STATES' RIGHTS AND INTERNATIONAL TRADE

A Legislator's Guide to Reinvigorating Federalism in the Era of Globalization

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INTRODUCTION

Polling data has consistently demonstrated that the vast majority of Americans understand that our current trade policy, symbolized by the 1994 North American Free Trade Agreement (NAFTA) and the 1995 World Trade Organization (WTO), has failed.[1] Largely, public concern has focused on the economic damage wrought by these trade agreements. During the period since NAFTA and the WTO were approved, the U.S. trade deficit jumped to historic levels, from $130 billion (current dollars) in 1994 to more than $717 billion in 2005 – an unsustainable U.S. trade deficit of $2 billion per day that threatens global economic stability.

The United States lost three million (one out of every six) manufacturing jobs in the NAFTA-WTO era, and many more manufacturing jobs are at risk.[2] It is not just blue-collar jobs that are under threat: Alan S. Blinder, a former Federal Reserve vice-chairman and Princeton economics professor, says that 28 to 42 million U.S. *service* sector jobs are now at risk of being shipped overseas – a process of exporting jobs euphemistically called "offshoring."[3] The export of U.S. professional and service sector jobs is being accelerated by a new set of trade agreements encouraging "cross-border trade in services" via the phone or the Internet. Unimaginably, the United States is heading toward net food-importer status for the first time since the 1950s, with food imports outpacing exports in 2006.[4] The United States lost 226,695 small farms during the NAFTA-WTO era while farm income plummeted.[5]

Many state and local officials are acutely aware of these devastating U.S. economic trends and have had to watch with mounting frustration as elected leaders in Washington, D.C. repeatedly approved terrible trade deals. Legislators representing areas that have seen massive job loss due to the NAFTA-WTO trade model need no lessons on the impacts of failed trade policy, nor on the deep upset among Americans who have witnessed a family member or friend lose a job because it was relocated to a country where workers are paid extremely low wages.

In recent years, however, state officials across the nation have begun to realize that trade is not just a federal issue anymore, nor are today's trade agreements mainly about traditional trade issues such as setting tariffs. Beginning with NAFTA and the WTO, trade pacts expanded deeply into domestic regulatory issues governed by state legislatures, mayors and other state and local officials. From state gambling law to local land-use policy, to the regulation of education or health care services, to how local tax revenues may be spent, subjects of traditional state and local jurisdiction are increasingly on the trade agreement negotiating table, and are increasingly caught up in hot-button trade disputes even though the issues at stake have nothing to do with moving goods between countries.

> "[I]t is clear that world trade is evolving into new areas that touch not only the sovereign heart of nation-states, but also areas within the constitutional prerogative of subnational governmental units."
>
> – University of Chicago law review article[6]

To understand why this is happening, it is important to understand that the NAFTA and WTO agreements were dramatically different from all other trade agreements that preceded them. Traditionally, trade agreements focused on matters under federal jurisdiction, such as tariffs, quotas and border customs inspections. NAFTA and the WTO exploded the boundaries of what was included in trade pacts, creating previously unheard-of challenges for states' rights.

In an effort to establish a uniform single global market place in which foreign investors, service providers and goods could freely move without being hindered by domestic policy differences, NAFTA and the WTO agreements imposed a form of international preemption. The trade pacts require signatory countries to ensure the conformity of their domestic policies with the terms of the agreements. The agreements set binding constraints on *subfederal* regulatory policy and subject non-conforming state and local policies to challenge as "barriers to trade" in closed trade tribunals. State and local laws having nothing to do with trade are covered. One commenter called

NAFTA a "hunting license" for those seeking to challenge state laws in the name of "free trade."[7] Unfortunately, the evidence has borne this out, as a range of non-trade issues reserved for state and local governments – such as local prevailing wage laws and other procurement policies; state and local "Buy America" procurement policies; low-cost health care programs; higher education policy; and state funding for public services, the environment and even local libraries – are now under NAFTA or WTO jurisdiction or being targeted by trade negotiators around the globe.

While the United States has entered into an increasing number of regional and bilateral trade agreements that have the same troubling provisions implicating state regulatory authority, the news is not all grim. Recent years have been marked by a reinvigorated effort by state and local officials concerned about the "trade agreement" erosion of states' rights to fight back against the invasion of state regulatory authority by the proliferation of trade agreements based on the NAFTA-WTO model. Governors, state legislators, attorneys general and associations representing state officials all interacted with the Bush administration and their congressional delegations on the Central America Free Trade Agreement (CAFTA) in 2005. In the end, only 19 governors signed their states onto CAFTA's procurement provisions – much fewer than the 37 states that originally signed onto the WTO's procurement agreement in the mid-1990s. The WTO's service-sector agreement also has significant procurement provisions, but states have not been consulted at all about those.

The 2006 midterm elections not only put Democrats in the majority in Congress but also delivered a solid majority against "more of the same" trade agreements. While the new Democrats have a variety of views on other important issues, nearly all of them campaigned *against* the NAFTA-WTO model. The new composition of Congress offers state and local officials and their constituents a unique opportunity to set a new course in U.S. trade relations and trade policy-making.

In June 2007, the current congressional delegation of Fast Track Trade Authority will expire. "Fast Track" is the primary mechanism by which the United States negotiates trade agreements. Fast Track delegates away many different congressional authorities in one lump sum – effectively undoing important checks and balances regarding trade policy that the Founders put into the U.S. Constitution. Fast Track also cuts out any meaningful consultation with states, much less an opportunity for states to decide if they want to be bound to trade agreements' regulatory constraints. In order to create better U.S. trade policy that among other important goals safeguards the principle and practice of federalism, there needs to be a new, more inclusive and transparent mechanism for negotiating the terms of trade. As Congress begins to consider how to replace the Fast Track mechanism, state and local officials have a unique opportunity to propose a new way forward. Among possible improvements would be establishment of a new model of federal-state consultation and cooperation that gives citizens a meaningful voice, protects states' right to regulate and safeguards the balance inherent in the system of federalism developed by our nation's Founders.

> "[I]t is vital to maintain the principle that the federal government may request, but not require, states to alter their regulatory regimes in areas over which the states hold constitutional authority …"
>
> – Letter from 29 U.S. State Attorneys General[8]

With this *Legislator's Guide*, Public Citizen's Global Trade Watch division puts in condensed form all of the information state officials need to know about the threat today's trade pacts pose to states' rights and how to reinvigorate federalism in the era of globalization so that the United States can gain the benefits of trade without unnecessarily sacrificing our democratic policy-making systems. While laws and policies under local jurisdiction are also frequently implicated in trade agreements, for brevity's sake this *Guide* will highlight challenges to state laws and opportunities for state officials.

The first three sections of this *Guide* focus on the key issues of how the procurement, services and investment rules contained in trade agreements can limit the regulatory options of legislatures. We also include information about the many creative ways in which states have worked to promote the mutual goals of increased trade as well as the preservation of their sovereignty. We conclude by highlighting opportunities for state officials to improve the system of federal-state consultation, both at the state and at the federal levels, so that states are guaranteed the ability to opt in or out *before* being bound to mandatory non-trade regulatory rules in trade pacts – in other words, the right to *prior informed consent*. This *Guide* will be an essential tool for state legislators to understand the once-in-a-decade opportunity that the 2007 sunset of Fast Track Trade Authority offers to change our trade policy-making processes and create real "win-win" trade agreements.

1 ESSENTIAL BACKGROUND: 'FREE TRADE' AND FEDERALISM

The Problem in Brief: States Are Rarely Consulted About Trade Agreement Provisions That Limit Their Sovereignty and Constrain Their Regulatory Authority

An increasing number of trade agreements contain provisions that constrict the policy options of state officials in the areas of government procurement, the regulation of services and foreign investment. NAFTA, which includes the United States, Canada and Mexico, contains a controversial investment chapter that allows foreign investors to challenge state or local regulations, laws and even court decisions on grounds that far exceed those available to U.S. businesses and citizens under the U.S. Constitution. The WTO, a 150-member international commerce agency headquartered in Geneva, Switzerland, houses the 17 major "Uruguay Round" agreements to which the United States is a signatory. A number of the WTO agreements, such as the WTO's service-sector and procurement agreements, contain provisions that directly limit the regulatory authority of state governments. In recent years, the United States has accelerated the negotiation of regional and bilateral agreements that contain similar investment, service-sector and procurement provisions, increasing the jeopardy for state policies that do not comply with the agreements' terms.

NAFTA and the WTO were not treaties; they were not approved in the U.S. Senate by a supermajority vote as the Constitution requires. Rather, these agreements are "international executive agreements with congressional approval." Under the Fast Track Trade Authority process, the federal executive branch negotiated and signed the 1994 NAFTA and the 1995 WTO agreements package and presented Congress with implementing legislation for each deal, which gave Congress' official approval to the signed deals and changed swaths of federal law to comply with the pacts' terms. This implementing legislation was then passed by Congress by a simple majority vote under Fast Track procedures, which forbid any amendments, limit debate and force a vote within a set number of days. The agreements approved by Congress have the status of binding federal law, which, like other federal law, preempts conflicting state law.

TRADE AGREEMENTS DELVE DEEPLY INTO MATTERS OF STATE LAW

The WTO and NAFTA agreements impact state law in a number of ways. First, they contain policy obligations and constraints to which U.S. federal, state and local governments are bound to conform their domestic policies. For instance, the policy constraints set forth in the WTO's service-sector agreement, named the General Agreement on Trade in Services (GATS), apply specifically to "measures by Members" taken by "central, regional or local governments and authorities; and non-government non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities."[9] The trade agreement establishing the WTO requires that: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."[10] Thus, the U.S. government is under an affirmative obligation to secure the compliance of states and localities with the WTO's array of non-trade regulatory provisions; NAFTA and its clone agreements (called FTAs or Free Trade Agreements) have similar provisions.

Second, state and local laws that conflict with the terms of various trade agreements can and have been challenged as violating WTO or NAFTA rules in trade tribunals that operate outside the U.S. domestic court system. If another WTO nation challenges a state policy as a violation of one of the many WTO agreements, for instance, the case goes to a powerful, binding dispute resolution system built into the WTO. State and local officials have no standing before the WTO tribunals and must rely on the federal government to defend a challenged state or local policy. Tribunals are staffed by a rotating roster of trade lawyers who are not subject to conflict-of-interest rules and who may have no expertise in the matter at hand, yet are empowered to judge whether a local public health, labor or environmental policy has resulted in a violation of a particular trade agreement – without reference to any U.S. law and jurisprudence on the matter. If a state law is ruled against in one of these trade tribunals, the policy must be eliminated or amended, or the federal government is subject to punitive trade sanctions until the violation is remedied.

Note that WTO trade sanctions can and have been constructed to target specific local economies. In the case of NAFTA, in addition to the tribunals that can authorize trade sanctions, there is an additional enforcement system with tribunals empowered to order that cash damages be paid to corporations that are permitted to directly challenge state laws as a violation of their NAFTA-granted foreign investor rights. Though it is the federal government that is technically liable for these cash damages, state governments could be held hostage for the funds. Simply defending one such corporate attack on a California law banning the gasoline additive and water pollutant MTBE has cost over $3 million in legal fees alone.

After an initial wave of WTO cases and NAFTA foreign investor challenges, the enforcement of the NAFTA and WTO policy constraints has gotten more subtle – with challenges being threatened as a way to chill innovation or trigger federal government pressure against state initiatives. Given that trade attacks on health and environmental law draw terrible press and controversy, challengers have found cheaper and politically safer ways to deal with trade barriers: They threaten trade suits rather than formally file. Thus, while there is not a long list of formal WTO or NAFTA cases against U.S. state policies,[11] the cases that *have* been launched are illustrative of the threats posed to normal governmental activity and legislative prerogatives by the NAFTA-WTO model.

Massachusetts Burma Law

In 1997, the European Union (EU) and Japan challenged a Massachusetts law banning purchases from companies that did business with the dictatorship in Burma (Myanmar). The EU argued that the state's procurement policy had to conform to WTO rules and that the Burma law contravened the WTO procurement agreement by imposing conditions that were not "essential to fulfill the contract." Massachusetts officials were flummoxed to learn that they were required to comply with WTO procurement rules that they had never approved. They later learned that a previous governor had unilaterally sent a letter to the federal government agreeing to bind the state's purchasing laws to the WTO procurement agreement without legislative consultation, much less approval.

