

February 1, 2006

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-Peru Trade Promotion Agreement, reflecting advisory opinions on the proposed 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. Thank you for your consideration.

Sincerely,

Kay Alison Wilkie

Chair  
Intergovernmental Policy Advisory Committee

# **The US-Peru Trade Promotion Agreement (TPA)**

Report of the  
Intergovernmental Policy Advisory Committee

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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-Peru Trade Promotion 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. IGPAC members affirm that our nation's economic growth and prosperity are best served by embracing trade and economic development policy strategies that:

- (1) are developed in a nonpartisan manner in close consultations with relevant stakeholders;
- (2) yield significant, measurable economic gains for the country;
- (3) create open, transparent, and fair global markets;
- (4) invest in innovative research and technologies to foster commercialization and job creation in the globally competitive industries and jobs of the future;
- (5) provide comprehensive assistance to workers negatively impacted by technology and changing trade trends;
- (6) safeguard essential federalism principles;
- (7) respect basic American values; and
- (8) advance, rather than isolate us from, international trade policy dialogue and analysis of competitive forces in our increasingly interconnected world.

The Peru TPA meets a number of these strategic goals. Provided that serious reservations about procurement provisions, investor-state dispute mechanisms, and other elements contained in this agreement and previous FTAs are addressed, IGPAC members, in principle, support the trade liberalization objectives of the US-Peru Trade Promotion Agreement (TPA). IGPAC members would also like to suggest some clarifications to certain provisions of the Agreement, and to specifically note that the TPA's objectives of economic growth, employment creation, sustainable development, and market opportunities should be pursued in a manner consistent with the nation's constitutional and public policy obligations to state and local governments and their constituents. Consequently, IGPAC members believe firmly that this TPA -- like all trade agreements -- should be drafted, implemented, and interpreted, to respect and give due consideration to existing state and local level regulatory, tax, and economic development policies, and to the social, economic, and environmental values that 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 are reflected in the Trade Act of 2002's directive that trade agreements be negotiated so as to not "weaken or reduce the protections afforded in domestic environmental and labor laws" as well as the fact that the Act makes "ensuring that foreign investors in the United States are not accorded greater substantive

rights with respect to investment protections than United States investors in the United States” a principle trade policy negotiating objective. 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 must 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 – or otherwise implicated by – a trade agreement, offer or other binding commitment. IGPAC members would therefore strongly prefer that trade commitments be derived via a process based upon “positive lists,” that are based on the affirmative, informed consent from affected state and local entities, rather than upon a system of “negative list” opt-outs. The WTO internet gambling case between the US and Antigua & Barbuda illustrates the inherent peril of the “negative list” approach, which risks covering matters that were expected to be excepted, either by inadvertence or by lack of knowledge of relevant laws and regulations.

While many IGPAC members are hopeful that on-going negotiations with Colombia and Ecuador will result in expanding this Peru TPA into an Andean FTA, IGPAC continues to believe that achieving progress in the ongoing WTO Doha Development Round of multilateral market liberalization efforts is of far greater importance to state economic development objectives than any single regional or bilateral trade agreement. However, the broad scope of WTO negotiations creates new challenges for state and local governments. Several IGPAC members are particularly concerned about ongoing efforts within WTO General Agreement on Trade in Services (GATS) negotiations to impose trade disciplines on domestic regulation. Given the importance of WTO negotiations, IGPAC reiterates its request that the USTR consult closely and comprehensively with state and local governments as WTO Doha Development Round negotiations progress.

At the same time that the US pursues market access initiatives, IGPAC also stresses the importance of expanding America’s trade promotion capacity and improving the process of collecting and disseminating trade data. 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 Peru and elsewhere. IGPAC members applaud the recent actions undertaken by the Department of Commerce to improve the quality of state and local-level trade information by re-introducing zip code specificity to merchandise export data. However, as the US economy is increasingly driven by the services sector, it is vital that state-level *services export data* collection be improved. Similarly, states and regions will continue to have difficulty assessing their trade balances and relative global competitiveness unless the federal government makes significant progress in collecting state-level merchandise and services *import data*. While IGPAC recognizes the challenges inherent in collecting such data, Canada (website link: [http://strategis.gc.ca/sc\\_mrkti/tdst/tdo/tdo.php?lang=30&headFootDir=/sc\\_mrk](http://strategis.gc.ca/sc_mrkti/tdst/tdo/tdo.php?lang=30&headFootDir=/sc_mrk)) manages to track product exports and imports by province, country and US state, and offers an instructive example.

IGPAC members appreciate their consultations with the USTR about the impact of existing trade agreements and the conduct of ongoing negotiations. However, as with previous trade agreements, 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 TPA. In some cases, the accelerating pace of trade negotiations and dispute litigation has strained the limited resources available at both the state and local level and amongst USTR’s hard-working staff. This occasionally results in inadequate time and resources being devoted to trade policy analysis and the consultation process.

Some IGPAC members have expressed concerns about certain market access provisions in this agreement. The IGPAC member representing North Carolina indicates that the state is opposed to this TPA on the grounds that it

further accelerates the loss of textile jobs without additional protections for North Carolina's workers and communities. An IGPAC member representing Puerto Rico is concerned that market access provisions may lack sufficient reciprocity, leading to potential harm to certain import competing industries in Puerto Rico.

As this TPA's procurement provisions include coverage of eight states and Puerto Rico, some IGPAC members have detailed certain process, language and implementation issues that remain of concern. Public awareness of the implications of "outsourcing" or "offshoring" has been heightened as some US employment shifts overseas and across borders – while awareness of the benefits of international investment and foreign affiliate employment to the US economy seems less evident. Proposals under review by federal, state and local elected officials could further constrain international procurement market access. Given this context, IGPAC members suggest that relevant federal agencies provide data to the public and technical assistance to US firms regarding the value and other benefits of improving market access to newly opened Peruvian procurement markets under this agreement.

