redistributing a small portion of the national gains from technology and trade to dislocated workers and communities, might foster more domestic understanding of, and support for, investments in education, research, technology, and an agenda of trade liberalization in the future. Moreover, in light of the rapidly changing characteristics of employment being relocated or displaced, the reconstructed program should serve the needs of our nation's wide and diverse workforce, assisting manufacturing workers at varied skill levels as well as workers in services industries. Specifically, the US government should allocate full funding for Technology and Workforce Adjustment Assistance for both blue and white collar workers, including information technology and other professionals whose jobs are being lost due to outsourcing or technological change.

In addition to the recommendations above for expanding state/local and private sector connections to the TPCC, TRPG and TPSC, IGPAC members suggest that the USTR:

- Intensify the focus of its consultative process on reaching out to State Points of Contact, advisory committees and other interested parties for their input as early as possible when trade policy is being formulated and as trade agreement negotiations are being initiated – rather than after their conclusion. Given the economic distress and employment dislocations created in certain industries and communities due to trade liberalization, the USTR outreach process needs to include active participation by federal and state-level labor agencies and labor unions.
- Utilize the existing corporate, government, and academic relationships of the US states abroad as a bridge to foster cooperation and understanding in preparation for future trade policy, trade capacity building, program development and trade agreement initiatives and meetings, such as WTO Ministerials. Some illustrations of these collaborative ties in action would include: discussion of trade development best practices between state economic development officials and overseas counterparts; educational and technology exchanges and linkages among academic, corporate and government leaders; and, technical assistance and training offered by state courts system experts to enhance the efficiency, transparency and effectiveness of courts in other jurisdictions. These types of subcentral working relationships may provide linkages of benefit to Omani leaders working toward a more productive world

trade system. Many states have formal and informal international connections that could advance our shared objectives for trade development and capacity building.

V. Advisory Committee Opinion on the US-Oman FTA

General Observations:

The US-Oman Free Trade Agreement is supported in principle by most IGPAC members, as the agreement advances strategically critical and comprehensive trade development and market reform objectives in a manner generally beneficial to our national, regional and local economies. Certain provisions related to investment and procurement, however, warrant clarification, as detailed below.

Most IGPAC members conclude that while the Oman FTA contains elements of concern, including investor-state dispute provisions, the agreement holds the potential to foster valuable trade ties with an important U.S. ally and deepen economic integration throughout the Middle East. IGPAC members understand that bipartisan efforts in Congress, such as the Middle East Trade and Engagement Act, indicate active federal support for economic reform and trade liberalization in the greater Middle East.

The US-Oman FTA should substantially improve the business environment and advance civil society development objectives, while increasing trade capacity and investment opportunities between the US and this critically important world region. The elimination of 100 percent of tariffs on consumer and industrial product exports to Oman at inception is most welcome, as are other market opening provisions for a wide range of technology, services and agriculture products. US economic interests, entrepreneurs and employees would benefit from improved market access for goods, services, agricultural products, and from better access to government procurement opportunities. Improvements in market access, notably for key agricultural and industrial sectors, will likely help US exporters compete more effectively against European Union and Canadian firms. Provisions to promote workers rights, labor standards and environmental protections, and to advance regional development through trade capacity building, technical assistance and the integration of civil society, are appreciated and essential. IGPAC members note that the US, Oman and the broader geo-strategic region are poised to benefit, both from greater access between markets, and from greater regional integration amongst smaller and larger nations in Europe, Northern Africa and the Middle East.

While generally supportive of innovative regional and bilateral trade liberalization agreements, IGPAC members remain hopeful that USTR leadership, in re-energizing the WTO Doha Round, will successfully advance multilateral efforts. Given limited trade policy time and resources at the state and local level, we are especially mindful of the considerable staff time involved in the analysis of trade agreements – whatever their scope and economic impact. Obviously, comprehensive multilateral agreements encompassing all WTO member countries would offer comparatively significant trade development benefits for the investment of federal and subcentral staff time and resources involved. With demonstrable trade gains on a large scale from multilateral trade accords, the case for constituent support can be persuasively made at the subcentral level. It may prove more difficult for state and local officials to communicate the

relative importance and potential benefits of free trade agreements with smaller, individual countries or regions.