While this WTO suit was withdrawn because the same business interests were pursuing a parallel suit in the domestic court system (that eventually succeeded in undermining the state law on narrow grounds that federal policy already existed on the Burma trade issue), the case illustrated both the challenges posed to federalism in the era of globalization and the poor consultation process that frequently binds states to international trade pacts without the knowledge or support of the appropriate legislative officials. This EU-Japan formal WTO attack on Massachusetts' law was then used by the U.S. State Department as Exhibit #1 when Maryland sought to pass similar legislation regarding the Nigerian dictatorship's brutal human rights violations. Federal government officials descended on the state capital, lobbying to kill the proposal, which had been expected to pass easily. In the end, the bill was defeated by one vote.[12]

WTO Internet Gambling Suit

In 2003, the island nation of Antigua challenged a variety of U.S. laws banning Internet gambling as "barriers to trade" in cross-border gambling services under the WTO service-sector pact. Investors in Antigua had set up numerous Internet gambling sites targeting U.S. customers. When U.S. officials started to crack down on a few of these sites, these enforcement actions threw Antigua's burgeoning, lucrative industry into an uproar. The final WTO tribunal decision in this case ruled that – despite U.S. claims to the contrary – the entire U.S. gambling sector was bound to meet WTO GATS obligations. Additionally, the panel ruled that a *ban* on gambling was a GATS-illegal "quota" of zero (GATS prohibits quotas and other limits on service suppliers) and constituted a violation of the "market access" requirements for any service sector under GATS jurisdiction. However, the tribunal also ruled that despite this, the federal laws creating the U.S. Internet gambling ban could be maintained under a narrow exception if, and only if, the United States changed a specific law related to interstate horse race betting that the tribunal found to be discriminatory against foreign gambling operators. The United States has since failed to comply with this ruling and change its noncompliant law. Thus, Antigua is weighing the most effective way to apply trade sanctions against the United States.

While this case concerned Internet gambling specifically, the most significant outcome for states was the WTO tribunal's determination that U.S. negotiators had inadvertently committed the entire gambling sector – meaning all federal, state and local measures regulating gambling – to GATS requirements. This means that an array of common U.S. gambling regulations, that would likely not be covered by the narrow exception, allowing explicitly for Internet gambling are now subject to challenge before future WTO tribunals as violating U.S. GATS obligations. This includes gambling bans, limitations on the number of casinos or slot machines, state monopoly lotteries or exclusive Indian gaming rights.[13]

NAFTA Attacks on State Law

Under NAFTA, more than a dozen cases have directly attacked normal governmental activity at the state and local level in the three NAFTA countries. With regard to cases against the United States, aspects of the state tobacco settlements, which have resulted in a dramatic drop in the rate of teenage smoking in the United States, are being challenged by Canadian tobacco traders. California's ban on MTBE, the gasoline additive and water pollutant, was challenged by a Canadian investor. A Canadian mining firm is bringing a NAFTA suit over a California law that requires mining reclamation. A particularly shocking trend has been the number of U.S. domestic court decisions that have been challenged in NAFTA trade tribunals. A NAFTA tribunal ruling in one such case, involving the challenge by a Canadian funeral conglomerate of a Mississippi jury award in a private contract dispute, demonstrates that few domestic court decisions are immune from a rehearing in a NAFTA trade tribunal – not even decisions by the highest court in the land.

Obviously, there is no legal mechanism that allows a WTO or NAFTA tribunal directly to amend or overturn a U.S. state law. However, NAFTA and the WTO legally bind the U.S. federal government to *ensure* that state and local governments comply with WTO and NAFTA rulings by modifying or withdrawing challenged state policies. Under long-established trade jurisprudence, this obligation means that the federal government is subject to automatic punitive sanctions unless it uses all of its constitutionally available powers – including preemptive legislation, lawsuits and funding cuts – to force state and local government compliance with trade tribunal rulings.[14] Even small WTO member countries like the tiny island of Antigua have the potential to impose trade sanctions against the United States to apply pressure to the U.S. government if WTO orders to change state or federal laws are ignored. For instance, by "suspending" their compliance of other WTO rules (such as copyright terms in the WTO's intellectual property rights agreement that require Antigua to pay a fee each time certain U.S. music is played), Antigua could develop sanctions that could add up to a lot of lost revenue for key U.S. industries.

FLAWED FEDERAL-STATE TRADE CONSULTATION MECHANISMS LEAVE MUCH TO BE DESIRED

While the federal government generally works cooperatively with states and state international trade offices in the area of export promotion, in other important areas, consultation has been extremely limited or nonexistent. The Office of the U.S. Trade Representative (USTR), which is the cabinet-level, executive branch agency that negotiates U.S. trade agreements, relies on a severely flawed, outdated system for consulting states on trade-related matters. The current consultation system was largely designed back in the 1970s when the equally outdated Fast Track procedure was established. The premise behind Fast Track and the federal-state consultation system was that trade agreements covered only traditional matters, such as tariffs and quotas, over which states have no authority. Of course, since the early 1990s with the advent of NAFTA and WTO, that premise has been thoroughly shattered as today's trade agreements delve heavily into matters under state jurisdiction. Key components of this weak system of federal-state consultation include:

Rare Direct Consultation

On rare occasions, the federal government directly consults with states in the form of a letter to the governor. This consultation usually involves the federal government requesting states to bind themselves to an agreement's *government procurement provisions.* On trade agreements' other non-trade rules, the USTR simply binds states to comply without asking for consent, and even regarding procurement, state legislatures are kept out of the loop. Thus, even in the rare circumstances when the USTR consults directly with governors, the consultation is not designed to ascertain the wishes of states, but rather of individual governors.

The USTR continues to claim that "state commitments to cover government procurement in trade agreements are voluntary; a state decides whether, and the extent to which, it will cover its procurement under the new agreements; a state decides the manner in which it will make a commitment to cover its procurement; a state may exclude sensitive goods and services…"[15] However, the USTR has refused specific state requests to list some state laws as exceptions (i.e. listing state laws that would not be required to comply with the agreements' constraints) when governors have signed on to past trade pact procurement rules.[16] For instance, in 2004, Governor Gary Locke of Washington submitted a list of laws he wanted the USTR to exclude as a condition of his signing up Washington State to meet CAFTA procurement rules.[17] USTR Zoellick simply refused to include Governor Locke's reservations for sensitive Washington State procurement policies and listed the state as bound to CAFTA procurement rules without any exceptions, putting in perspective the lack of real commitment to the oft-repeated promise that states can define participation on their own terms.

USTR also expressed its reluctance to work cooperatively with states when it flatly rejected a 2005 proposal by the National Conference of State Legislatures (NCSL) to simply *carbon-copy* state legislatures on trade-related communications by USTR to governors.[18]

Indirect Consultation on Services and Other Matters

The USTR occasionally sends communications via a state "single point of contact" (SPOC) system. The SPOC concept was established in the mid-1990s to placate the concerns of state officials and state attorneys general during the negotiation of the WTO and NAFTA. At that time the Clinton administration agreed to establish a federal-state consultation process based on the designation of a single person who was to receive USTR communications within each state. Then and since, state SPOCs are usually someone in the state's Washington, D.C. office or the state's Department of Commerce whose activities focus on export promotion. Many states' designees lack the expertise to understand the domestic regulatory impacts of trade and are often unaware of the importance of their role. Often, legislative leaders or other state officials with enormous interest in trade talks do not even know who their state's SPOC is.

As a result of this flawed system, important communications from the USTR often are not reviewed by state officials with interest or expertise in the matter at hand and are not always shared with the appropriate branches of government and the appropriate elected officials. The SPOCs have been the primary avenue of federal-state consultation over the ongoing WTO service-sector negotiations, and the result has been a haphazard response from inappropriately low-level state employees. NCSL has recommended that SPOCs not be utilized and a better system of communicating with states be developed.

IGPAC – One of 27 Trade Advisory Committees

The Intergovernmental Policy Advisory Committee (IGPAC) is one of the 27 advisory committees of the trade advisory committee system that was originally established by Congress in the 1974 Trade Act.[19] IGPAC is made up of approximately 48 state and local officials who serve at the behest of the president. The total federal trade policy advisory committee system consists of 500-plus advisors.[20] The vast majority of presidential appointees to the federal trade advisory committees represent large businesses and campaign contributors focused on exports and overseas investment. Unfortunately, recommendations made by IGPAC and the handful of others advisors who do not rubber-stamp administration proposals are easily ignored. IGPAC does not have representation from all 50 states, and many of its advisors represent associations of state and local officials.

Those advisors who do represent states operate under significant constraints that undermine their ability to successfully function. For instance, the Bush administration is apparently classifying the text of trade agreements – for alleged national security reasons – to try to limit who can have access to them. This is a relatively new classification practice that has not yet been tested in court. All trade committee advisors must undergo a background check and receive a national security clearance. IGPAC and other trade advisory committee members can be criminally prosecuted for giving classified documents to any other state official (even their own governors) or other individuals who have not been cleared for this purpose, and are extremely limited in what they can even say about IGPAC matters.

IGPAC does not receive any federal funds or have independent counsel or professional staff to support what is the challenging task of analyzing complex trade matters. There are no federal funds even to fly IGPAC members to Washington, D.C. for face-to-face meetings. While IGPAC members have worked hard to fulfill IGPAC's obligation to weigh in from a state perspective on important trade issues and trade agreements, the severe constraints imposed upon members, as well as the lack of resources and staffing, make IGPAC an insufficient mechanism for representing the interests of states in trade policy-making.

States' Role When State Laws Are Challenged in Trade Disputes

After state officials protested, provisions were added to the WTO implementing legislation and NAFTA's nonbinding administrative report that call upon federal officials minimally to notify and consult with states on disputes that affect their interests.[21] Notably, the texts of the agreements themselves recognize only the role of federal officials in defending trade suits. The record of this cooperation has been mixed. Recently, when California's ban on the gasoline additive MTBE was challenged under NAFTA, federal lawyers relied upon the expertise of four lawyers in the California attorney general's office. These lawyers worked hard on this case and report a generally cooperative relationship, but they were not allowed to speak in front of the trade tribunal or otherwise formally participate in the litigation. While federal lawyers ultimately prevailed and received $3 million in compensatory legal fees, the California lawyers were not compensated for their time and hard work. In this instance, the federal government's position on MTBE was somewhat complimentary to California's position. It has yet to be seen how federal lawyers will treat state lawyers in a NAFTA case involving a Canadian mining operation's challenge to a California mining reclamation law, where the federal position on the matter at hand is diametrically opposed to that of the state government.[22]

State governments were first challenged to examine the issue of federal-state consultation on trade matters in the early 1990s during the negotiations of the WTO and NAFTA, when these pacts' extensive scope was revealed to affect state authority. However, the question of federal-state consultation has gained increasing urgency since the "Doha Round" of WTO negotiations, which has been on and off for five years and would subject a broad array of new matters now under state and local jurisdiction to WTO jurisdiction. As well, the Bush administration has been pushing a plethora of bilateral and regional agreements based on the NAFTA model. In both venues, federal trade officials are negotiating legally binding commitments regarding higher education, professional licensing, construction, insurance, energy, hospital facilities, rental/real estate, zoning, retailing and many other service sectors normally regulated by states and localities. The federal government has simply presumed it has the authority to commit all levels of U.S. government to comply with the sweeping provisions contained in these trade pacts – without obtaining consent by subfederal governments and often without giving meaningful notice to states that such negotiations are under way.

AT THE ROOT OF THE PROBLEM IS FAST TRACK TRADE AUTHORITY

The scandalous disregard for states' authority and jurisdiction by federal trade negotiators has not been caused by any particular president or administration's personal animosity to federalism. Rather, the blighted state of federal-state consultation over trade matters is a bipartisan practice rooted in the use of extremely outdated processes for the negotiation of U.S. trade agreements. The real culprit is the inappropriate mechanism by which presidents of both political parties have concentrated power to ride roughshod over state sovereignty and the principles of federalism – specifically, **Fast Track Trade Authority.**

Fast Track Trade Authority (renamed Trade Promotion Authority by its supporters in 2002) was first developed by President Nixon in 1974. While hundreds of trade deals were approved without Fast Track, the most controversial – such as the WTO and NAFTA – would not have passed had Fast Track not been utilized to handcuff a wary Congress from exercising its exclusive constitutional authority to set the terms of U.S. trade policy or to use its normal oversight, debate or amendment rights. Since Nixon's 1974 Fast Track, the process has been reauthorized several times, although it also has had lapse periods, including eight years between 1995 and 2002. Fast Track was Nixon's idea of how the executive and legislative branches should coordinate connected constitutional authorities. Congress has exclusive authority over the content of trade policy. The executive branch has exclusive authority to represent the United States to foreign sovereigns. Nixon's Fast Track effectively delegated all of Congress' authority over trade to the executive branch.