IGPAC members remain concerned about the inclusion of certain investor-state dispute settlement provisions in this agreement. Some IGPAC members hope that the language in Article 10.18(4) will indeed provide additional sovereignty protection to US courts by precluding certain claims (e.g., those that have been submitted to a national court or subjected to a national administrative review process) from being subsequently raised before an arbitral tribunal. If effective in this manner, IGPAC members recommend that this provision be included in future trade agreements and that USTR also consider adding language that would preclude a notice of arbitration from being filed involving any dispute that is before a signatory nation's courts until a final appellate decision has been rendered in the matter. Three IGPAC concerns about investment provisions in this TPA (modeled on the Chile and Singapore FTA language) warrant highlighting: 1) the problematic and overly broad Article 10.18 definition of investment, as it is far more expansive than NAFTA, and is less linked to business enterprises, including concepts of "investment authorization", licenses and permits; 2) the Article 10.5 "minimum standard of treatment" language, seeming to codify the *Loewen* case holding that state court actions are subject to review by international investment tribunals; and 3) the Article 10.5 due process standards, based on unclear international norms rather than reflecting US constitutional norms of substantive due process, as required by the Trade Act of 2002.

The recent ruling in the *Methanex* dispute established an important precedent for safeguarding important principles of federalism and state sovereignty of concern to this Committee. However, since such tribunal judgments are not formally precedential, IGPAC members recommend that the case's finding that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted with due process and which affects...a foreign investor or investment is not deemed expropriatory and compensable..." be codified as a formal Interpretive Note in NAFTA and other existing FTAs, and that corrected language be added to this TPA and future trade agreements.

Ongoing investment disputes -- such as the NAFTA Chapter 11 arbitration claim filed by Glamis Gold Ltd. that challenges California's environmental and extractive industry regulations, and the claim filed by Grand River Enterprises Six Nations Ltd., that implicates state and local regulation of the tobacco industry (including settlements of litigation) -- continue to trouble IGPAC members. IGPAC is aware that these types of challenges cannot directly overturn local, state, or federal laws, regulations, or court decisions. Still, IGPAC would prefer to clarify and limit the circumstances in which these types of challenges may be raised, not the least because such challenges impose significant demands on state agencies' time and resources, and cause confusion about the scope of state and state and local authority in the context of free trade agreements. 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 considering legislative and regulatory action. While the federal government is responsible for defending investor challenges that are lodged against state and local measures, state resources are heavily taxed

during the course of such disputes. IGPAC therefore strongly recommends that the federal government commit to seeking compensation for legal costs, including staff time, incurred by states and localities when assisting the federal government to defend investor-state disputes. At the close of the *Methanex* dispute, for instance, the federal government was awarded full payment of the millions of dollars in fees and costs that it incurred while defending the case, however California was not similarly compensated.

As the US and Peruvian governments work to implement this TPA, and to develop a broader Andean regional agreement, IGPAC members continue to offer their support for remaining engaged with federal and subcentral counterparts to develop trade policy, to collaborate on trade capacity building efforts and to undertake 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 45 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**

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#### **Recommendations for Improving Federal-State Trade Policy Consultations**

Members of the IGPAC appreciate USTR efforts launched in 2003 to expand participation in trade policy formulation by state and local government representatives through the expansion of the Intergovernmental Policy

Advisory Committee on Trade (IGPAC). Because effective consultation is critical to achieving consensus on essential trade policy matters, IGPAC members remain hopeful that our document submitted to the USTR on August 5, 2004 entitled “**Recommendations for Improving Federal-State Trade Policy Coordination**” may eventually be considered by Congress and the USTR and implemented in some form. The recommendations in this memorandum grew out of discussions with USTR colleagues, who invited IGPAC members to suggest specific proposals related to procurement policy, federal-state trade policy coordination and capacity-building. Following initial discussions with the USTR, IGPAC has made these recommendations publicly available and has discussed federal-state trade policy issues and ideas with other interested parties. Because the recommendations have not yet been implemented, IGPAC’s ability to comment fully on the US-Peru TPA and prior FTAs has been hampered. Hence, it is relevant to summarize below the 8/5/04 memorandum’s findings and core recommendation of creating a Federal-State International Trade/Investment Policy Commission.

#### IGPAC Findings: Current Context and Elements of an Improved State-Federal Trade Policy Framework

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 such businesses may turn first to private sector contacts for trade assistance, research shows that the transaction costs associated with this type of trade development assistance generally outweigh the benefits for most private sector service providers. Hence, federal, state and local government trade development agencies play a key role in filling this need by providing information, technical assistance, referrals, and guidance to smaller firms often 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. Unfortunately, many state and local trade development efforts are constrained by limited resources and competition from other budgetary priorities.

Today as throughout history, the benefits of trade liberalization and its short, medium and long-term costs and benefits are being 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 and international investment impacts, those communities, businesses and workers gaining from greater international market access tend to be less visible, while those losing to global competitive challenges 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 experience comparatively greater damage, given their lack of ability or clout to gain preferential treatment. Public concern about the perceived negative consequences of trade is indicated by recent legislative action against “offshore outsourcing” in government procurement. Some legislation enacted or under review by federal, state and local elected officials would seem to reverse the trend toward further liberalization of national and subnational procurement markets.

Though the involvement of state decision-makers in international trade and investment agreements has increased over the past decade, the structure for federal-state trade policy consultations remains insufficient. State level involvement intensified following trade liberalization efforts launched in the early 1990s, culminating notably in the WTO Uruguay Round agreements and NAFTA. These trade agreements expanded beyond a focus on “at the border” tariffs, quotas and other measures, to “non-tariff barriers” involving government regulation, taxation, procurement and economic development policies – many of which are deployed at state and local levels. These

post-1994 agreements also included enforcement provisions allowing lawsuits to challenge non-compliant federal and state measures. Hence, trade agreements, dispute settlement cases and negotiations have an intensified impact on federalism and on the historically established state-federal division of power and responsibility. While aware that such challenges do not directly overturn state or federal laws, the demands on state agencies' resources for legal preparation and barriers to comprehensive policy response remain significant.

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. 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. Given the comparative newness of states' involvement in the content of 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. Yet, at the same time, the accelerating pace of reaching such agreements and their expanding scope has made them ever more salient to state and local governments.

