August 22, 2001

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Office of the U.S. Trade Representative
1724 F Street, Northwest
Fifth Floor
Washington, D.C. 20508
Attention: Free Trade Area of the Americas Draft Text Release

RE: Federal Register July 12, 2001 (Volume 66, Number 134)

To Whom It May Concern:

The National Conference of State Legislatures (NCSL) has consistently supported recent international trade agreements, provided that they include adequate federalism protections. NCSL is eager to build on the intergovernmental partnership reflected in recent agreements, including the implementing legislation for the Uruguay Round of the General Agreement on Tariffs and Trade, to ensure that state authority is preserved and protected. In this connection, we appreciate the opportunity to comment on the Free Trade Area of the Americas (FTAA) draft agreement.

The following comments outline general principles that NCSL advocates for the FTAA negotiations. These comments are based on the limited information and heavily bracketed text (denoting that it is still under negotiation) currently available. NCSL looks forward to continued communication and opportunities for expanded dialogue on the range of issues affecting the states during the negotiations.

Due to a lack of information, NCSL is unable to comment on the FTAA Technical Committee on Institutional Issues as requested in the Federal Register at this time. NCSL looks forward to commenting on this committee upon publication of additional information and consultation with the Office of the U.S. Trade Representative.

General Principles

The National Conference of State Legislatures believes that international agreements such as the FTAA that liberalize the world trading and investment system can and must be harmonized with traditional American values of constitutional federalism. In particular, NCSL recognizes that reservations can be made to trade and investment agreements that limit the unnecessary preemption of state law and preserve the authority of state legislatures. Implementing legislation also can be crafted that includes protections for our constitutional system of federalism.

The states are committed to nondisriminatory treatment of foreign firms that do business within their borders, based on the broad standard of protection afforded by the Commerce Clause and the Foreign Commerce Clause of the U.S. Constitution. What the states are not prepared to accept, however, is a challenge to their sovereignty and to state authority based on an arbitrary and unreasonable standard of discrimination against foreign commerce, similar to that employed by the GATT panel in the so-called Beer II decision. Therefore, reservations must be made to the FTAA to "grandfather" existing state laws that might otherwise be subject to challenge. Particular care must also be exercised to ensure that state tax laws and revenue systems are not subject to unjustified challenge under the FTAA, and they generally should be "carved out" of any agreement. Provisions must also be made in federal implementing legislation that so far as possible commit the federal government to protect state lawmaking authority when it is exercised in conformity with accepted U.S. constitutional principles of nondiscrimination against foreign commerce.

Dispute Settlement

Great care must be exercised to protect state laws from unjustified challenges that will predictably result from the broad language of trade agreements such as the FTAA. In general, federalism protections consistent with NCSL's policy on Free Trade and Federalism (see attached) must be included in the agreement and its implementing legislation. The Uruguay Round Agreement's implementing legislation and accompanying Statement of Administrative Action also provide an excellent model.

Provisions in the FTAA draft text providing for an investor-state dispute settlement mechanism (a private right of action) in investment-related disputes are very troubling in light of recent experience under the North American Free Trade Agreement (NAFTA). In particular, NCSL is concerned about this mechanism being used to bring unreasonable challenges to state sovereignty. Provisions must be made to deny any new private right of action in U.S. courts or before international dispute resolution panels based on the FTAA, especially if it could result in foreign firms gaining an advantage in terms of their tax and regulatory treatment over U.S. firms.

Only the United States should be allowed to sue a state to enforce an FTAA dispute resolution panel ruling. Neither the decisions of international dispute resolution panels nor international trade and investment agreements themselves must be binding on the states as a matter of U.S. law. It must be absolutely clear that neither the provisions of the FTAA nor the findings of a dispute resolution panel shall be imported into U.S. law in such a way that allows private parties

to enforce the panel decision or the agreement itself in U.S. courts. It also must be unambiguous that neither the FTAA nor panel findings may be bootstrapped onto litigation based on U.S. law (Commerce Clause, Foreign Commerce Clause, Foreign Policy Power, etc.) involving states, particularly if such litigation is initiated by private parties rather than the United States.

Implementing legislation for any agreement must include provisions that promote effective and meaningful consultation between the states and the federal government related to any dispute involving state law or any dispute that could prompt retaliation against states. These provisions should include a timetable for prompt notice to states of a potential state issue, as well as the right of attorneys for the state to participate as part of the "team" defending a state law before international tribunals. States must also be given the right to file amicus briefs before international dispute resolution panels, both independently and collectively through state organizations such as NCSL. It is imperative that when state laws are under challenge in international proceedings that the federal government defend state laws as vigorously as it defends federal law.

Because the federal government retains the power to sue a state to enforce international agreements, federal legislation implementing any new trade or investment accord must include appropriate protections for the states related to rules of procedure, evidence and remedies in such litigation. The federal government must bear the burden of proof in court showing that state law is inconsistent with an international agreement, regardless of the finding of an international dispute resolution panel. The President must be required, at least 30 days before the Justice Department files suit against a state, to file a report with Congress justifying its proposed action. In the event of an unfavorable judgment, states must be protected from financial liability. If the federal government agrees in the FTAA to allow foreign firms to collect money damages for "harm" caused by a state law, then the federal government must fulfill its promise to pay those damages itself, rather than shift the cost to states.

Procurement

To reiterate, NCSL supports efforts to negotiate trade agreements such as the FTAA that secure free and open access to overseas markets for American products, provided they include adequate federalism protections. This principle applies to procurement issues as surely as any other issue.

In light of recent experience with the World Trade Organization's Government Procurement Agreement, it is critical to stress that decisions affecting state procurement practices must be made in consultation with state legislators. While the executive branch is an important partner in state procurement decisions, state legislators are equally vital. It is clear that Governors' commitments alone cannot legally bind a state. Indeed, state laws and constitutions require action by the legislature for a state to bind itself voluntarily to any new procurement regime. Given the binding procurement commitments on the states that are contained in the FTAA negotiating text, NCSL requests an expanded and more intensive dialogue regarding potential impacts on state procurement practices.