Under Fast Track, Congress delegates away its constitutionally granted authority to set the terms of trade to the executive branch for a certain period of time and gets only a "yes" or "no" vote on finished, signed agreements as long as the executive branch gives 90 days notice to Congress of intent to sign. Fast Track authorizes the president and USTR staff to determine with which countries it will seek agreements, decide the desired content, negotiate the trade agreements, sign them and then send the final trade package to Congress with implementing legislation to conform U.S. law to the pact's rules. Under Fast Track, Congress' role is strictly limited to a "yes" or "no" vote on the final package, with limited debate and no amendments. Not surprisingly, since NAFTA and WTO, each attempt to get Congress to cede so much authority with Fast Track is a *battle royale* in Congress. In 1995 and 1997, legislation authorizing Fast Track was withdrawn before it was defeated, and in 1998, another attempt to obtain Fast Track was rejected by Congress. Fast Track was ultimately re-established in 2002 only for a five-year period – by a two-vote margin after a two-year effort.

While Fast Track's design strictly limits Congress' role, it completely *excludes* any meaningful role for states in trade policy-making, despite the array of non-trade regulatory issues under state authority that trade pacts affect. The only way to get better trade agreements, and thus better results, is to secure a better process – one that ensures a meaningful role for states and their elected representatives in trade policy-making. **The June 2007 sunset of the current grant of Fast Track authority presents concerned state officials with a once-in-a-decade opportunity to replace the failed Fast Track model and create a new negotiating mechanism that ensures a mandatory and meaningful federal-state consultation process.**

The Solution in Brief: Replacing Fast Track With a Mechanism That Requires States' Prior Informed Consent Before They Can Be Bound to Non-Tariff Terms of Any Trade Agreement

Other nations with federalist systems have found ways to recognize and respect the authority of subfederal governments in trade policy-making. Canada, for instance, has a mechanism that allows provincial officials to agree to or veto federal trade proposals touching upon regulatory matters under subfederal jurisdiction.[23] The United States would benefit greatly from such a system. At a minimum, what is needed in the United States are mechanisms for ensuring that states give their explicit approval before they are bound to the non-trade regulatory terms of trade agreements. There is much that states can do to develop appropriate procedures to handle trade-related information and inquiries from the federal government. However, states also can have a major role in insisting that whatever mechanism replaces Fast Track include a much more robust consultation system and states' right of *prior informed consent* before federal negotiators can bind states to comply with trade agreement terms.

STATE PROCESS

States can take action by passing legislation that formally clarifies and clearly provides that *only an act of the state legislature* – not just a governor's actions – can bind a state to the non-tariff terms included in any trade agreement that affects subfederal regulatory authority. Annex I of this *Guide* contains two versions of model legislation for states to consider. One model comes from the Center for Policy Alternatives and is based on a bill passed by the Maryland General Assembly. The other model accomplishes the same end and is sponsored by the national AFL-CIO.

FEDERAL PROCESS

State legislatures also have a critical role to play in the congressional debate that is foreseeable when Fast Track sunsets in June 2007. Many in Congress havedetermined that the Fast Track mechanism must be replaced. State legislatures can pass resolutions urging the replacement of the failed Fast Track model with a new delegation mechanism that requires checks and balances, including by requiring federal trade negotiators to seek consent from state legislatures *prior* to binding states to conform their laws to the terms of international trade pacts. (See Annex II of this *Guide* for recommended resolution language). If a large number of states were to pass such resolutions, it would send a powerful message to Congress that states expect their concerns about Fast Track running roughshod over state sovereignty to be addressed when Congress replaces Fast Track.

2 PROCUREMENT RULES IN TRADE PACTS JEOPARDIZE STATE LEGISLATIVE CONTROL OVER STATE PURCHASING POLICY

HISTORY

Until NAFTA and the WTO, trade agreement provisions did not extend far beyond setting tariff and quota levels. Certainly, such past agreements did not include rules constraining government procurement policy. Unfortunately, adding such non-trade rules was a goal of the first Bush administration. Thus, the United States was among 26 nations that first negotiated the WTO's Government Procurement Agreement (GPA) during the Uruguay Round talks in the early 1990s. The very notion of setting one-size-fits-all global rules on government purchasing was so strongly opposed by a majority of the nations involved in the Uruguay Round negotiations that the GPA is one of the few WTO agreements that does not automatically cover all countries. Only countries that have opted into the agreement are covered by its rules. The GPA was part of the WTO package of agreements that the Clinton administration pushed through Congress in 1994 utilizing Fast Track procedures.

The goal of the GPA is to open federal and state government procurement contracts to competition from foreign goods and service providers by requiring equal treatment for foreign firms (no preferences for local producers) and by limiting the criteria states can use to purchase goods and services. The GPA applies only to those purchasing entities that the United States has listed in an annex of the trade agreement (many federal government agencies, 37 states and various entities such as port authorities), and to contracts for goods and services above a certain dollar threshold.[24]In addition to the GPA, there are seven other recently approved trade agreements with government procurement provisions that are binding down to the state level: the U.S.-Chile Free Trade Agreement (FTA), the U.S.-Singapore FTA, the U.S.-Australia FTA, the U.S.-Morocco FTA, CAFTA and proposed agreements with Peru and Columbia. NAFTA includes a government procurement chapter, but it does not cover state-level procurement.

FEDERAL-STATE CONSULTATION

In the early 1990s during the negotiations of the Uruguay Round, President Clinton's trade representative, Mickey Kantor, bound many federal agencies to the agreement and also decided to request that state governors volunteer to bind state procurement policies to the pact. Although setting state procurement policy is generally the role of state legislatures, state legislatures were not consulted, only governors. In the end, 37 governors sent letters that the USTR interpreted as agreeing to bind their state purchasing policies to the agreement. The bound states and state agencies are listed in an annex to the agreement.[25] Early in 2003, U.S. Trade Representative Robert Zoellick bound the same 37 states – without consulting them – to comply with the terms of the U.S.-Chile and U.S.-Singapore FTAs' procurement chapters. However, in an apparent about-face, Zoellick then sent a letter to all 50 states in 2003 asking the governors to provide an open-ended authorization committing their states to be bound to the procurement provisions in a list of trade agreements that were then under negotiation.[26] In essence, he asked governors to deposit a signature card good for five future procurement agreements, including CAFTA.

Initially, a number of states sent back letters to USTR granting consent. However, as word began to circulate that being bound to the procurement terms of agreements like CAFTA would jeopardize legislation introduced in 30 states that would ban the offshoring of state service contracts, many governors began to reconsider. In short order, a bipartisan group of governors from eight states withdrew their initial agreement to bind their states to comply with the government procurement rules in CAFTA (Pennsylvania, Iowa, Missouri, Maine, Oregon, Minnesota, Kansas, and New Hampshire). Many other governors simply said "no" in the first place. In the end, only 19 governors signed their states onto CAFTA's procurement provisions. Most recently, only eight governors have signed their states onto the procurement provisions in the proposed U.S-Peru FTA, indicating rapidly dwindling support for such pacts. (See chart in Annex III for information about your state's status).

HOW THE RULES AFFECT STATE AUTHORITY

The procurement rules contained in these trade pacts threaten a variety of common state purchasing policies.

1. "Non-discrimination" rule prohibits anti-offshoring policies, "Buy America" and "Buy-Local" preferences

Each procurement pact requires that states provide the same or more favorable treatment to foreign goods and foreign service suppliers than they provide to domestic firms supplying "like" goods and services. This rule, which is called "non-discrimination," means state governments whose purchasing policies are bound by the pacts cannot favor the purchase of local goods or services for economic development reasons or even for environmental reasons. This rule also forbids anti-offshoring policies that require work under state contract be performed in the state or in the United States. Other common state policies, for instance those that give preference to bids by local producers, also run afoul of this rule.

2. "Technical Specification" rules strictly limit the criteria that can be used to describe desired goods and services

The procurement agreements also contain rules limiting technical specifications that states can use when they request bids from companies seeking to provide goods or services. CAFTA, for instance, requires that "procuring entities shall not prepare, adopt or apply any technical specification describing a good or service with the purpose or the effect of creating unnecessary obstacles to trade … and that technical specifications are limited to performance requirements rather than design or descriptive characteristics."[27] This rule means that procuring entities are prohibited from setting specifications describing goods or services sought based on *how* a good is made or *how* a service is provided. Thus, states are forbidden from banning products made in sweatshops or with child labor and similarly cannot require recycled content or renewable energy.

3. "Supplier Qualification" rules prohibit consideration of contractors' labor or environmental track records

The procurement agreements also restrict what sorts of qualifications and criteria states may employ to choose suppliers of goods and services. For instance, under CAFTA, procuring entities can set only those conditions for supplier participation in procurement that are essential to ensure that the supplier has the "legal, technical, and financial" abilities to fulfill the requirements of the contract.[28] Thus, states required to meet trade agreement procurement rules are forbidden from barring contractors based on past environmental, labor rights or worker safety violations. This rule also forbids state procurement policies that exclude businesses operating in countries with human rights offenses. It also could run afoul of requirements that companies pay prevailing wages or provide preferences for suppliers with a unionized workforce.

CONSEQUENCES FOR STATE POLICY

If a state procurement policy is judged by a trade tribunal to violate the trade agreement's rules, it must be eliminated or changed. Otherwise, the tribunal could authorize the imposition of trade sanctions until the policy is brought into compliance with the terms of the trade agreement. Many existing state procurement policies are in conflict with trade rules, including:

Local economic development policies: An array of economic development policies aimed at keeping state dollars paying in-state wages and giving preference to locally produced goods and services (so-called "Buy America" policies) are prohibited under trade procurement rules. At least ten states have anti-offshoring laws or executive orders (AZ, IL, MD, MI, MN, MO, NJ, NC, TN, WA) that may be subject to challenge before trade tribunals.

"Green" procurement policies: Policies at risk include requirements for recycled content in goods or a percentage of energy from renewable sources, as well as preferences for certain environmental or consumer safety labels and eco-friendly packaging requirements that may have the unintended "effect" of creating an obstacle to trade.

Policies targeting companies' human rights, environmental or labor conduct: Under trade agreement procurement rules, suppliers cannot be disqualified because of companies' labor, human rights or environmental records or practices. "Sweat-free" rules that ban the purchase of goods from companies using sweatshop labor or child labor are prohibited.

Prevailing and living wages and project-labor agreements: Trade agreement procurement rules place limits on the requirements that can be imposed on contractors, such as requiring payment of prevailing wages and living wages. Project-labor agreements that require fair treatment of workers and their unions in order to avoid labor disputes in public works projects also cannot be required within these agreements as a condition for a bidder to qualify for state business.

Pro-union or pro-public bidding assistance: Trade agreement procurement rules prohibit policies that provide aid to employees and unions in bidding for public contracts and also prohibit laws that require favorable consideration of such in-house bids. Also in conflict with these rules are costing requirements that require private bidders to provide substantial savings over public providers in order to get a public contract but do not allow savings due to lower wages or benefits to be factored in.

Policies targeting countries' human rights, labor rights or other conduct: Under trade agreement procurement rules, governments cannot treat foreign companies differently based on the human rights, labor rights or environmental records of the countries in which they are based or in which they operate. This removes tools used by states in the past to demand corporate responsibility in the face of human rights abuses, including the nationwide anti-apartheid divestment effort in the 1980s.