In addition to the legal context for trade policy, state and local governments lack sufficient information to assess the economic impact of trade and investment on their jurisdictions. At present, 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 no current information on merchandise exports at the zip code level (given the discontinuation by the US Department of Commerce of the Exporter Location data series in 2002); and limited, delayed and highly aggregated international investment information. IGPAC members applaud the recent actions undertaken by the Department of Commerce to improve the quality of state and local-level trade information by re-introducing zip code specificity to merchandise export data. However, as the US economy is increasingly driven by the services sector, it is vital that state-level *services export data* collection be improved. Similarly, states and regions will continue to have difficulty assessing their trade balances and relative global competitiveness unless the federal government makes significant progress in collecting state-level merchandise and services *import data*. 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.

A number of barriers confront state and local government officials and staff – whether procurement directors, trade directors, legislators or other officials – who may endeavor to analyze trade and investment agreements with a view to determining benefits and costs from the state or local perspective. Reliable, objective, unbiased information regarding the impact of trade liberalization is not readily available, nor are there sufficient state-level data for independent analysis. Many states may not be aware of the extent of existing international trade and investment agreement commitments that might have been made under prior administrations, and that situation is surely exacerbated by the growing number of bilateral and plurilateral agreements being reached in recent years, each of which involves similar but not identical provisions and coverage. Moreover, many states do not yet have a clearly defined set of policies or positions on such international matters. This situation may be a consequence of delicate partisan politics, and of the absence of trade policy staffing, at most state and local government levels. Finally, federal resources dedicated to assist state agencies' implementation of relevant agreements are largely nonexistent, leaving state procurement and other officials to grapple with confusing and inconsistent information. These barriers create a disincentive for state support of trade liberalization. States that participate in international trade and

investment agreements, and wish to comply with commitments, face legal, political and resource challenges – while those states that refrain from participation manage to avoid such difficulties, and to still help their resident companies benefit as “free-riders” from the international market access and opportunities gained through such agreements. The following elements are critical to resolving these challenges:

1. **Trade policy capacity with resources relevant to state level concerns** in order to accurately inform state and local officials, trade opponents, trade proponents, and the public about the impacts of trade, procurement and investment agreements. Such trade policy capacity would include legal analysis for the balanced evaluation of trade and investment agreements’ impacts on state laws, regulations and practices during all phases of policy formulation, negotiation and dispute resolution. This trade policy function should be performed in a structured, responsive manner by nonpartisan, qualified staff with expertise in international trade/investment policy and law, and should offer general background and customized analysis, interpretation and guidance for state and local government officials. Tools for extending access to such resources and assistance could include a dedicated, interactive website and/or helpline.
2. **Information sharing between the USTR and states, and in the trade policy dialogue among states** including more timely and frequent consultations as trade policy is being formulated, as trade controversies emerge, and as trade negotiations are being initiated, allowing sufficient time for evaluation of trade and investment agreements and for effective response to challenges and concerns. Given the economic distress and employment dislocations created in certain industries and communities due to trade liberalization, and the lack of awareness of the benefits of trade and international investment in some communities, USTR informational efforts need to be more informed by state-level data analysis, with outreach that is more inclusive and public when feasible. The USTR should reconsider its reliance on states’ Single Points of Contact and broaden its outreach to include multiple key state contacts. **IGPAC recommends that USTR communications and requests be sent to Governors, with copies to states’ legislative leaders, attorneys general, offices of federal affairs and IGPAC members.**
3. **Improvement of trade data and analysis** based on national, state, regional and zip-code level data on merchandise and services exports and imports, on international investment flows, and on international government procurement contracts awarded to US companies. Trade data applications should use mapping technologies and other tools to better inform analysis and planning. While IGPAC recognizes the challenges inherent in collecting such data, Canada (website link: [http://strategis.gc.ca/sc\\_mrkti/tdst/tdo/tdo.php?lang=30&headFootDir=/sc\\_mrk](http://strategis.gc.ca/sc_mrkti/tdst/tdo/tdo.php?lang=30&headFootDir=/sc_mrk)) manages to track product exports and imports by province, country and US state, and offers an instructive example. Trade data analysis should compare state/federal trade performance against major trading partners and regions with successful trade development agencies (e.g. Canada, European Union, Japan) and evaluate performance measures, program outcomes, and customer satisfaction at the subnational level.
4. **Assessment of 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. Policy revisions based on such analysis could lead to more effective and reasonable resource allocation related to trade development, technology policies and workforce adjustment programs. In addition to suggesting appropriate redistribution of a small portion of the national gains from technology and trade to dislocated workers and communities, such research might foster more domestic understanding of, and support for, investments in education and technology, and for continuing trade liberalization in the future.

5. **Discussion of international procurement from the state perspective** including: the implications of participation in, or withdrawal from, the WTO Government Procurement Agreement and relevant Free Trade Agreement provisions; policy responses to such concerns as the lack of access to Canadian provincial procurement; the implications of the new USTR reciprocity policy; and development of international procurement assistance programs to assist US companies seeking overseas contracts.
6. **Improvement in the state/federal trade development partnership** with efforts that: prioritize support by overseas posts for state-led trade initiatives in global markets; increase cooperation in domestic trade development program delivery; increase linkage with USDA for expansion of agricultural export programs to agri-business and related non-agricultural exports; integrate Eximbank trade finance and delegated authority activities with those of states and the private sector, improve SME awareness of and access to trade financing; and learn from studies on the best practices of trade partners' export promotion programs.
7. **Prioritization of federal support for 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. Support for high technology infrastructure, commercialization and trade, along with an educational system preparing the technology workers of the future, is crucial to the nation's global competitiveness.

Many executive, legislative and judicial branch officials at the state and local level assert the critical need to **broaden and deepen an informed, non-partisan trade policy dialogue** in order to support on-going federal-state cooperation related to trade agreements' negotiation, implementation and dispute settlement. Existing consultative mechanisms are largely informational, and inadequate to this task:

- the expanded IGPAC is more energized and pro-active, but lacks staff, resources and independence;
- states' "Single Points of Contact" provide destinations for USTR communications, but typically remain unclear as to their function, and disengaged from interactive response.