Members of IGPAC support expanding trade and market access, while simultaneously maintaining a commitment to ensuring that trade laws, enforcement efforts and the dispute settlement process respect the authority of states and local governments to regulate and interpret land-use, labor, health, safety, welfare, and environmental measures. Some of the core principles that could facilitate international trade and investment agreements, and dispute resolution processes, without sacrificing constitutional standards, include:

- Inclusion of the phrase “no greater procedural or substantive rights” in trade agreements, notably with respect to international investment provisions. Such language would ensure that international businesses do not receive preferential treatment when compared to domestic businesses, and would reference the US Constitution as the benchmark with respect to competing language in international agreements. As evidenced by disputes arising from the NAFTA Chapter 11 *Methanex* and *Loewen* cases, generalized expropriation language has allowed some foreign investors to file frivolous takings claims that challenge laws traditionally in the purview of state and local governments. Where agreements are reached with countries such as Oman, inclusion of a wholly separate litigation process, applicable only to foreign commerce and investment, would seem understandable, as the Kingdom’s legal and regulatory systems may lack the certainty and clarity desired by the international business community. Still, the construction of any investor-state provisions should be approached with extreme caution and after extensive consultation with state and local governments, in order to avoid unintended consequences akin to NAFTA Chapter 11.
- Legal standards that are “rationally related to a legitimate governmental interest,” and that are consistent with the US Constitution and applicable case law, by ensuring state and local governments are not held to a higher standard in defending legitimate governmental interests with respect to international trade than domestic commerce. International agreements that include standards such as “least trade restrictive” or “least burdensome” for defining the permissible scope of governmental regulation are inconsistent with constitutional standards for evaluating legislation, and may affect a state or municipality’s ability to implement effective economic development programs and zoning laws.
- IGPAC members are encouraged by the enhancements to procedural transparency included in the Oman FTA, including provisions allowing public proceedings and *amicus curiae*. However, the United States and relevant international tribunals need to provide prompt notification to state and local governments when their regulation or law is being challenged, seek their input and assistance at all stages of the process, and allow impacted state and local governments to participate fully in the hearing and deliberation process. Recent developments in trade disputes impacting federal and state jurisdictions, such as the NAFTA Chapter 11 arbitration claim filed by Grand River Enterprises Six Nations Ltd. seeking compensation related to the tobacco Master Settlement Agreement, are troubling to IGPAC members. While aware that such challenges do not directly overturn local, state, or federal

laws, the demands on state and local agencies' resources for legal preparation and policy response remain significant. Finally, further consideration should be given to the structural problems inherent in regulating important aspects of international trade through a process that uses *ad hoc* judges and eschews reliance on precedent. In view of the need of businesses for stability and predictability and, in light of the substantial impact that decisions may have, there is an imperative need to ensure that the decisions and decision-makers are viewed as having substantial institutional credibility.

- Improvement by USTR of the consultation process by implementing the recommendations for consultations outlined above, and by adopting the standard set out in Federalism Executive Order 13132, Section 6, (which requires federal agencies to consult with state and local officials and representatives of their respective national organizations *before* issuing proposed rules or submitting legislative proposals to the Congress) would help the USTR gauge the concerns of state and local governments in a timely fashion.
- No presumption of federal authority over state and local law, when dealing with matters of unclear constitutional authority. This would bolster due consideration for the principles of federalism, and the negotiating position of the US would be clarified if federal functions were clearly separated from those of state and local governments.
- Monitoring and enforcement by USTR and relevant federal agencies, to ensure Oman's compliance with commitments made under the FTA with respect to market access, labor standards, environmental protections and other provisions. Updated information on on-going US monitoring and enforcement efforts should be made readily and publicly available.

Market Access

To the extent that state and local laws, regulations and other measures are involved, IGPAC requests that, in concert with the consultation provisions between FTA parties, regular channels of communication and consultation between federal and subcentral governments be established as needed (note report recommendations in section IV) with respect to provisions of this Agreement, notably on agriculture and sanitary and phytosanitary measures (Chapter 6), technical barriers to trade (Chapter 7), government procurement per detailed notes below (Chapter 9 and Annexes), investment and investor-state dispute settlement per notes below (Chapter 10 and Annexes), cross border trade in services (Chapter 11), financial services (Chapter 12 and Annexes), telecommunications (Chapter 13 and Annexes), e-commerce (Chapter 14), intellectual property (Chapter 15), labor (Chapter 16), environment (Chapter 17), transparency (Chapter 18), and dispute settlement (Chapter 20).

Government Procurement

IGPAC members note that state and local procurement are NOT covered by this agreement. As a matter of general principle, IGPAC members 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.