SAFEGUARDING SOVEREIGNTY OVER STATE PURCHASING POLICY

Whether a governor's signature is an appropriate, or even legal, procedure by which to bind state law and thus limit future policy options is a critical question. State officials must tackle this question so that proper procedures can be established to ensure that such decisions are made by the state legislative branch, if that is the legal and appropriate mechanism. Some states have already analyzed what their state constitutions require in this regard. For instance, in Washington State, the legal counsel for the House of Representatives concluded that the governor lacked the authority to bind the state's procurement policy to trade agreements, because the state legislature would have to explicitly grant him the power to do so.[29] In 2005, the Maryland General Assembly also studied the issue and decided to take legislative action to clarify that the power to agree to be bound by the procurement terms of any trade agreement rested exclusively with the state legislature and not the governor. By doing so, Maryland became the first state to require the informed consent of the legislature prior to being bound by the government procurement terms of any trade agreements. In 2006, Rhode Island passed similar legislation. It has yet to be seen how the USTR will respond to these new state laws when negotiating future trade agreements. Unless the USTR decides to pick a "states' rights" fight, it will need to address future requests to the legislative authorities designated by Maryland's and Rhode Island's new laws. Model bills that establish a state legislative approval process before a state can be bound to meet service-sector, investment and procurement rules of global trade pacts are included in Annex I of this *Guide*.

For more information on trade and state procurement, please see Public Citizen's Briefing Paper on Procurement: http://www.citizen.org/procurement.

3 SERVICE-SECTOR RULES IN TRADE PACTS LIMIT STATE POLICY OPTIONS

HISTORY

From the 1947 establishment of General Agreement on Tariffs and Trade (the precursor to the WTO) until the 1988 signing of the Canadian-U.S. FTA (the precursor to NAFTA), trade agreements had pertained only to trade in *goods*. However, major U.S. *service* industries – including banking, insurance, energy and retail giants – desired global rules to push their way into other countries. Thus, the United States was a key proponent of the WTO's service-sector pact called the General Agreement on Trade in Services (GATS), which is designed to limit government regulation over the service economy. Like the WTO's procurement agreement, the GATS was also part of the Uruguay Round package of agreements that was pushed through Congress in 1994 by the Clinton administration utilizing Fast Track. Because the U.S. demand to include services in a trade agreement was so controversial, GATS is structured as a "bottom-up" agreement, which means that it applies only to the service sectors each nation volunteers to bind (or "commit") to its terms.

As few in Congress ever reviewed the content of the thousands of pages comprising the Uruguay Round package, it is not surprising that Congress approved the binding of nearly 100 sectors of the U.S. service economy with little discussion, debate or understanding. Key aspects of our service-sector economy such as financial services, health care services, distribution services and land use, information services, telecommunication services, media services, transportation services, construction services, cultural services such as libraries and the arts and certain professional services are bound to the regulatory constraints contained in the GATS. The 100 service sectors the United States committed to the GATS are contained in a "schedule" document which can be tricky to understand. To help, Public Citizen has created a database of U.S. GATS commitments – with the WTO jargon translated into plain English (www.citizen.org/GATSdirectory). We also have a key that will help you decipher the actual U.S. commitments (www.citizen.org/GATSglossary).

There was an extraordinary amount of push-back against the U.S. proposal to include a service-sector agreement under the WTO. Many of the most extreme U.S. demands that made it into NAFTA were rejected at the WTO. The compromise was to insert into the original GATS text a provision to restart GATS negotiations in 2000 and revisit the U.S. demands. Thus in 2000, the WTO initiated GATS-expansion talks aimed at increasing the number of service sectors to be covered by the agreement and expanding GATS rules by establishing new "disciplines" on domestic regulation that would further erode states' ability to regulate service-sector operations.[30] The 2000 GATS expansion talks were later folded into the Doha Round of WTO talks launched in 2001.

While the Doha Round talks collapsed in July 2006 and may or may not be renewed, "built-in" GATS-expansion talks may continue on another track. The United States has proposed signing up new U.S. service sectors to comply with GATS, including higher education, pipeline transport, warehousing and storage (a category that covers "tank farms" of gasoline, oils and chemicals as well as highly dangerous Liquid Natural Gas Terminals). While many other countries found ways to consult state and local officials about service sectors regulated under subfederal jurisdiction, in the United States, state and local officials have not been meaningfully consulted.

FEDERAL-STATE CONSULTATION

In the early 1990s, during the negotiations of the Uruguay Round, state officials and their congressional allies were very concerned about the potential for dispute proceedings against state law. With regard to the GATS specifically, U.S. Senator Kent Conrad, who first won statewide office as North Dakota's Tax Commissioner, succeeded in getting then-U.S. Trade Representative Mickey Kantor to promise to carve out state *tax* policy from GATS rules. Although the promise was issued, no such carve-out was included in the final GATS text.[31] Reportedly, the EU objected to this safeguard for state law.

Today, the same disregard for the concerns of state officials continues. Federal-state consultation regarding the U.S. position for the GATS 2000 expansion talks has been systematically inadequate, inappropriately low-level, confusing and "last minute." In January of 2003, for instance, the USTR triggered its state "single point of contact" (SPOC) system, discussed above. State SPOCs received a 400-plus page document from the USTR regarding the complex WTO service-sector negotiations. Many SPOCs were at a loss as to how to respond to this document and failed to do so. There is no evidence that any state legislature was consulted, and SPOCs failed to realize (because it was not explained to them) that these complex WTO service-sector negotiations could one day have a significant impact on the future policy-making options of state officials. Notably, the cover letter sent by the USTR focused on the very narrow issue of whether state law exemptions that had been included in the original 1995 GATS agreement needed to be updated because of subsequent changes in state law.

The right people were simply not being asked the right questions. For instance, can you imagine the response of a state legislative committee on energy if it were asked: Does your state wish to sign up its energy utilities to WTO rules promoting privatization and deregulation? Or, are you willing to sign up the state's higher education institutions to WTO rules and share state higher education subsidies with foreign for-profit service providers? The U.S. proposal to bind the higher education sector to the WTO service-sector agreement was just one of the crucial issues at play in the GATS-expansion negotiations.

In Canada, where provincial officials were meaningfully consulted, subfederal education officials were given time to study the issue and commission research and legal opinions. In the end, they decided that the potential risks to higher education – especially to educational subsidies – far exceeded the potential gains, and they effectively vetoed efforts by Canadian federal trade negotiators to bind Canada's higher education sector to comply with GATS requirements. In contrast, the original U.S. proposal to bind the higher education sector to GATS authority "went to the World Trade Organization without being seen by the major representatives of the higher education community," according to the Council for Higher Education Accreditation.[32] The January 2003 USTR letter to SPOCs claimed that "all commitments made by states would be voluntary and subject to consultation."[33] In truth, states were not being given the information they needed to understand even the narrow question (about updating exclusions) that they were asked, and they were not asked about the truly important decisions (what to bind, and what not to bind).

Indeed, it is not clear how well the USTR itself understood the complex GATS issues. In 2005, the WTO ruled in the Antigua Internet gambling case that the United States had inadvertently signed up the entire U.S. gambling service sector to meet GATS requirements by committing the broader category of "recreational services" to GATS jurisdiction. This astounding USTR mistake and WTO ruling means a wide array of state gambling laws are presumptive WTO violations. State and local bans on gambling are likely violations of GATS rules that require unfettered market access for foreign firms. State lotteries and Indian gaming compacts could also be challenged as GATS-prohibited monopolies or exclusive service provider arrangements. To date, the U.S. federal government has failed to respond to a 2005 letter from 29 state attorneys general who urged the USTR to take action at the WTO to safeguard state gambling laws from future WTO challenges – specifically by moving to withdraw the gambling sector from GATS coverage.[34]

Given this history of poor consultation and colossal mistakes by USTR negotiators, it was not surprising that in 2006 a number of concerned governors took executive action to safeguard their states' sovereignty and regulatory options from GATS by explicitly asking the USTR to remove their states from GATS coverage. See the "Safeguarding Sovereignty" section below for more information.

HOW THE RULES AFFECT STATE AUTHORITY

The GATS covers every conceivable way that a service might be delivered. The GATS encourages foreign service corporations to set up new operations or buy existing service companies within the United States. GATS also protects the rights of foreign service firms abroad to deliver services to U.S. customers over the Internet or by U.S. residents traveling abroad to receive a service (e.g., going to India for heart surgery). GATS also facilitates the immigration of workers to the United States on a temporary basis to provide a service, such as those of architects or construction workers. Because GATS also encourages cross-border trade in services (via the Internet and phone), it promotes the offshoring of service jobs in almost every sector signed up to the agreement.

In addition, the GATS "non-discrimination" rule requires that no domestic policy alter the "conditions of competition" in a way that results in less favorable treatment for a foreign service provider – even if the law applies equally to domestic and foreign firms! For instance, in the construction sector, even if the same controls on land use, building regulations and building permits are applied to domestic and foreign service suppliers, they may be found to be more onerous to foreign suppliers. The non-discrimination rule also requires that public subsidies and grants be shared with foreign service suppliers on the same footing as U.S. service suppliers, unless those funds are specifically exempted from the terms of the agreement. It is worth noting that the federal government protected National Endowment for the Arts grants from GATS obligations to share subsidies with foreign services providers, but failed to exempt any state arts grants or subsidies.

The GATS rules guaranteeing foreign service firms "market access" to U.S. service markets go well beyond requiring equal treatment. They prohibit any policies that limit the number of services providers in the form of quotas, public or private monopolies and exclusive service-provider contracts. The hours of operation or size of an operation (for instance, a mega retailer) cannot be limited. Needs tests are also explicitly forbidden. Regulatory bans in covered service sectors (such as bans on certain types of gambling or other unsavory or dangerous activity) are considered barriers to market entry and presumptive WTO violations.

While GATS proponents say that government services are exempt from the agreement's terms, in reality, few government services qualify for the poorly written exemption to which they refer. (Only services provided exclusively by the government can qualify, yet most U.S. sectors are provided both by the government and private companies). GATS contains rules on government procurement of services that are equally ambiguous. These GATS rules drag some aspects of government procurement of services under GATS jurisdiction, yet state officials have not been consulted about this aspect of GATS even though the USTR recognizes state authority in this area. If a nation seeks to withdraw a sector from the terms of the agreement, GATS requires that nation compensate the other WTO signatory countries for real and theoretical lost business opportunities, making the reversal of ill-advised GATS commitments costly and difficult.

CONSEQUENCES FOR STATE POLICY

If a U.S. state-level service-sector regulatory policy is challenged by another WTO member country, the binding and powerful dispute resolution system of the WTO decides the law's "WTO legality." Policies ruled against by the WTO must be changed or trade sanctions can be authorized.

Energy: Under the category of "services incidental to energy," the system of organizing and regulating many public and private electric utilities, as well as rural electrical co-operatives, would appear to violate GATS prohibitions on monopolies or exclusive service suppliers. State Renewable Portfolio Standards (RPS) may constitute GATS violations, as they could be perceived as changing competitive conditions in a way that "discriminate" against foreign distributors of energy.[35] Proposed new U.S. GATS commitments on "warehousing" implicate the safety and zoning regulations governing highly controversial liquid natural gas terminals (LNG), which are front page news in many states.[36]

Health Care: The United States signed up many "financial services" to comply with GATS strictures, including health insurance. While states attempt to address the scandalous lack of health care coverage for the 43 million uninsured Americans, states' policy options are being curtailed. Certain health care reform proposals, especially those that create a subsidized low-cost health plan that successfully competes with private-sector plans in the market, may violate GATS antimonopoly rules.

Land Use: The United States committed "retail services," "franchising" and "hotel and restaurant" development to meet GATS rules, but failed to include any safeguards for local land-use laws that prohibit development in certain areas (such as environmentally sensitive areas or historic districts) or that place limits on the size or number of retail operations. These zoning and land-use rules are considered to be GATS violations by giant retailers such as Wal-Mart, according to a document the big box retailer submitted to the USTR.

Libraries: The United States committed public libraries, archives and museums to the rules of the GATS without specifying that public funds for these institutions are limited to public institutions only. Since aspects of these services are provided in competition with private sector for-profit service providers, they may not qualify for the GATS exception for governmentally provided services.

Public Transportation: Because the United States failed to exempt public transportation systems from its GATS commitments on "road and rail transport," municipally owned public transit systems – and even public school bus services – may have to be opened up to competition from private foreign companies to meet GATS obligations to provide market access to foreign firms. Also, public subsidies or grants may have to be shared with foreign firms on a "nondiscriminatory" basis.

Higher Education: The United States is proposing to commit private and *public* "higher education" to WTO jurisdiction even though trading partners have requested access only to U.S. private higher education (i.e., for-profit commercial and technical training colleges). As a result, state subsidies for public institutions and students would be put at risk of WTO attack.