Moreover, in light of the consequences of the current context of insufficient infrastructure, there is a need to **ensure that there is dedicated institutional capacity at all levels of government** in order to support on-going federal-state-local cooperation related to trade agreements' negotiation, implementation and dispute settlement. The creation in the US of a consultative federal-state trade policy infrastructure could be informed by the best practices of trading partners, such as the Canadian federal-provincial model for trade consultations (C-Trade), and would serve to bridge the gaps between federal agencies' understanding of the varied state processes and socio-economic contexts and states' understanding of the scope of federal requests -- and between federal agencies' needs and expectations, and states' capacity and willingness to engage in cooperative trade liberalization efforts. In order to ensure its effectiveness, such institutional capacity should be guided by the principles of US **constitutional federalism** and **nonpartisan independence**.

#### **IGPAC Recommendation for Action:**

**Creation of a Federal-State International Trade/Investment Policy Commission** to provide institutional structure for continuous bipartisan consultation about US federal-state trade policy. Priority **action plan items** for the Commission include: assessing content, process, impact and implementation issues in trade agreements including services, investment, procurement and other provisions relevant to subfederal governments; conducting benefit-cost analysis of federal resources and trade protections allocated to agriculture, goods, services and technology; improving trade and investment data collection and dissemination; increasing trade development collaborations and transforming trade adjustment assistance programs.

Federal-State International Trade/Investment Policy Commission Purpose:

Establishing and fully funding a Commission would provide **institutional structure for continuous bipartisan consultation and contribution on US federal-state trade policy**. In light of the increasing state role in trade policy formulation, negotiation and dispute resolution, the Commission would facilitate federal-state-local and interstate dialogue on trade policy issues, including multilateral, regional and bilateral trade and investment negotiations and agreements. The Commission would provide the interactive framework needed by the USTR, IGPAC and key state and local decision-makers, facilitating more effective consideration of communications and requests. Such policy interaction by the Commission would build upon expanded USTR outreach to states – particularly if the states’ Single Point of Contact process were improved, and if USTR requests sent to Governors, were copied to states’ legislative leaders, attorneys general, offices of federal affairs and IGPAC members. The Commission would address state and local trade policy interests in dispute settlement issues, government procurement, trade and investment agreements, negotiations and related economic, legislative and legal developments. The Commission would offer state and local officials guidance, assistance and information related to analysis and implementation of trade and investment agreements. The Commission would work to resolve state and local-level concerns and would also foster interstate dialogue on trade, procurement and investment issues with trade policy implications. Given the economic distress and employment dislocations created in certain industries and communities due to trade liberalization, the Commission’s public outreach should involve federal and state labor agencies and labor unions. Addressing the framework elements identified above, the Commission would convene meetings, conduct research and report on its findings derived from analysis of economic, social and governmental impacts of existing and proposed trade and investment agreements, and would make duly informed recommendations to federal, state and local government officials and to the public. In summary, the roles of the Commission would be to:

- foster consultations among federal/state/local government officials on trade and investment concerns;
- be a resource for objective trade policy and trade law analysis, with expert staff and technology providing research and information;
- create reports and recommendations for consideration by federal, state and local governments.

Commission Structure:

The creation of this Commission should be informed by the best practices of major trading partners, such as the Canadian federal-provincial model for trade consultations (C-Trade) and trade policy consultation within the European Union, as well as by the federal-state structure and budgeting format of the Appalachian Regional Commission. The Commission would need:

- ❖ Bipartisan leadership, co-equal co-chairs from federal and state government, supported by qualified nonpartisan staff with trade policy and trade law expertise;
- ❖ Members drawn from federal and state officials responsible for trade policy in their respective jurisdictions, e.g. the USTR, IGPAC, TPCC federal agencies, Congress, academic and legal experts, foundations and other institutions;
- ❖ Sufficient resources and funding to develop essential institutional capacity, to ensure active consultations among members, to prepare and convey reports and to convene meetings at least quarterly;
- ❖ Liaison with national associations of legislative, executive and judicial branch officials and with national associations of state officials exercising regulatory functions, including active participation in relevant

meetings and publications, with a focus on their international and economic development committees (including such organizations as: Council of State Governments; National Conference of State Legislatures; National League of Cities; National Governors Association; National Association of Attorneys General; National Center for State Courts; Conference of Chief Justices, National Association of Insurance Commissioners, National Association of State Procurement Officials, National Association of Regulatory Utility Commissioners; etc.);

- ❖ Involvement in the annual Trade Policy Leadership Seminar (begun as the National Trade Policy Forum in North Carolina in December 2003 and being supported as an annual event by IGPAC members, the National Conference of State Legislatures, the Forum on Democracy & Trade and the Harrison Institute of Public Law-Georgetown University), encouraging more active state trade policy capacity-building and interaction with the Commission, and building upon relevant Seminar findings.

### **Action Plan Suggestions for the Commission**

- ❖ Advocating for **improved collection and dissemination of 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 for Commission researchers to conduct research relevant to assessing the state/local impact of trade and investment agreements and proposals. Commission research made possible by such data could be customized to the needs of federal, state and local government officials. Commission research could also benchmark state/federal trade performance against other major trading partners and regions with successful trade development efforts (e.g. Canada, European Union, Japan) through regular evaluations of performance measurement, program outcomes, and customer satisfaction at the subnational level.
- ❖ Conducting research to assess 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. Research would also assess the trade, investment and economic impact of increasing federal funding for R&D and technology commercialization in emerging sectors such as biotechnology, nanotechnology, photonics, advanced materials, and other innovative technologies. The Commission could recommend policy revisions based on such analysis, that in turn could lead to more effective and reasonable resource allocation.
- ❖ Taking action to substantially **transform, expand and fully fund the Trade Adjustment Assistance** program, perhaps renamed as the “Technology” or “Workforce Adjustment Assistance” program. The Commission could conduct research on the workforce implications of technological adaptations confronting many manufacturing and services industries in an increasingly integrated and competitive global context. Research findings could suggest improvements to a Technology or Workforce Adjustment Assistance effort, with respect to scope for new initiatives, funding requirements, implementation process, programmatic flexibility for adapting to varying states’ needs, and effective outreach to impacted workers, employers and communities. Such Commission work, by exploring how best to redistribute a small portion of the national gains from technology and trade growth to dislocated workers and communities, might foster more public understanding of, and support for, investments in education, research, technology, and an agenda of trade liberalization in the future.