Still concerns arise from the IGPAC perspective due to the fact that certain provisions of this FTA are inconsistent with language in the World Trade Organization (WTO) Government Procurement Agreement and with previous FTA's covering state procurement. Two examples:

- With respect to sole source procurements and documentation of the basis for non-competitive procurement, the Oman FTA requires the procuring entity to "prepare a report in writing" while the CAFTA requires the procuring entity to "maintain records or prepare written reports." The Oman provision, if intended to be extended to states without modification, would represent a new reporting responsibility for state procurement officials;
- The Oman FTA requires notice of awards within 60 days and adds the date of the award as a mandatory data element, while the CAFTA requires prompt publication of notice of awards. Again, divergent terms and conditions present difficulty for state implementation. Moreover, setting very specific time limits such as this may lead to technical violations where the information is provided but not necessarily in the precise way envisioned by the agreements.

In the event that future negotiations are undertaken to expand the Oman FTA's coverage to include state procurement, state procurement officials would need to be actively consult during the negotiation process. Moreover, the inconsistent provisions would need to be amended in order to conform with other relevant FTAs' procurement provisions impacting states. Ensuring that FTA provisions on state procurement are consistent across agreements would avoid unnecessary confusion and complexity for implementation at the state level.

Services

State and local governments generally support objectives to liberalize trade in services industries as a means of increasing market access for US firms and for reaching trade development objectives. IGPAC members equally assert that the independent exercise of state and local legislative and regulatory power is critical to protecting citizens' interests and safeguarding the federal system. IGPAC would suggest that involving the National Association of Regulatory Utility Commissioners (NARUC) as a member of IGPAC and as part of the trade policy consultation process could significantly enhance substantive comment on services provisions from the state and local regulatory perspective, as NARUC members include governmental agencies engaged in the regulation of telecommunications, energy, and water utilities and carriers in the US, Puerto Rico and the Virgin Islands.

The USTR has endeavored to identify various state statutes and local measures that may not conform to certain provisions in this agreement, excluding them from coverage by listing them in annexes of non-conforming measures. It should not be presumed, however, that these annexes are comprehensive, nor that future legislative and regulatory decisions must be consistent with commitments made in this agreement.

In this regard, IGPAC members reaffirm their belief that international trade and investment agreements should be structured in a manner consistent with the principles of US constitutional

federalism. To the extent that USTR may wish to negotiate liberalization of services and other matters under states' sovereign jurisdiction, it is essential to duly confer with states in order to gain their informed, explicit advice and consent. The general "blanket" exemption for "existing" and subsequent state and local measures that do not increase the degree of non-conformity could leave open a myriad of potential disputes about future changes. At a minimum, this matter highlights the critical need for the USTR to educate and consult with state and local entities so that they remain aware of the constraints that may be imposed upon future legislative actions. If future measures are not covered by current exceptions for existing laws, it would be necessary to fit them within other exceptions, many of which are far narrower and risk being subject to problematic standards, such as being "no more burdensome than necessary." The unintended consequence might be to freeze state and local legislation in ways that prevent it from adapting adequately to changing facts and circumstances. This is particularly problematic since it is not normally assumed that one Governor or legislature can bind the hands of its successors, so this sort of freeze is a new and unique proposition that needs careful scrutiny by the states after full disclosure of its ramifications. The difficulties that developed under energy deregulation in the Western states, and the discussions about whether to reconsider any aspects of current law in the area are indicative of such potential problems. This is particularly true where the interpretation of many of these terms and concepts continues to evolve and is subject to dispute within the WTO framework. IGPAC members urge the USTR to act expeditiously to work with the global community on forging a common view on these issues, so that state and local governments can make more informed assessments of their positions on future agreements.

Investment

Where agreements are reached with countries such as Oman, which have legal systems structured significantly different from the United States, inclusion of a wholly separate litigation process, applicable only to foreign commerce and investment, may be viewed as necessary at the moment for creating the secure, predictable legal conditions in such countries that are conducive to attracting and retaining international investment. IGPAC members' objections to investor-state provisions stem from concerns that investors from nations with well-developed legal systems have abused such FTA provisions to challenge the authority of state and local governments. In particular, the *Methanex* and *Loewen* disputes stemming from NAFTA Chapter 11 have reinforced concerns that the provision will be abused by investors who simply hope to circumvent established legislative and judicial procedures. While, to be sure, the *Methanex* dispute was eventually resolved in favor of the United States, it took years of effort, many millions of dollars, and involved highly intrusive inquiry into the normal legislative and regulatory process. Such a proceeding is not one that many states or localities would willingly endure more than once. Given the still evolving context of investor-state disputes, IGPAC members continue to have significant concerns about Chapter 10, Section B's provisions on investor-state dispute settlement, claim submission, and arbitration under the FTA. IGPAC members do welcome those Chapter 10-Section B provisions in the FTA that bring about greater transparency, inclusion of non-disputing party and *amicus curiae* submissions, and consideration of whether claims or objections may be frivolous. IGPAC also appreciates that the agreement does not include an appellate mechanism in the investor-state provisions. It is hoped that efforts

to strengthen and reform the administration of justice in Oman and the Middle Eastern region may ameliorate legitimate concerns in the future about these legal systems.