Jobs: When U.S. workers expressed anxiety that NAFTA and WTO would result in the loss of millions of U.S. manufacturing jobs, sympathetically minded proponents of those pacts admitted industrial jobs would be lost, but promised that in the new global economy these pacts would create new opportunities for displaced industrial workers. Yet in the "new service economy," it is these very service-sector jobs that are being sent offshore to cheaper labor. GATS provisions that label U.S. service-sector regulatory polices "illegal trade barriers" and encourage cross-border trade via the Internet or phone will result in the off-shoring of an incalculable number of service jobs in almost 100 categories including the broad categories of: legal, accounting, taxation, architectural, engineering, environmental, computer-related, real estate, media, advertising, communications, telecommunications, tourism and recreation, financial services, air transport services, higher education, maintenance and repair of equipment, commission agents and nursing services. GATS rules that encourage the importation of foreign workers to provide services in the United States also place U.S. workers at risk.

SAFEGUARDING SOVEREIGNTY OVER STATE SERVICE-SECTOR LAWS

In 2006, four state governors took action to try to safeguard from GATS their states' sovereignty to regulate service suppliers in the public interest. On April 5, 2006, Governor Baldacci of Maine wrote to the USTR, stating: "I write to request that you carve Maine out of new service offers you are proposing in the context of the current Doha Round of negotiations …Your proposal to offer higher education to the constraints of the GATS is particularly alarming … This sector is simply too important to subject to broad and poorly worded GATS rules which are subject to various interpretations by WTO tribunals."[37] Governor Kulongoski of Oregon, Governor Vilsack of Iowa and Governor Granholm of Michigan wrote similar letters to the USTR, as did members of the Maine and California state legislatures. While the WTO's Doha Round of talks has had an on-again/off-again course in the recent past, it is still extremely important for more governors and state legislators to communicate to the USTR their concerns about carving out any service sectors in their state that they do no want to submit to the complex rules of the GATS and to WTO jurisdiction. The four governors' letters can be accessed at: http://www.citizen.org/statesGATSletters.

For more information on service-sector regulation and trade, please see Public Citizen's searchable GATS Directory located at: http://www.citizen.org/GATSdirectory.

4 INVESTMENT RULES IN TRADE PACTS THREATEN PROGRESSIVE POLICY SOLUTIONS TO MODERN PROBLEMS

HISTORY

In 1993, the controversial North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico was pushed through Congress by the Clinton administration utilizing Fast Track procedures. NAFTA was called a trade agreement, yet much of NAFTA focuses on investment issues. Extensive new foreign investor rights and privileges were laid out in NAFTA's Chapter 11, a 29-page chapter of NAFTA, which has nothing to do with U.S. bankruptcy law despite the similar name. NAFTA establishes new rights for foreign investors to acquire, own and operate a broadly defined category of "investments" within the NAFTA nations (including land, factories and service sector firms, stocks, bonds, patents and more), and restricts government regulation of such foreign investors and their investments. Remarkably, the array of new rights and privileges are privately enforceable. The agreements empower foreign investors to directly sue signatory governments in extra-judicial tribunals for cash compensation if they think that their new privileges are not being delivered.

Public Citizen has uncovered 42 of these cases filed thus far by corporate interests and investors under NAFTA's Chapter 11 foreign investor protection provisions. While only a small number of these cases have been finalized, the track record of cases and claims demonstrate an array of attacks on public policies and normal governmental activity at all levels of government – federal, state and local. These cases have a common theme: They seek compensation for government actions that would not be subject to such demands under U.S. law and claim violations of property rights established in NAFTA that extend well beyond the robust property rights our conservative U.S. Supreme Court has interpreted are provided by the U.S. Constitution. The Bush administration has sought to expand NAFTA-style investor rights – which among other things require compensation for "regulatory takings" – to new countries via bilateral and regional trade agreements, including the U.S.-Chile FTA, U.S.-Singapore FTA, CAFTA, U.S.-Morocco, U.S.-Oman FTA, U.S.-Peru FTA and U.S.-Colombia FTA. The USTR also has pushed to put these extraordinary foreign investor privileges into the WTO, but the majority of WTO member countries have flatly refused. The raft of new agreements with the foreign investor privileges are sure to spawn new cases and new liability for U.S. taxpayers who must foot the bill if foreign investors succeed in challenging state or federal laws – as well as face the consequences of not having vital environmental health, safety and zoning policies enforced.

FEDERAL-STATE CONSULTATION

During the negotiation of NAFTA in the early 1990s, states did not have access to key negotiating documents, but were able to access enough information to be concerned about what details they were being denied. Many associations representing state officials, such as the National Governors Association, the National Association of Attorneys General, the National Association of State Legislators and others, were particularly concerned about the potential for trade tribunals to rule against state law. Increasing opposition by states and state associations posed a real threat to the passage of NAFTA in Congress. As a result of this vocal opposition, the USTR became much more conciliatory towards states, working with state associations to address some of their concerns. While many of the "concessions" states received during the NAFTA debate were merely cosmetic, states did succeed in creating a mechanism in NAFTA that allowed for the grandfathering-in of state laws that contradicted the terms of NAFTA's service-sector, investment and financial services chapters.

The problem is that due to the lack of outreach and follow-through at the federal level, the mechanism was apparently never properly utilized. There have been multiple attacks on state law and state court decisions under NAFTA's Chapter 11, and no state laws are listed as exempt from the investment chapter in the NAFTA text. Only a handful of state laws are listed as exceptions to the service-sector chapter in the area of legal services. Under NAFTA rules, all state laws not explicitly excluded from NAFTA coverage are automatically subject to NAFTA authority – meaning wide swaths of state authority are jeopardized.

HOW THE RULES AFFECT STATE AUTHORITY

Opposition to NAFTA's Chapter 11 foreign investor protections and privileges by state and local officials is in part premised on the fact that these NAFTA rules contain provisions that undermine the fundamental legal and constitutional principles upon which the U.S. system of governance and law was founded.

1. Public Disputes Heard in Private Tribunals

The terms of most trade agreements are subject only to those enforcement actions taken by signatory governments against each other. In contrast, NAFTA's Chapter 11 creates an "investor-state" enforcement system that allows foreign corporations and investors to sue the U.S. government in tribunals operating outside of the U.S. court system over federal, state and local laws and regulations that they believe negatively affect investment. These cases are decided in private arbitral tribunals operating under the auspices of the United Nations and the World Bank. These arbitration institutions were designed to arbitrate private cases between contractual parties in narrow commercial disputes. Now, however, thanks to NAFTA's Chapter 11 and similar foreign investor protections in other trade pacts, these private arbitral bodies are empowered to deal with significant issues of public policy. State and local public health, environmental and land-use policies all have been successfully challenged using NAFTA's Chapter 11. Yet subfederal governments have no standing in these tribunals and must rely on the federal government to defend their interests.

2. Foreign Investors Operating in the United States are Granted Greater Rights for Compensation for Extended Category of "Takings" than U.S. Companies Under U.S. Law

NAFTA's Chapter 11 allows foreign investors to demand compensation for so-called "regulatory takings" cases over government actions not subject to such claims under U.S. domestic law. The "Takings Clause" of the Fifth Amendment to the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." In contrast, NAFTA's Chapter 11 rules and tribunals departed from these U.S. Constitutional norms in many ways, including allowing cases over the loss of expected future profits. U.S. law almost never allows compensation for government actions short of actual permanent seizure of real property – for instance to build a road – or for a regulatory action that permanently eliminates all uses and value of an entire piece of real estate. While the U.S. Supreme Court has long held that "mere diminution" in the value of property does not constitute a taking, NAFTA panels have held that "incidental interference" with the use of a property might constitute a taking. Thus, NAFTA's Chapter 11 has been criticized for creating a new, international takings standard outside of the U.S. Constitution, which grants foreign investors greater rights on U.S. soil than U.S. companies.

3. Foreign Investors Granted Extraordinary Rights to NAFTA Tribunal Re-hearings of U.S. Domestic Court Cases

A surprising development under NAFTA has been the number of domestic court decisions that have been challenged as NAFTA violations by foreign investors using NAFTA's investor-state system. A ruling in one such case, involving the challenge by Canadian funeral conglomerate Loewen of a Mississippi jury award in a private contract dispute, demonstrates that few domestic court decisions involving foreign investors with NAFTA privileges are immune from NAFTA review, not even decisions of the U.S. Supreme Court. U.S. firms, in contrast, must abide by the decisions of domestic courts. In addition, NAFTA's Chapter 11 contains no sovereign immunity shield for governments. This constitutes a radical revision of longstanding U.S. sovereign immunity protections and provides yet another example both of how foreign investors are granted greater rights than U.S. businesses operating under U.S. law and how NAFTA's foreign investor rules pose an unusual threat to governments' regulatory authority.

4. Increasing Questions Regarding the Constitutionality of Investor-State Tribunals

Increasingly, U.S. jurists and legal scholars are questioning the very constitutionality of NAFTA's investor-state foreign investor protection system. Article III of the U.S. Constitution creates an independent judiciary, separate from the legislative and executive branches of the federal government. U.S. Supreme Court Justice Sandra Day O'Connor has questioned the delegation of Article III authority to an increasing number of trade tribunals. "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power', " said Justice O'Connor.[38] Before the passage of CAFTA in 2005, the association representing state Supreme Court justices passed a resolution stating: "The question of whether the investor-state process is consistent with Article III of the U.S. Constitution raises a sufficiently serious and important issue that deserves prompt, thorough examination as the United States considers negotiating additional trade agreements with various other nations."[39] This thorough examination has yet to occur. Instead, the investor-state system is being extended to a growing number of companies and investors as the Bush administration includes this mechanism in future agreements.

5. Potential Cost to Taxpayers Could Reach the Billions

Foreign investors have succeeded five times with NAFTA Chapter 11 claims, and $35 million in public funds have been paid in compensation to foreign investors by governments. As an increasing number of cases are being filed, billions in taxpayer dollars are being sought by NAFTA firms. While the United States has been able to deflect four NAFTA Chapter 11 cases for various technical shortcomings, many more cases challenging U.S. policies are in the wings. For instance, Canadian cattlemen are demanding more than $300 million in damages because of the U.S. federal government's decision to close the border to trade in cattle and beef when mad cow disease was discovered in Canadian herds.

CONSEQUENCES FOR STATE POLICY

If a state law is judged by a NAFTA investor-state tribunal to violate NAFTA-granted foreign investor rights, instead of ordering the law to be changed, the tribunal orders payment of compensation to make up for investors' lost profits. The federal treasury – meaning U.S. taxpayers – are liable to foot the bill for the cash damages awarded by the tribunal. The federal government of Mexico already has tried to hold one local government hostage for the funds awarded in a NAFTA case. It has yet to be seen if the U.S. government will try something similar or otherwise attempt to pressure state and local governments to alter their policies to avoid similar future liability. The following cases illustrate the threat that NAFTA-style investment rules pose to state and local government measures.

Land Use: A Mexican municipal government's denial to a U.S. firm of a permit for the operation of a heavily contaminated toxic waste facility (that the U.S. firm acquired after it has been closed by the local government for cleanup) and the governor's declaration of an ecological preserve on the site were ruled to be NAFTA-illegal "expropriations" by a NAFTA tribunal. The Mexican government was ultimately ordered to pay the California-based Metalclad company $15.6 million in compensation – an enormous sum relative to Mexico's environmental protection budget.

Public Health (Tobacco): Aspects of the state tobacco settlements, which have resulted in a dramatic drop in the rate of teenage smoking in the United States, have been challenged as arbitrary and unfair by Canadian tobacco traders. Philip Morris also has threatened to bring a NAFTA investor-state suit against a proposed groundbreaking Canadian law restricting misleading claims (such as "light") made on cigarette packages. That measure has still not become law.

Mining Law: A California regulation requiring the backfilling of open-pit mines has been challenged by a Canadian mining enterprise, which plans to develop a giant open-pit cyanide gold mine in Imperial Valley, California, and which owns and operates similar mines around the world. In this instance, the U.S. federal government does not support the California law they are charged with defending.