- ❖ Assessing the impact of **investment provisions** in international agreements (e.g. NAFTA Chapter 11, WTO General Agreement on Trade in Services, Free Trade Agreements) on executive, legislative and judicial powers and regulatory functions (e.g. licensing, taxation, environmental policies, etc.) at all levels of US government. In reviewing past and current negotiation objectives and all investment tribunals' actions and rulings (interim and final) related to investor-state disputes, the Commission should ascertain:
  - the specific extent to which investment provisions in some international agreements extend greater investor rights to foreign investors than those available to US investors via US federal, state and local courts;
  - whether international agreements' investment provisions have redefined government regulation at the federal, state and local levels as "regulatory takings" of private property, subject to government compensation to owners; and
  - how such redefinition may constrain the potential for and scope of government action.

Based on such analyses, the Commission would make recommendations to IGPAC and the USTR, suggesting modifications to the process for investment-related consultation and negotiation, revisions to existing investment provision texts, procedural changes, and other guidance that would serve to bring agreements in line with established principles of US constitutional federalism and representative democracy.
- ❖ Consulting with the National Association of State Procurement Officials (NASPO) to collect information on the impact of **international procurement agreements** (GPA, FTAs) on the state level and of state actions on such agreements, including negotiation process, implementation experience and varied state policy legislative and programmatic responses. Following quantitative and qualitative analysis, the Commission could distribute a "white paper" report that would:
  - detail and clarify background information on agreements' provisions and implementation guidance for state procurement and trade policy officials, legislators and attorneys general;
  - develop plans for additional resources targeted to state procurement officials with front-line implementation responsibilities, such as a user-friendly website with links to: an email and telephone helpline for rapid response needs; key resource documents; explanatory charts outlining state commitments to various agreements; and details on states' varied terms, conditions and exceptions for participation; and
  - recommend improvements to negotiation and coordination processes, best practices and suggested strategies relevant to federal and state procurement policymakers.
- ❖ Bolstering **collaborative federal-state trade development** efforts. Federal and state agencies need to be encouraged to deepen their trade development partnership, by, as examples: prioritizing overseas posts' support for state-led trade initiatives in global markets; increasing cooperation in domestic trade development program delivery; and integrating Eximbank trade finance and delegated authority activities with those of states and the private sector, thus improving SME access to trade financing.
- ❖ Building on 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. The Commission could identify those state-global formal and informal international connections of greatest potential benefit to US trade policy objectives, advancing trading partners' participation in the world's trading system, and leadership in trade development and capacity building initiatives.

## **V. Advisory Committee Opinion on the US-Peru TPA**

### **General Observations:**

Provided that serious reservations about procurement provisions, investor-state dispute mechanisms, and other elements contained in this agreement and previous FTAs are addressed, IGPAC members, in principle, support the trade liberalization objectives of the US-Peru Trade Promotion Agreement (TPA). While this TPA advances strategically critical and comprehensive trade development and market reform objectives in a manner generally beneficial to our national, regional and local economies, the agreement also includes problematic investor-state and procurement provisions that IGPAC members recommend be clarified and modified. Moreover, the TPA's objectives of economic growth, employment creation, sustainable development, and market opportunities should be pursued in a manner consistent with the nation's constitutional and public policy obligations to state and local governments and their constituents. The IGPAC member representing North Carolina indicates that the state is opposed to this TPA on the grounds that it further accelerates the loss of textile jobs without additional protections for North Carolina's workers and communities. An IGPAC member representing Puerto Rico is concerned that market access provisions may lack sufficient reciprocity, leading to potential harm to certain import competing industries in Puerto Rico.

This agreement with Peru, a long-standing ally of the US, could foster trade ties and deepen economic integration throughout Latin America. Negotiations with Peru were concluded in the context of regional negotiations with other nations (Colombia and Ecuador) for an Andean Free Trade Agreement. Expanding global market access and broadening economic opportunity throughout the Andean region, and all of Latin America, are essential goals, and IGPAC members hope that USTR negotiations for the Andean FTA and the Free Trade Agreement of the Americas are successful. The US-Peru TPA 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. 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. IGPAC members note that the US, Peru and the broader Andean region are poised to benefit, both from greater access between markets, and from greater regional integration amongst smaller and larger nations in Latin America.

While many IGPAC members are hopeful that on-going negotiations with Colombia and Ecuador will result in expanding this Peru TPA into an Andean FTA, IGPAC continues to believe that achieving progress in the ongoing WTO Doha Development Round of multilateral market liberalization efforts is of far greater importance to state economic development objectives than any single regional or bilateral trade agreement. However, the broad scope of WTO negotiations creates new challenges for state and local governments. Several IGPAC members are particularly concerned about ongoing efforts within WTO General Agreement on Trade in Services (GATS) negotiations to impose trade disciplines on domestic regulation. Given the importance of WTO negotiations, IGPAC reiterates its request that the USTR consult closely and comprehensively with state and local governments as WTO Doha Development Round negotiations progress. Given the 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 subfederal 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 subfederal level. It may prove more difficult for state and local officials to communicate the relative importance and potential benefits of FTAs or Trade Promotion Agreements with smaller, individual countries or regions.

