

Trade Agreement Threats to State Sovereignty

International trade is no longer simply a federal matter. Today's international trade agreements delve deeply into matters of state law. Pacts like the North American Free Trade Agreement (NAFTA) and the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) contain numerous policy obligations and constraints to which U.S. federal, state and local governments are bound to conform their domestic policies. These types of "trade" agreements — which were passed in the United States using an extremely outdated, and now expired, trade negotiating process called Fast Track Trade Authority — undermine state regulatory authority in three major areas:

Government Procurement

The procurement rules contained in trade pacts such as the WTO Government Procurement Agreement (GPA) and the Central America Free Trade Agreement (CAFTA) threaten a variety of common state purchasing policies, including:

- Measures to prevent offshoring of state jobs;
- “Buy Local” or “Buy America” policies;
- Preferences for recycled content, renewable energy, fuel efficient vehicles and more.

Investment

Under NAFTA, not only can countries challenge state laws as barriers to trade, but corporations can also launch trade suits against state policies in trade tribunals. Corporate investors have used NAFTA's Chapter 11 investor-state enforcement system to challenge domestic state court rulings, state environmental laws, local land use policies, public health measures and even the provision of public postal services.

Services

The United States has committed over 100 service sectors to the WTO's GATS without consulting states including financial services, transportation, telecommunication services, health insurance, services related to mining, fishing, gambling, energy and information services. The GATS covers every conceivable way that a service might be delivered and contains rules that make it difficult to regulate the committed service sectors. The rules of the GATS threaten innovative state programs, such as efforts to expand low-cost health care coverage to the uninsured.

How a WTO challenge of a U.S. state or federal law would work:

- The other 152 WTO signatory countries are empowered to challenge nonconforming federal and state policies as a violation of the international trade agreement before trade tribunals in a binding dispute resolution system.
- State government officials have no standing before these tribunals and thus must rely on federal officials to defend a challenged policy.
- The tribunals are staffed by trade officials who are empowered to judge if state policy violates WTO requirements.
- Policies judged to violate the rules must be changed, or trade sanctions can be imposed.
- The federal government is obliged to use all constitutionally available powers – for instance preemptive legislation, lawsuits and cutting off funding – to force state and local governments to comply with trade tribunal rulings.

States Demand a New Direction for U.S. Trade Policy

Procurement

Due to the growing awareness that states have much to lose and little to gain by signing up to the restrictive procurement rules of trade agreements, 31 states rejected CAFTA's procurement provisions in 2005. In the recent trade agreements with Peru, Panama and Colombia, all but eight governors declined to sign up to the agreements' procurement rules. State legislators, who are responsible for setting procurement policy in the state, have been active in weighing in with governors. Since 2005, five state legislatures have taken the extra step of clarifying the legal procedure at the state level regarding trade agreements' procurement provisions. Maryland, Rhode Island, Hawaii, Minnesota and Maine have all passed laws that ensure the power to sign up to the procurement terms of any trade agreement rests with the state legislature.

Services

Alarmed at the role the WTO's GATS has already had in accelerating the offshoring of service-sector jobs and worried about the problems the agreement could pose for quality health care and higher education, in 2006 four state governors took decisive action to safeguard their states from the worst aspects of the GATS. Governors Baldacci of Maine, Kulongoski of Oregon, Granholm of Michigan and Vilsack of Iowa wrote to the U.S. Trade Representative (USTR) demanding that their states be carved out of prior and future U.S. GATS commitments.

A Chance to Change the Trade Negotiation Process

The sunset of "Fast Track" trade negotiating authority, thanks in part to states' demands, and the arrival of a new president offers a rare opportunity for state legislators and Congress to work together to devise a new system for formulating trade policy— one that provides states with meaningful consultation about provisions of trade agreements that limit state regulatory authority. The **Trade Reform, Accountability, Development and Employment (TRADE) Act**, introduced by U.S. Sen. Sherrod Brown (D-Ohio) and Rep. Mike Michaud (D-Maine) in June 2009 with 103 original cosponsors, is one proposal that takes states legislators' concerns into consideration. The TRADE Act describes a new presidential trade negotiating process to replace "Fast Track" that dramatically improves state-federal consultation by permitting states to determine to which investment, service sector and procurement regulatory terms they will be bound.

TAKE ACTION

- **Federal Action: Tell Congress to respect state sovereignty in trade agreements.** Pass a resolution supporting a Fast Track replacement that requires proof of states' *prior informed consent* before they can be bound to comply with the terms of any trade agreement. This means trade negotiators cannot sign up states to comply with the services, investment and procurement rules in trade agreements without their explicit approval.
- **State Action: Make sure your state legislature gets a say.** Many state legislatures are working to pass bills that provide for the state legislature to cast the deciding vote on whether or not the state will agree to comply with the services, investment and procurement terms of trade agreements. Without this process, governors can simply sign on unilaterally and the legislature is left in the dark..