Toxics Bans: Bans or phase-outs of toxic substances have been challenged under NAFTA's Chapter 11 three times. Canada's proposed ban on the gasoline additive MMT was challenged and Canada negotiated a settlement – reversing the policy and paying $13 million to the U.S.-based Ethyl Corporation. In a second case, California's ban on the gasoline additive MTBE was challenged by a Canadian firm, but the tribunal ruled that the firm, Methanex, which produced a component of MTBE but not the chemical mixture itself, did not have proper standing to pursue the case because it could not prove that California's ban was sufficiently "related to" the company's investments in the United States. Additionally, a challenge to Canada's phase-out of certain uses of the hazardous pesticide lindane has been initiated by a U.S. company.

SAFEGUARDING SOVEREIGNTY FROM FOREIGN INVESTOR PRIVILEGES AND INVESTOR-STATE TRIBUNALS

The investor-state suits and extensive foreign investor privileges granted in NAFTA's Chapter 11 and various agreements modeled on NAFTA have generated extraordinary levels of concern among state and local officials. During the debate surrounding the 2002 grant of Fast Track authority, dozens of groups and organizations representing state and local legislative and judicial officials weighed in demanding that Fast Track contain provisions to ensure that foreign investors are not granted "greater rights" in trade agreement investment chapters than U.S. firms have under the U.S. Constitution. These groups include: Conference of Chief Justices, National Association of Attorneys General, U.S. Conference of Mayors, National Association of Counties, National Association of Towns and Townships, National League of Cities and the National Conference of State Legislatures. The next trade agreements negotiated did contain some improvements with regard to the transparency of tribunal operations but unfortunately failed to meet state and local officials' demands – again providing foreign investors greater rights than the U.S. Constitution provides to U.S. businesses and citizens. Letters from these groups and others can be accessed at: http://www.citizen.org/trade/subfederal/inv.

For more information on trade and investment, please see Public Citizen's report, *NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005* located at: http://www.citizen.org/trade/nafta/CH__11. A Spanish translation is available at: http://www.citizen.org/cap11.

5 WHAT STATE ELECTED OFFICIALS CAN DO AT THE STATE LEVEL TO PROMOTE BETTER TRADE POLICY-MAKING

The way in which federal officials are negotiating trade agreements with limited input from states amounts to a type of back-door federal preemption. The U.S. Constitution explicitly grants the legislative branch authority to set our nation's trade policy and grants the federal executive branch authority to conduct relations with other nations. When trade agreements only covered subjects under the traditional scope of trade – setting tariff and quota levels, for instance – federal versus state authority was clear. The traditional trade pacts were federal government business. However, given there was no discussion or transparent decision to drastically expand the scope of today's international agreements to include an array of non-trade regulatory issues, the implications for state authority were also not considered.

Yet under the 10th Amendment to the U.S. Constitution, states are empowered to regulate a wide array of industries and issues. It is this "right to regulate" that is being increasingly undermined by federal trade negotiators without there ever having been a discussion or decision to radically change the federal-state balance of power. Expressing concern about this quiet but pervasive erosion of states' rights by international commercial agreements, 29 state attorneys general wrote to federal trade negotiators in 2005: "[I]t is vital to maintain the principle that the federal government may request, but not require, states to alter their regulatory regimes in areas over which the states hold constitutional authority …"[40] States must assert their constitutional sovereign rights against the trade agreements' intrusion and reestablish the important balance needed for our federalist system of governance to survive.

An important mechanism to help restore the proper balance would be a new system for federal-state consultation and cooperation over negotiation of international commercial agreements. However, such improvement will require both state-level changes and federal-level reforms, both of which are discussed in the next two sections. Nothing illustrates the need for this two-pronged approach better than the experience of Maryland's legislature when it took important state-level action to protect its sovereignty from a trade agreement's intrusion.

In December of 2003, Maryland Governor Robert Ehrlich wrote to the USTR agreeing to bind the state's procurement policies to CAFTA. He made this commitment without consulting the Maryland legislature. Yet setting the state's policy regarding procurement is clearly a legislative function. And, the strong separation of powers language included in the Maryland Constitution prohibits the encroachment by one branch of government into an area reserved for another branch. The action by Governor Ehrlich to bind Maryland to CAFTA's procurement rules clearly altered the legal rights and duties of the state in relation to the other parties to the agreement. For example, in procuring goods and services while being bound to CAFTA, Maryland would not be allowed to give preference to Maryland suppliers or contractors over suppliers or contractors from the signatory countries.

The Maryland legislature decided that it had to take action to prevent this executive branch encroachment into a legislative matter. The legislature not only voted to rescind the governor's consent to be bound to CAFTA's procurement rules, but also enacted a law mandating that only the Maryland General Assembly – not the governor – has the power to bind the state to comply with trade agreements. The governor vetoed the bill and the legislature overrode his veto. The bill became Maryland law.[41] On June 2006, Rhode Island also enacted legislation similar to the Maryland law. In a similar sequence of events, Governor

Donald Carcieri vetoed the bill and the Rhode Island legislature overrode his veto. Rhode Island became the second state to mandate that the state legislature – not the governor – has the power to bind the state to comply with trade agreements.[42]

Despite this, the USTR refused to remove Maryland from the list of states bound to CAFTA's procurement rules. Maryland legislative leaders were outraged. Maryland's congressional representative, Ben Cardin, a Ways and Means Committee member, protested to the USTR at a public hearing and demanded that Maryland's law be respected. The USTR claimed that since the agreement had already been signed it was too late to remove states. Yet the agreement was not approved by Congress, and the USTR conveniently ignored the provision in CAFTA that allows any party to adjust its commitments, withdraw and add parties bound to the procurement chapter.[43]

Only time will tell if the USTR will respect Maryland and Rhode Island's new state laws and how it will consult these state legislatures regarding future trade agreements' procurement chapters. Enforcement may require litigation, although hopefully not. However, it is clear from Maryland's experience that the best way to ensure real change and to reestablish balance between federal and state powers is to take action at *both* the state and federal levels of government. While states can develop internal procedures for ensuring that the legislature must be consulted with regard to the question of whether or not to participate in trade agreements, the only way to force the federal government to do what states want is to mandate in federal law that states can only be bound to trade pact non-trade regulatory terms with states' prior informed consent.

TAKE ACTION!

CREATE A FORMAL PROCESS TO ENSURE STATE LEGISLATORS DECIDE TRADE ISSUES

1. Create a formal mechanism requiring your governor to consult the legislature on trade issues.

Occasionally, the USTR consults governors directly about trade matters. Yet the very issues subject to such consultation, such as state procurement policy and the regulation of services and investment, are generally the prerogative of the legislative branch. One option for states is to consider legislation requiring governors to notify the legislature about such trade-related inquiries from the federal government and outline an appropriate process for legislatures to consider such requests. Annex I of this *Guide* contains two model bills for consideration that achieve this end. One model is from the Center for Policy Alternatives, which requires state SPOCs to share all USTR-provided information with key legislators and clarifies that governors can only grant consent to bind a state to the "procurement, services, or investment rules of an international trade agreement only if the General Assembly enacts legislation that explicitly authorizes the governor to bind the State." Also included in Annex I is the AFL-CIO model legislation that accomplishes the same task and adds additional elements which would establish a state Office of Trade Enforcement as well as a system for developing state-specific trade impact statements.

2. Establish an Office of Trade Enforcement.

This state-level office would be designated to monitor trade negotiations and disputes affecting the state economy, as well as analyze pending trade agreements and provide a Trade Impact Report to the governor, the legislature and the public. The office could require the Trade Impact Report to include an audit of the amount of public contract work being performed overseas; an audit of government goods being procured from overseas; a study of trade's effects on state employment levels, tax revenues and retraining and adjustment costs; and an analysis of the constraints that trade rules place on state regulatory authority, including but not limited to the state's ability to preserve the environment, protect public health and safety and workers' rights and provide high-quality public services.

3. Spot your SPOC.

The USTR has developed a group of state contacts who have been selected to participate in a state consultative mechanism. Each state has a "single point of contact" or SPOC, usually someone in the state Department of Commerce. Find out who your state's SPOC is. Find out who they speak to in the federal government and how often. Is your SPOC an appropriate person for the job? Do they have the necessary expertise? Or should the job be transferred to another office or branch of government? Check out the model bill in Annex I that shows how you can legislate to create a formal consultative mechanism for the SPOC to report systematically to the state legislature on all USTR communications.

4. Consider a Citizen's Commission on Globalization.

Follow the lead of Maine and others and create a special committee comprised of legislators and citizens that holds public hearings on trade issues, calls upon USTR officials to testify and meets on a regular basis to analyze new developments in trade and investment agreements and their potential impact on the state. Don't wait until a hard-fought state regulation is implicated in a NAFTA or WTO case – get ahead of the curve.

5. Join the trade debate at NCSL.

Get appointed to NCSL's Economic Development, Trade and Cultural Affairs Committee. Make sure your views are represented by the committee's policy positions. NCSL's position on trade has been developing over time. Ask NCSL to beef up lobby efforts to represent state legislators' concerns on trade issues in the U.S. Capitol. Contribute ideas for panel topics and speakers at future meetings to make sure your concerns are raised.

6. Defy the trade rules.

If you are told that a legislative proposal conflicts with U.S. commitments under the WTO or NAFTA, do not succumb to the chill! Continue to do business as usual at the state capitol. If U.S. trade negotiators have trampled on state law and prerogatives by agreeing to bind state governments to international commercial rules not agreed to by the affected jurisdictions, then that is the federal government's problem. This problem must be resolved by changing the trade rules and how U.S. international commercial policy is made – not by changing state law. Even if a law that corporate or federal government lobbyists are threatening as WTO or NAFTA-illegal *is challenged*, it takes several years for the case to be resolved – giving you the opportunity to launch a public-relations and political campaign in support of your good initiative and demand change to NAFTA and WTO rules.

6 WHAT STATE ELECTED OFFICIALS CAN DO AT THE FEDERAL LEVEL TO PROMOTE BETTER TRADE POLICY-MAKING

Even if state legislators enact excellent mechanisms to ensure requests from the federal government are decided by a formal legislative process, unless the USTR *asks* states for their consent, the same international preemption problem will continue. The only way to ensure that the USTR respects state authority is for the USTR to be legally required to consult states prior to binding them to comply with the regulatory provisions of trade agreements. States can play a critical role in demanding such new procedures at the federal level to require appropriate state consultation and states' prior informed consent.

To understand how to restore respect for state authority and regulatory space, we need to understand the way trade negotiations are conducted today. The trade agreements that jeopardize treasured state policies and constrain state sovereignty were negotiated and propelled through Congress using an extraordinary process called Fast Track. Article I-8 of the U.S. Constitution gives Congress exclusive authority "to regulate commerce with foreign nations." The Constitution also grants the executive branch responsibility over relations with foreign sovereigns. Thus, the negotiation and entry into international commercial agreements requires a shared authority between the branches.

This design is one of many checks and balances built into the Constitution to avoid one branch of government from having absolute control over a vital policy area. Historical documents from the time of the Constitution's framing show that granting Congress the authority to regulate foreign commerce was an intentional decision to move away from the European model, which gave control of such matters to the "king," and instead to put that power in the body "closest to the people." The Fast Track trade negotiating mechanism delegates away to the executive branch Congress' constitutional trade authority and more. Fast Track's broad delegation of legislative authority sweeps away vital checks and balances.

FAST TRACK

By granting a president Fast Track authority, Congress delegates, in one lump sum, numerous rights and authorities:

Under Fast Track, the executive branch gets to choose the countries with which the United States will negotiate trade agreements. If U.S. trade negotiators simply give Congress 90 days' notice of intent to start negotiations, they can select a country and launch talks and Congress has no power to veto the decision.

Fast Track delegates Congress' constitutional authority *to set the substantive rules* for trade. Congress has listed "negotiating objectives" (instructions to federal trade negotiators that they are supposed to follow when crafting trade agreements) in its Fast Track bills, but these are not mandatory or enforceable.

Fast Track allows the executive branch to sign and *enter into* an agreement *before* Congress votes on it as long as Congress is given 90 days' written notice that the executive branch intends to sign a trade deal. This process cuts out any meaningful role for states.

Fast Track empowers the executive branch to write implementing legislation and circumvent the congressional committee process, meaning that under Fast Track, not only is Congress stuck with pre-signed trade agreements, but there is no opportunity even for Congress to tweak the agreement's "implementing legislation" – legislation that could require the change of federal and state law to conform them to a trade agreement's terms.