Further, IGPAC members support expanding trade and market access, but only as long as there is a simultaneous commitment to ensuring that our nation's trade initiatives, trade laws, enforcement efforts and the dispute settlement process respect the authority of states and local governments to regulate, legislate 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 language such as 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 some cases arising from NAFTA Chapter 11, 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. 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. Specific comments from IGPAC about the US-Peru TPA's investment provisions are outlined below.
- 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.
- Transparency in claim and dispute resolution processes. While it may be appropriate to include investor-state dispute resolution procedures in certain trade agreements, policymakers should take steps to ensure that these procedures are more accessible to both the public and all governmental entities that may be affected by particular investor claims. The United States and relevant international tribunals should promptly notify state and local governments when any regulation or law may be implicated by an investment dispute, 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. Affected state and local governments should also be empowered to file *amicus* briefs in matters before dispute tribunals and be permitted to work with the federal government when necessary to defend their laws and regulations. Attention should also be given to making the investor-state proceedings open to the public. IGPAC members have been troubled by recent developments in trade disputes impacting federal and state jurisdictions, such as the WTO decision on the Antigua-Barbuda GATS case involving US federal and state internet gambling restrictions, the NAFTA Chapter 11 arbitration claim filed by Glamis Gold Ltd. challenging California's environmental and extractive industry regulations, and the claim filed by Grand River Enterprises Six Nations Ltd. seeking compensation related to the tobacco Master Settlement Agreement. While aware that such challenges do not directly, automatically overturn state or federal laws, these disputes place significant demands on state legal and policy resources. 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 ostensibly eschews 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. Since NAFTA tribunal judgments are not formally precedential, IGPAC members

recommend that the *Methanex* case's finding, that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted with due process and which affects...a foreign investor or investment is not deemed expropriatory and compensable....," be codified as a formal Interpretive Note in NAFTA and exiting FTAs, and that corrected language be added to this TPA and all relevant future trade agreements.

- 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 Peru's compliance with commitments made under the TPA 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.

### Government Procurement

IGPAC members note that Puerto Rico and several US states (Arkansas, Colorado, Florida, Illinois, Mississippi, New York, Texas, and Utah) have agreed to have some subcentral government procurement covered by this TPA, with thresholds of \$526,000 for goods and services, and \$7,407,000 for construction services. 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 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.

State officials on IGPAC have raised concerns about the new USTR state "reciprocity policy," adopted during negotiations last year, which would be applied for the first time to the Peru TPA, and to an eventual Andean FTA. This USTR policy is ostensibly designed to encourage states to participate in the procurement provisions of trade agreements by offering reciprocal subcentral procurement market access in other countries for only those businesses located in states having agreed to accede to the procurement provisions in the given FTA. However, IGPAC members have indicated that potential benefits to participating states tend to be weakened by the policy's implementation process, through supplier self-certification, and by the overly broad definition of "principal place of business" ("defined to include the headquarters or main office of a supplier or any other place where a supplier's business is managed, conducted, or operated. This means that, under this policy, a supplier could have more than one principal place of business." USTR Trade Facts 2/24/05). Prior to the USTR issuance of the new reciprocity policy, IGPAC members provided detailed observations and comments in response to the USTR request for feedback about a revised approach to the coverage of state government procurement. Some notable IGPAC observations from our 9/8/04 memo included:

- In the absence of first initiating a public process for substantive improvements to federal-state trade policy consultation and information-sharing, IGPAC members remain concerned that the suggested revised approach may be premature, and may seem punitive rather than constructive, as is clearly intended. Promotion of the revised approach could risk further politicizing debates within states regarding trade policy in general, and state sovereignty with respect to procurement in particular.
- **IGPAC respectfully requests USTR's consideration of and response to our 8/5/04 memo's recommendations, and urges the USTR to take action on improving its overall federal-state trade and investment policy approach and intensifying information-sharing efforts with state-level decision-makers, prior to instituting revisions to procurement-specific coverage policies.**
- Given recent developments, IGPAC members fully understand the need to re-examine the process for arranging coverage of state-level procurement in international agreements. We have been, and continue to be, actively supportive of USTR outreach efforts involving NASPO and other interested parties.
- IGPAC would observe that the burden should be on the USTR, Governors, state legislators and others who have been constitutionally tasked with making public policy decisions to make the case as to whether a State should voluntarily subject their procurement markets to the GPA and/or any new FTA. Ideally, decision-makers would consult with potentially affected entities and others as they weigh policy options, as it is in everyone's interest to ensure that informed decisions are made based on detailed, accurate and objective information. **Unfortunately, essential detail on state and local level international trade and investment is largely absent in existing government data sources – making the case for advocating for expanded international procurement market access more problematic.**
- IGPAC members understand USTR concerns related to negotiating subnational procurement coverage with diverse international partners, amidst changing state understanding of and support for such negotiations. It may be inevitable that states' terms and conditions for inclusion will alter given their sovereign legislative, executive and judicial processes for procurement policy-making.
- IGPAC members are cognizant of the current disincentive for states to commit to the GPA and FTAs. Non-participating states receive the benefits of these trade agreements without undertaking the administrative changes and other work required to comply.
- States having agreed to open their procurement markets generally recognize the need to attach market access benefits to such GPA or FTA commitments, and to eliminate the "free rider" problem associated with the current situation by creating market access consequences for states choosing not to participate in, or to withdraw from, such agreements.
- Some states wonder whether the proposed reciprocity revisions would provide sufficient incentive to encourage additional states' participation – notably when data on subnational procurement opportunities is limited or unavailable, and/or when small country trading partners have very little national or subnational procurement activity.
- With respect to the specifics of potentially implementing the suggested reciprocity approach, it is not clear how the practical details would be administered. For example, in order to reward companies from participating states and penalize firms from non-participating states, presumably both the USTR and the relevant trading partner(s) would have to compile a list of which states and/or companies would and would not be allowed

access to a given procurement market and/or bid opportunity. As an indication of the types of concerns that might arise, IGPAC members wonder, for example:

- what criteria would be used to determine business location;
- who would be empowered to create such lists of states or companies;
- who would be in charge of the administrative process;
- how would challenges, requests for review or other concerns be addressed;
- how would regulatory enforcement occur, in light of the possibility that companies could devise ways to “game” the proposed system (witness the difficulties in determining taxation for multi-state and multinational companies)?

Thoughtfully addressing such issues would require a significant investment of time and energy, at a time when government administrative resources are becoming increasingly scarce. Again, IGPAC members would emphasize that our energies could be better spent on stimulating dialogue on overall federal-state trade policy coordination – and that educating decision-makers about potential benefits and costs of procurement commitments be an essential part of that dialogue.