While appreciating the importance of flexibility in provisions related to national treatment (Article 10.3.3), such provisions could be clarified to more clearly preclude misunderstandings and unintended consequences related to investment and subcentral jurisdiction. Conceivably, a foreign investor could use this provision to argue for the treatment provided by one US state for its investment in another US state. Though clearly not intended to be used in this manner, such language may leave open that potential interpretation and misuse. IGPAC members would welcome the opportunity to discuss clarifications and suggested language for various investor-state provisions in the FTA and future trade agreements.

Comment on Advisory Committee Process:

IGPAC members sincerely appreciate the assistance of USTR's intergovernmental staff as we prepared this report. However, IGPAC members found the 30 day period allotted for review of each of the FTA documents and creation of reports to be insufficient, given the complexity of the agreements, the time needed for consultation amongst many members entirely new to the Committee, the delay in making documents publicly available which hampered our discussions with other interested parties, and the coordination of members' schedules -- especially complex since some members are elected officials with legislatures in session.

IGPAC members emphasize that the creation of an institutional infrastructure, to foster on-going federal-state-local trade policy consultations before, during and after final trade agreement language is made available, would provide for a far more comprehensive, inclusive and valuable IGPAC review process. In light of the commitment of the USTR and Congress to receiving input from IGPAC and other advisory committees, lengthening this time frame and deepening the resources devoted to the entire process, as detailed in earlier recommendations (section IV of this report), would be most welcome.

VI. Membership of Intergovernmental Policy Advisory Committee (IGPAC)
Roster as of August 2005

<u>Name</u>	<u>Affiliation</u>
Rep. Sheryl Allen	Utah House of Representatives
Jill Arthur	City of Santa Ana, California
Walter Bikowitz	OGS Procurement Services Group
Representative Daniel E. Bosley	Commonwealth of Massachusetts
George Brady	National Association of Insurance Commissioners
Peter Bragdon	Office of the Governor/ State of Oregon
James A. Brooks	National League of Cities
Teresa Brown	Arkansas Attorney General's Office
Brian R. Caldwell	Office of Consumer Counsel/ Northern Mariana Islands
Liz Cleveland	Mississippi Development Authority
Carol Colombo	State of Arizona
Karen Cordry	National Association of Attorneys General
Peter S. Cunningham	North Carolina Department of Commerce
Ryan Fitzgerald	State of Idaho, Washington, DC Office
Rep. Johnny Ford	Alabama House of Representatives
Robert Hamilton	Office of the Governor/ State of Washington
Kathy M. Hill	Iowa Department of Economic Development
Governor Dirk Kempthorne	State of Idaho
Eloisa Klementich	Office of Mayor James K. Hahn/ Los Angeles, CA
Brian Krolicki	Treasurer, State of Nevada
Peter Owens Lehman, Esq.	South Carolina State Ports Authority
Rep. Peter Lewiss	Rhode Island House of Representatives
Tony Lorusso	Minnesota Trade Office
Cassandra Matthews	National Association of Counties
Robert R. Matthias	City of Virginia Beach, Virginia
James Mazzarella	State of New York, Office of Federal Affairs
Jerome McClusky	Indiana Department of Commerce
Jeremy Meadows	National Conference of State Legislatures
Dave Naftzger	Council of Great Lakes Governors
Mayor Meyera E. Oberndorf	City of Virginia Beach, Virginia
Senator Jose Ortiz-Daliot	Commonwealth of Puerto Rico
Dugan Petty	State Procurement Office/ Salem, Oregon
Paul D.A. Piquado	Commonwealth of Pennsylvania
Veronique Pluvoise-Fenton	National League of Cities
Representative Clay Pope	State of Oklahoma
Mayor Miguel A. Pulido	City of Santa Ana, California
Ricardo A. Rivera-Cardona	Puerto Rico Trade Company
Lynne Ross	National Association of Attorneys General
Milton Segarra	Commonwealth of Puerto Rico
Hannah Shostack	Office of Legislative Services, New Jersey Legislature
Gary Smith	State of Idaho

Ron Teixeira
Richard Van Duizend
Governor Tom Vilsack
Christopher Whatley
Kay Alison Wilkie
Frank Williams

National Governors Association
National Center for State Courts
State of Iowa
Council of State Governments
New York State Department of Economic Development
Supreme Court of Rhode Island