Congress' role is limited to a "yes" or "no" vote with absolutely no amendments, and only 20 hours of debate are allowed. Effectively, Fast Track pre-sets the floor procedures Congress is allowed to use during its consideration of final trade deals – even before negotiations on a deal have started. Congress must vote on whatever the administration brings back (agreement and implementing legislation) within 90 days. The normal Senate procedures that require super-majorities to close down debate are eliminated.

Fast Track established "trade advisory committees" through which approximately 500 business-sector advisors have privileged access to documents and negotiators. If it seems like U.S. trade policy is designed by a few special interests in the business world, it's because that is exactly how it is done! Fewer than two dozen labor and environmental advisors are included on a few of these committees, but many have only business interests deciding what the "U.S." position should be. An advisory committee of state and local officials (IGPAC) is swimming against a powerful tide of industry giants and administration campaign contributors.

Fast Track is not synonymous with "trade authority." Indeed, because Fast Track had gotten such a bad name, it was renamed "Trade Promotion Authority" or "TPA" during the last Fast Track debate in 2002. Call it what you will, the system now known as Fast Track is just the proper name of *one version* of how Congress and the executive branch can coordinate their constitutional roles (Congress sets the policy – executive branch talks to foreign sovereigns) in trade negotiations. This sharing has been arranged in different ways over the past 230 years of our nation – in the past always with Congress having the leading role given its constitutional authority is the substantive one. What is clear is that the original Fast Track is now extremely outdated relative to the realities of the scope and complexity of today's international commercial agreements which cover so may areas of domestic policy. There is no reason why the failed Fast Track system cannot be replaced with a more democratic and accountable trade negotiating mechanism. In fact, if we are ever to change the substance of U.S. policy, we must change the process.

On June 30, 2007, Congress' current grant of "Fast Track" trade authority will expire. **The sunset of Fast Track provides a once-in-a-decade opportunity to discuss improving *how* U.S. trade policy is created to ensure that it benefits the most people.**

BUILDING BLOCKS FOR A NEW MECHANISM

Below we include for discussion some basic principles or building blocks for designing a new trade negotiating system that can restore our democracy's fundamental principle of checks and balances and our unique system of federalism to deliver a trade policy that works for the majority.

Set binding goals. The terms of future trade agreements must set new rules for the global economy. This will only happen if in those instances when Congress delegates its trade authority, Congress sets mandatory goals on what must and must not be contained in trade pacts. These goals must include states' right to prior informed consent before being bound to meet pacts' investment, procurement, service sector and other rules limiting their non-trade regulatory authority. These binding goals must also mandate that U.S. trade deals require corporations to meet the many existing globally-agreed rules on labor, environment and human rights. Without mandatory goals that impose a floor of decency in business conduct required to enjoy trade benefits, we will continue to have race-to-the-bottom trade agreements.

Declassify negotiating documents so more state leaders and other interested parties can examine them. Currently, states can be bound to trade agreement obligations set forth in texts that governors, attorneys general, state legislators and others are forbidden to even see while under negotiation. Indeed even IGPAC members cannot share trade negotiating documents with other state officials under threat of criminal prosecution and are restricted from even *verbally* discussing IGPAC business. This inappropriate classifying of government documents must cease and a mechanism should be developed to allow trade negotiating documents to be made available to elected state officials and the public before the agreement is signed, so that all interested parties – not just industry advisors – can assess the contents.

Create a meaningful state consultation mechanism in which every state is represented, in contrast to IGPAC, where members are selected and serve at the pleasure of the president. As discussed above, there is an official federal trade advisory committee for state and local officials. The president selects who serves on this committee and appoints representatives who serve at his pleasure. Not all states are represented. In addition, this committee has little power compared to the industry-dominated advisory committees, and operates under significant constraints that compromise their ability to consult a variety of elected representatives and other relevant state officials and thus to give informed feedback to federal negotiators. What is needed is a meaningful mechanism to garner advice and consent from *all 50* states before a trade agreement is finalized. Canada and other nations have developed mechanisms for allowing their subfederal authorities to opt-in and opt-out of trade agreement terms that impact their subfederal regulatory authority. There is no reason why such a system could not be created here.

TAKE ACTION!

STATES MUST WEIGH IN TO DEMAND A FEDERAL PROCESS FOR NEGOTIATING TRADE AGREEMENTS THAT RESPECTS STATE REGULATORY AUTHORITY

In 2007, state legislatures can play a powerful role in generating a demand for the replacement of the outdated, failed Fast Track mechanism. Annex II of this booklet contains a model state resolution which calls for "a more democratic model for negotiating the terms of trade that enshrines the principles of federalism and state sovereignty" and requires "an explicit mechanism for ensuring the prior informed consent of state legislatures before they are bound to the terms of any trade agreement that impacts their regulatory authority." Legislators can also join Public Citizen's Working Group on Federal-State Consultation and take part in creating an entirely new trade negotiating mechanism, one that respects state sovereignty and the principles of federalism. To join, contact: Saerom Park, Public Citizen's State and Local Program Coordinator, at 202-454-5127 or spark@citizen.org.

ANNEX I

A. CENTER FOR POLICY ALTERNATIVES MODEL LEGISLATION

SAFEGUARDING FEDERALISM IN TRADE ACT

Summary: The Safeguarding Federalism in Trade Act ensures that only the legislature can bind the state to international trade agreements and declares the legislature's opposition to "Fast Track" trade authority.

SECTION 1. SHORT TITLE

This Act shall be called the "Safeguarding Federalism in Trade Act."

SECTION 2. FINDINGS AND PURPOSE

(A) FINDINGS—The legislature finds that:

1. Today's international trade agreements have impacts which extend significantly beyond the bounds of traditional trade matters such as tariffs and quotas, and instead grant foreign investors and service providers certain rights and privileges regarding operations within a state's territory, subject various state non-trade related laws to challenge as "barriers to trade" in the binding dispute resolution bodies that accompany the pacts, and place limits on the future policy options of state legislatures.
2. NAFTA, for example, grants foreign firms new rights and privileges for operating within a state that exceed those granted to U.S. businesses under state and federal law. NAFTA has already generated "regulatory takings" cases against state and local land use decisions, state environmental and public health policies, adverse state court rulings, and state and local contracts that would not have been possible in U.S. courts.
3. When states agree to be bound by government procurement provisions contained in trade agreements such as WTO, NAFTA and various NAFTA-expansion agreements such as CAFTA, common economic development and environmental policies, such as buy-local laws, policies to prevent offshoring of state jobs, as well as recycled content laws could be subject to challenge as "barriers to trade" as they contradict the obligations in the trade agreements.
4. Today's trade agreements also curtail state regulatory authority by placing constraints on future policy options. The WTO service-sector agreement undermines state efforts to expand healthcare coverage and rein in healthcare costs, and places constraints on state and local land use planning. New negotiations in the services area will have additional implications for state regulation of energy, higher education, professional licensing, and more.
5. Despite the indisputable fact that today's international trade agreements have far-reaching impacts on state and local law and policy, federal government trade negotiators have failed to provide state legislatures with necessary information and documents regarding provisions directly affecting state jurisdiction, have failed to consult with state legislatures when seeking the consent of states to be bound to trade agreement procurement obligations, and have sought neither governor nor legislature consent before binding states to comply with numerous other trade agreement provisions.
6. The current encroachment on state regulatory authority by international trade agreements has been exacerbated because U.S. trade policy is being formulated and implemented under "Fast Track" Trade Authority procedures. Fast Track eliminates any meaningful role for states and limits Congress' role to a yes or no vote with no amendments after negotiations are completed and a final agreement is signed. When Fast Track sunsets in 2007, it should be replaced with a more democratic model for negotiating trade agreements, one which ensures that the prior informed consent of states is secured before states are bound to the regulatory terms of any trade agreement.

(B) PURPOSE—This law is enacted to protect the state's sovereignty; the state's ability to safeguard the health, safety and welfare of its citizens; and the Founders' system of federalism in the current era of globalization.

SECTION 3. INTERNATIONAL TRADE AGREEMENTS

After section XXX, the following new section XXX shall be inserted:

(A) The individual or office in the state government that has been designated as the "State Point of Contact" for interactions with the Office of the United States Trade Representative (USTR) shall transmit copies of all information received from and sent to the U.S. government to the House Committees on [Health and Safety, Environment and Labor] and the Senate Committee on [Health and Safety, Environment and Labor].

(B) Except as provided in subsection (C) of this section, [State] officials, including the governor, may not:

1. Bind the state to the terms of an international trade agreement or otherwise commit the state to comply with the non-tariff terms of an international trade agreement; or

2. Give consent to the federal government to bind the state to the terms of an international trade agreement or otherwise indicate that the state will comply with the non-tariff terms of an international trade agreement.

(C) The governor may bind the state or give consent to the federal government to bind the state to the government procurement, services or investment rules of an international trade agreement only if the legislature enacts legislation that explicitly authorizes the governor to do so.

SECTION 4. COMMUNICATIONS TO THE FEDERAL GOVERNMENT

(A) It is the sense of this legislature that the Congress of the United States should replace the failed "Fast Track" system of trade negotiation with a new, more democratic and inclusive model, and pass binding legislation instructing the USTR to fully and formally consult individual state legislatures regarding procurement, services, investment or any other trade agreement rules that impact state laws or authority before negotiations begin and as they develop, and to seek informed consent from state legislatures prior to binding states to conform their laws to the regulatory terms of international commercial agreements.

(B) Not later than October 1, 2007, the Attorney General shall notify the USTR of the enactment of this legislation.

SECTION 5. EFFECTIVE DATE

This Act shall take effect on [July 1, 2007].

ANNEX I
B. AFL-CIO NATIONAL LABOR CAUCUS MODEL LEGISLATION

JOBS, TRADE AND DEMOCRACY ACT

Purpose:

The model bill ensures that state citizens and the state legislators they elect have access to information on the impact of international trade policy on the state economy; it also clearly establishes the role of the state legislature in setting trade policy for the state. It also helps workers and businesses that have been impacted by trade. The model bill:

- Requires the consent of the state legislature in order to bind the state to international trade agreements, and establishes State Legislative Points of Contact to serve as official liaisons with the Governor's office and the Federal Government on trade policy.
- Establishes an Office of Trade Enforcement to:
    - Monitor trade negotiations and disputes;
    - Analyze the potential impact of proposed international trade agreements on the state;
    - Assess impact of trade on the state economy and make trade policy recommendations;
    - Assist local workers, firms and communities on trade matters.
- Requires the Office of Trade Enforcement to provide annual reports to the Governor and Legislature on the impacts of trade on the state, and requires the Governor and Legislature to respond to policy recommendations for handling trade's impacts on the state.
- Establishes a Citizens' Commission on Globalization appointed by the Governor and Legislature to assess legal and economic impacts of trade agreements, hold hearings and make recommendations to the governor, legislature, congressional delegation and U.S trade negotiators.

A Bill for an Act

I. This Act may be cited as the "Jobs, Trade and Democracy Act."

II. Findings

The Legislative Assembly finds that:

A. States have traditionally enjoyed a large degree of autonomy to set their own procurement policies under the U.S. system of federalism.

B. Recent international trade agreements threaten to erode this traditional state autonomy by requiring state governments to accord foreign suppliers of goods and services treatment no less favorable than that afforded to in-state suppliers. In addition, the agreements stipulate that state contract specifications must not burden trade any more than necessary, and limit supplier qualifications to those that are "essential" to the performance of the contract.

C. The Governor – not the state legislature – chose to bind [State X] to the terms of various international trade agreements upon the request of the United States Trade Representative (USTR).

D. State legislators have an important role to play in preserving state authority over procurement policy. These critical decisions should be made only with the involvement of the state legislatures, and only after the public has been adequately informed and has openly debated the issues involved.

E. It is critical for citizens, state agencies, the state legislature, and other elected officials in the state to have access to information about how trade impacts state legislative authority, the state's economy, and existing state laws in order to participate in an informed debate about international trade issues.

F. The current encroachment on State regulatory authority by international commercial and trade agreements has been exacerbated because U.S. trade policy is being formulated and implemented under "Fast Track" Trade Authority procedures. The current grant of Fast Track is scheduled to sunset in July 2007.

G. Fast Track, first established in 1974 by then-President Richard Nixon, is outdated and inappropriate, given the diverse range of non-trade issues now impacted by "trade" agreements. These agreements broadly affect federal and state regulatory authority over non-trade areas, such as public health and procurement policies. Fast Track should be replaced with a more democratic model for negotiating and implementing trade agreements, so that elected legislators and ordinary citizens can have a meaningful voice in determining the content of trade policies.