Certain IGPAC members have expressed concerns about the implications of recent developments in Maryland, whose legislature took action to explicitly bar the executive from committing the state to trade agreements, such as the procurement provisions of the CAFTA-DR, without legislative consent. Subsequent to this action, the USTR informed Maryland officials that they remain in the CAFTA-DR. Some states specify terms and conditions for their procurement offers through their Governors’ letters to the USTR. States have received assurances from the USTR in the past that such letters’ terms and conditions would be honored, even if the specific language were not included in the trade agreement itself. Doubts have arisen about whether such letters might be interpreted to lack legal effect. IGPAC would like to work with the USTR to clarify this situation and to ensure that any terms and conditions specified by states are included in the annex of the relevant trade agreement or in another mutually acceptable format.

Additional concerns arise from the IGPAC perspective that certain provisions in this TPA are inconsistent with language in the World Trade Organization (WTO) Government Procurement Agreement and with previous FTAs covering state procurement. Two examples:

- Article 9.8(2) on Limited Tendering: With respect to sole source procurements and documentation of the basis for non-competitive procurement, the Peru TPA requires the procuring entity to “prepare a written report” while the CAFTA requires the procuring entity to “maintain records or prepare written reports.” The Peru provision, if intended to be extended to states without modification, would represent a new reporting responsibility for state procurement officials;
- Article 9.9(8) on Treatment of Tenders and Awarding of Contracts: The Peru TPA 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.

Such inconsistent provisions should be amended in order to conform with other relevant FTAs and with GPA procurement provisions impacting states. Ensuring that TPA provisions on state procurement are consistent across agreements would avoid unnecessary confusion and complexity for implementation at the state level. IGPAC members have expressed concern that the texts negotiated by federal parties, for this TPA and other FTAs, for the WTO GPA and for other international agreements covering subcentral procurement, have not included detailed language on the terms and conditions 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, with the understanding that, to the extent reciprocity policies are used, withdrawal from the agreement will mean the loss of that reciprocity and market access;
- 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. Varied proposals under review by federal, state and local elected officials could further increase limits on 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 information to the public to increase awareness of the benefits of procurement market liberalization, collect and share data on the market value of international procurement opportunities, and provide technical assistance to US firms to encourage success in their reaching newly opened procurement markets under this agreement, other TPAs and the WTO Government Procurement Agreement.

### Investment

Some suggest that, where agreements are reached with countries with less fully developed legal systems, inclusion of a wholly separate litigation process, applicable only to foreign commerce and investment, may be viewed as necessary for creating 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* cases stemming from NAFTA Chapter 11 reinforced concerns that the provision would be abused by investors intending to circumvent established legislative and judicial procedures. Given the still evolving context of investor-state disputes as cited earlier, IGPAC members maintain significant concerns about overly expansive definitions of investment, and investor-state provisions on

dispute settlement claim submission and arbitration and welcome clarifying language in NAFTA interpretive notes and in this TPA.

- Three major IGPAC concerns about investment provisions in this TPA (modeled on the Chile and Singapore FTA language) warrant highlighting: 1) the problematic and overly broad Article 10.18 definition of investment, as it is far more expansive than the NAFTA definition, and is less linked to business enterprises, including concepts of “investment authorization,” licenses and permits; 2) the Article 10.5 “minimum standard of treatment” language, seeming to codify the *Loewen* case holding that state court actions are subject to review by international investment tribunals; and 3) the Article 10.5 due process standards, based on unclear international norms rather than reflecting US constitutional norms of substantive due process, as required by the Trade Act of 2002.
- While appreciating the importance of flexibility in provisions related to national treatment, the provisions in Article 10.3(3) could be clarified to entirely 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. Our constitutional system of federalism accepts the idea that regulatory requirements may differ between the States without raising concerns or giving rights to challenge those requirements. It should be made clear in these agreements that non-discriminatory application of those differing provisions to foreign investors does not violate the TPA.
- IGPAC members welcome those Chapter 10-Section B provisions that bring about greater transparency, inclusion of non-disputing party and *amicus curiae* submissions, and consideration of whether claims or objections may be frivolous. Some IGPAC members hope that the language in Article 10.18(4) will indeed provide additional sovereignty protection to US courts by precluding certain claims (e.g., those that have been submitted to a national court or subjected to a national administrative review process) from being subsequently raised before an arbitral tribunal. If effective in this manner, IGPAC members recommend that this provision be included in future trade agreements and that USTR also consider adding language that would preclude a notice of arbitration from being filed involving any dispute that is before a signatory nation's courts until a final appellate decision has been rendered in the matter.
- In the event that state laws, regulations or practices are challenged, and defended by state officials in the dispute settlement process, (most notably and frequently in California under NAFTA Chapter 11), IGPAC members recommend that the USTR and US Department of Justice consider that awards for costs (per Article 10.26 in this TPA) be duly requested for the efforts expended by such states in assisting the federal government.
- The recent ruling in the *Methanex* dispute established an important precedent for safeguarding important principles of federalism and state sovereignty of concern to this Committee. Since NAFTA tribunal judgments are not formally precedential, IGPAC members would like the *Methanex* case's finding, that “as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted with due process and which affects...a foreign investor or investment is not deemed expropriatory and compensable....,” codified as a formal Interpretive Note in order to clarify existing agreements such as the NAFTA and other FTAs, while corrected language should be added to this TPA and all relevant future trade agreements.
- In Section C, the meaning of “investment agreement” and “investment authorization” needs clarification. Explanation of the coverage and scope of these terms in the US federal and state context is also needed.

IGPAC members would welcome additional opportunities for discussions about clarifications and suggested language for various investor-state provisions in this TPA and future trade agreements.

## Market Access

To the extent that state and local laws, regulations and other measures are, or may become, implicated by market access negotiations or commitments, IGPAC requests that, in concert with the consultation provisions that the agreement establishes between the TPA 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 the provisions of this Agreement, and particularly as they apply to sanitary and phytosanitary measures (Chapter 6), technical barriers to trade (Chapter 7), government procurement (Chapter 9 and Annexes), investment (chapter 10), cross-border trade in services (Chapter 11), financial services (Chapter 12 and Annexes), telecommunications (Chapter 12 and Annexes), e-commerce (Chapter 15), intellectual property (Chapter 16), labor (Chapter 17), environment (Chapter 18), transparency (Chapter 17), trade capacity building (Chapter 20), and dispute settlement (Chapter 21).

## 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 again strongly 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.

Given outstanding issues to be clarified with respect to US compliance with the WTO panel ruling on the Antigua & Barbuda internet gambling case, IGPAC members are concerned that this TPA does not include clarifying side letters on gambling. Regarding the side letter that is included in the Peru TPA, IGPAC members would appreciate knowing more about the USTR's plans for reviewing state-level measures related to engineering, architecture, nursing, dentistry, medical general practitioners, and paramedics, requiring permanent residency or citizenship, in New York, New Jersey, California, Texas, Florida and the District of Columbia.

While the USTR has diligently 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, IGPAC members still strongly recommend shifting to a positive list approach. Given the current negative list context, it should not be presumed that these annexes are comprehensive, nor that future legislative and regulatory decisions must be consistent with commitments made in this agreement. IGPAC members reaffirm that international trade and investment agreements need to be structured in a manner consistent with the principles of US constitutional federalism. To the extent that the 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. 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, as well as being subject domestically to the US Constitution's Commerce Clause. 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. IGPAC members also welcome ongoing dialogue with the USTR in response to our 10/7/05 memorandum **"IGPAC Recommendations and Comments on the US Submission for the WTO General Agreement on Trade in Services (GATS) Negotiations."**

Comment on the Advisory Committee Process:

IGPAC members sincerely appreciate the dedication of USTR Intergovernmental staff in providing information and assistance as we prepared this report. However, IGPAC members found the 30 day period allotted for review of the final Peru TPA documents, and creation of reports to be insufficient, given the complexity of the agreements and the time needed for consultation amongst members of the Committee.

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 view of the compressed schedule and the need to consult with a large number of constituent members, the representatives of the National Association of Attorneys General (NAAG) do not take a formal position on this Agreement at this time. The National Association of State Procurement Officials (NASPO) appreciates its participation in the IGPAC and the inclusion of its input regarding the procurement-related issues in this report. Because NASPO represents purchasing directors from all states, some of which may take differing positions on the Agreement itself, NASPO also does not take a formal position on this TPA at this time.

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, by creating a Federal-State Trade and Investment Policy Commission (as detailed in section IV of this report), would be most commendable.

**VI. Membership of Intergovernmental Policy Advisory Committee (IGPAC)**

*Roster as of January 2006*

<b>Rep. Sheryl Allen</b>	Utah House of Representatives
<b>Jill Arthur</b>	Office of the Mayor – Santa Ana, CA
<b>Walter Bikowitz</b>	NYS Office of General Services- Procurement Services Group
<b>Rep. Daniel E. Bosley</b>	Commonwealth of Massachusetts State House
<b>Peter Bragdon</b>	Office of the Governor – State of Oregon
<b>George Brady</b>	National Association of Insurance Commissioners
<b>James A. Brooks</b>	National League of Cities
<b>Brian R. Caldwell</b>	Assistant Attorney General – Northern Mariana Islands
<b>Liz Cleveland</b>	Mississippi Development Authority
<b>Carol Colombo</b>	Colombo & Bonacci – State of Arizona
<b>Karen Cordry</b>	National Association of Attorneys General
<b>Peter S. Cunningham</b>	North Carolina Department of Commerce
<b>Ryan Fitzgerald</b>	Washington DC Office – State of Idaho
<b>Rep. Johnny Ford</b>	Alabama House of Representatives
<b>Robert Hamilton</b>	Governor’s Advisor for Trade Policy- State of Washington
<b>Edward T. Hayes</b>	Saporito Law Firm – City of New Orleans, LA
<b>Kathy M. Hill</b>	Iowa Department of Economic Development
<b>Governor Dirk Kempthorne</b>	State of Idaho
<b>David Libatique</b>	Office of the Mayor – City of Los Angeles, CA
<b>Brian Krolicki</b>	State Treasurer – State of Nevada
<b>Peter Owens Lehman, Esq.</b>	South Carolina State Ports Authority
<b>Rep. Peter Lewiss</b>	Rhode Island House of Representatives
<b>Tony Lorusso</b>	Minnesota Trade Office
<b>Cassandra Matthews</b>	National Association of Counties
<b>Teresa Marks</b>	Deputy Attorney General – State of Arkansas
<b>Robert R. Matthias</b>	Office of the Mayor – City of Virginia Beach, VA
<b>James Mazzarella</b>	Office of Federal Affairs – State of New York
<b>Jeremy Meadows</b>	National Conference of State Legislatures
<b>Dave Naftzger</b>	Council of Great Lakes Governors
<b>Mayor Meyera E. Oberndorf</b>	City of Virginia Beach, VA
<b>José Ortiz-Daliot</b>	Commonwealth of Puerto Rico
<b>Dugan Petty</b>	State Procurement Office – Office of Governor of Oregon
<b>Paul D.A. Piquado</b>	Office of Trade Policy – Commonwealth of Pennsylvania
<b>Veronique Pluvoise-Fenton</b>	National League of Cities
<b>Mayor Miguel A. Pulido</b>	City of Santa Ana, CA
<b>Ricardo A. Rivera Cardona</b>	Puerto Rico Trade Company
<b>Lynne Ross</b>	National Association of Attorneys General
<b>Milton Segarra</b>	Commonwealth of Puerto Rico
<b>Hannah Shostack</b>	Office of Legislative Services, New Jersey Legislature
<b>Juan Otero</b>	National Governors Association
<b>Richard Van Duizend</b>	National Center for State Courts
<b>Governor Tom Vilsack</b>	State of Iowa
<b>Christopher Whately</b>	Council of State Governments
<b>Kay Alison Wilkie</b>	New York State Department of Economic Development
<b>Chief Justice Frank J. Williams</b>	Supreme Court of Rhode Island