III. Role of the State Legislature in Trade Policy

A. It shall be the policy of the State of (X) that approval for the state to be bound by any trade agreement requires the consent of the State Legislature.

B. State Legislative Points of Contact – Two State Legislative Points of Contact (SLPCs) will be appointed at the beginning of each legislative session; one by the [Majority and Minority leaders] in the Senate, and one by the [Majority and Minority leaders] of the [House/Assembly]. The legislature declares that the purposes of the SLPCs are to:

1) Serve as the State's official liaisons with the federal government and as the legislature's liaisons with the Governor on trade-related matters;
2) Serve as the designated recipients of federal requests for consent or consultation regarding investment, procurement, services or other provisions of international trade agreements which impinge on State law or regulatory authority reserved to the States;
3) Transmit information regarding federal consultation with states to the Office of the Governor, the Attorney General, all appropriate legislative committees, and the Office of Trade Enforcement;
4) Issue a formal request to the Office of Trade Enforcement and other appropriate state agencies to provide analysis of all proposed trade agreements' impact on state legislative authority and the economy of the state;
5) Inform all members of the legislature on a regular basis about ongoing trade negotiations and dispute settlement proceedings with implications for the State more generally;
6) Communicate the interests and concerns of the legislature to the United States Trade Representative (USTR) regarding ongoing and proposed trade negotiations; and
7) Notify the USTR of the outcome of any legislative action.

C. The following actions are required before the State of [X] shall consent to the terms of a trade agreement:

1) In a timely fashion, concurrent with trade negotiations, the Governor, Majority or Minority Leader, or ranking member of the appropriate committee of jurisdiction may submit to the legislature, on a day on which both Houses are in session, a copy of the final legal text of the agreement, together with –
    a) A report by the Office of Trade Enforcement, which shall include an analysis of how the agreement of the State of [X] to the specific provisions of the agreement will change or affect existing state law;
    b) A statement of any administrative action proposed to implement these trade agreement provisions in the State of [X]; and
    c) A draft of legislation authorizing the State to sign on to the specific listed provisions of the agreement in question.
2) A public hearing – with adequate public notice – shall occur before the legislature votes on the bill; and
3) The bill authorizing the State of [X] to sign on to specific listed provisions of an agreement is enacted into law.

D. Sense of the Legislature: It is the sense of this legislature that the Congress of the United States should pass legislation instructing the USTR to fully and formally consult individual State legislatures regarding procurement, services, investment, or any other trade agreement rules that impact State laws or authority before negotiations begin and as they develop, and to seek consent from State legislatures in addition to Governors prior to binding States to conform their laws to the terms of international commercial agreements. Such legislation is necessary to ensure the prior informed consent of the State of [X] with regard to future international trade and investment agreements.

E. Notice to USTR – The State Attorney General shall notify the USTR of the Policies set forth in section D in writing no later than [X date], and shall provide copies of such notice to the President of the Senate, Speaker of the House of Representatives, the Governor and State of [X]'s Congressional delegation.

IV. Office of Trade Enforcement and Citizens' Commission on Globalization

A. The state shall establish an Office of Trade Enforcement and a Citizen's Commission on Globalization.

B. The Office of Trade Enforcement is directed to:

1) Monitor trade negotiations and disputes impacting the state economy.
2) Analyze pending trade agreements the state is considering signing and provide the analysis to the Governor, the Legislature, the Citizens' Commission and the public.
3) Provide technical assistance to workers and firms impacted by unfair trade practices.
4) Provide a Trade Impact Report to the Governor, the Legislature, the Citizens' Commission and the public no later than [X date] and annually thereafter.
5) Provide additional research and analysis as requested by the Governor, the Legislature, and the Citizens' Commission.

C. Each annual Trade Impact Report required under section (B)(4) above shall include:

1) An audit of the amount of public contract work being performed overseas;
2) An audit of government goods being procured from overseas;
3) A study of trade's impacts on state and local employment levels, tax revenues, and retraining and adjustment costs;
4) An analysis of the constraints trade rules place on state regulatory authority, including but not limited to the state's ability to preserve the environment, protect public health and safety and workers' rights, and provide high-quality public services; and
5) Findings and recommendations of specific actions the state should take in response to the impacts of trade on the state identified above. Such actions may include, but shall not be limited to:
    a) Revocation of the state's consent to be bound by the procurement rules of international trade agreements;
    b) Prohibition of offshore performance of state contract work and preferences for domestic content in state purchasing;
    c) State support for cases brought under federal trade laws by residents of the state;
    d) State advocacy for reform of trade agreements and trade laws at the federal level; and
    e) Implementation of a high-road growth strategy formulated with business, labor and community participation. Such a strategy may include, but not be limited to:
        (i) More effective early warning and layoff aversion measures;
        (ii) Increased assistance and adjustment programs for displaced workers and trade-impacted communities;
        (iii) Stronger standards and accountability for recipients of state subsidies and incentives;
        (iv) Investments in workforce training and development;
        (v) Investments in technology and infrastructure; and
        (vi) Increased access to capital for local producers.

D. Within 30 days of receipt of the annual Trade Impact Report:

1) The Governor shall review the report and issue a public statement explaining which of the report's recomendations for specific action under section (IV) (C) (5) the Governor will act upon in the next 30 days, whether through executive action or proposed legislation.
2) The Legislature shall review the report, hold public hearings on the report's recommendations for specific action under section (IV) (C) (5), and introduce legislation to enact those recommendations accepted by the Legislature.

E. A Citizens' Commission on Globalization shall be appointed by the (Governor and/or Legislature).

1) The following stakeholders shall be equally represented on the Commission: employers, labor organizations, community organizations, and government.

2) The Commission shall:

a) Assess the legal and economic impacts of trade agreements;

b) Provide input on the annual Trade Impact Report;

c) Hold public hearings on the impacts of trade on the state and communities, as well as on the Annual Trade Impact Report; and

d) Make policy recommendations to the Governor, State Legislature, State Congressional delegation and U.S. trade negotiators.

ANNEX II
MODEL FAST TRACK RESOLUTION FOR STATE CONSIDERATION

SAFEGUARDING FEDERALISM IN TRADE RESOLUTION

To the Honorable George W. Bush, President of the United States, and to the President of the Senate and the Speaker of the House of Representatives, and to the Senate and House of Representatives of the United States, in Congress assembled, and to the United States Trade Representative, Ambassador Susan Schwab.

We, the [Senate and House of Representatives of the State of XXX], in legislative session assembled, respectfully represent and petition as follows:

a) Whereas, democratic, accountable governance in the States generally, and specifically the authority granted to the legislative branch by [XXX]'s Constitution, is being undermined by international commercial and trade rules enforced by the World Trade Organization (WTO) and established by the North American Free Trade Agreement (NAFTA) and is further threatened by similar provisions in an array of pending trade agreements;

b) Whereas, today's "trade" agreements have impacts that extend significantly beyond the bounds of traditional trade matters such as tariffs and quotas and instead grant foreign investors and service providers certain rights and privileges regarding acquisition of land and facilities and regarding operations within a State's territory, subject State laws to challenge as "non-tariff barriers to trade" in the binding dispute resolution bodies that accompany the pacts, and place limits on the future policy options of State legislatures;

c) Whereas, NAFTA and other U.S. free trade agreements grant foreign firms new rights and privileges for operating within a State that exceed those granted to U.S. businesses under State and federal law;

d) Whereas, NAFTA already has generated "regulatory takings" cases against State and local land-use decisions, State environmental and public health policies, adverse State court rulings, and State and local contracts that would not have been possible in U.S. courts;

e) Whereas, when States are bound to comply with government procurement provisions contained in trade agreements, common economic development and environmental policies – such as buy-local laws, prevailing wage laws, policies to prevent offshoring of State jobs as well as recycled content laws – could be subject to challenged as violating the obligations in the trade agreements;

f) Whereas, recent trade agreements curtail State regulatory authority by placing constraints on future policy options;

g) Whereas, the WTO General Agreement on Trade in Services (GATS) could undermine State efforts to expand health care coverage and rein in health care costs, and places constraints on State and local land use planning and gambling policy;

h) Whereas, new General Agreement on Trade in Services (GATS) negotiations could impose additional constraints on State regulation of energy, higher education, professional licensing and more;

(i) Whereas, despite the indisputable fact that international trade agreements have a far-reaching impact on State and local laws, federal government trade negotiators have failed to respect States' rights to prior informed consent before binding States to conform State law and authority to trade agreement requirements and have refused even to copy State legislatures on key correspondence;

(j) Whereas, the current encroachment on State regulatory authority by international commercial and trade agreements has occurred in no small part because U.S. trade policy is being formulated and implemented under the Fast Track Trade Authority procedure;

(k) Whereas, Fast Track eliminates vital checks and balances established in the U.S. Constitution by broadly delegating Congress' exclusive constitutional authority to set the terms of trade over to the executive branch such that the executive branch is empowered to negotiate broad-ranging trade agreements and to sign them prior to Congress voting on the agreements;

(l) Whereas, the ability of the executive branch to sign trade agreements prior to Congress' vote of approval means executive branch negotiators are able to ignore congressional negotiating objectives or States' demands and neither Congress nor the State have any means to enforce any decision regarding what provisions must be contained in every U.S. trade agreement and what provisions may not be included in any U.S. trade agreement;

(m) Whereas, federal trade negotiators have ignored and disrespected States' demands regarding whether or not States agree to be bound to certain non-tariff trade agreement provisions;

(n) Whereas, Fast Track also circumvents normal congressional review and amendment committee procedures, limits debate to 20 hours total and forbids any floor amendments to the implementing legislation that is presented to Congress to conform hundreds of U.S. laws to trade agreement obligations and to incorporate the actual trade agreement itself into U.S. federal law which preempts State law;

(o) Whereas, Fast Track Trade Authority is not necessary for negotiating trade agreements as demonstrated by the existence of scores of trade agreements, including major pacts, implemented in the past thirty years without use of Fast Track;

(p) Whereas, Fast Track, which was established in 1974 by then-President Richard Nixon when trade agreements were limited to traditional matters such as tariffs and quotas is now woefully outdated and inappropriate given the diverse range of non-trade issues now included in "trade" agreement that broadly affect federal and State non-trade regulatory authority;

(q) Whereas, the current grant of Fast Track expires in June 2007;

(r) NOW, THEREFORE, BE IT RESOLVED, that the State of [XXX] respectfully requests that the U.S. Congress create a replacement for the outdated Fast Track system so that U.S. trade agreements are developed and implemented using a more democratic, inclusive mechanism that enshrines the principles of federalism and State sovereignty;

(s) BE IT FURTHER RESOLVED, that this new process for developing and implementing trade agreements include an explicit mechanism for ensuring the **prior informed consent** of State legislatures before States are bound to the non-tariff terms of any trade agreement that affects State regulatory authority so as to ensure that the United States Trade Representative respects the decisions made by States;

(t) BE IT FURTHER RESOLVED, that copies of this [Memorial] be immediately transmitted to the Honorable George W. Bush, President of the United States, Ambassador Susan Schwab, United States Trade Representative, the President of the United States Senate, the Speaker of the House of Representatives, and each member of Congress from the State of [XXX].

ANNEX III

STATES BOUND TO INTERNATIONAL TRADE AGREEMENT GOVERNMENT PROCUREMENT PROVISIONS

	WTO AGP	U.S.-Singapore FTA	U.S.-Chile FTA	U.S.-Australia FTA	U.S.-Morocco FTA	CAFTA	U.S.-Peru, Colombia, Panama FTAs*	U.S.-Ecuador FTA**
Alabama								
Alaska								
Arizona	X	X	X					
Arkansas	X	X	X	X	X	X	X	X
California	X	X	X	X				
Colorado	X	X	X	X	X	X	X	X
Connecticut	X	X	X	X	X	X		
Delaware	X	X	X	X	X	X		
Florida	X	X	X	X	X	X	X	X
Georgia				X				
Hawaii	X	X	X	X	X	X		
Idaho	X	X	X	X	X	X		
Illinois	X	X	X	X			X	X
Indiana								
Iowa	X	X	X					
Kansas	X	X	X	X	X			
Kentucky	X	X	X	X	X	X		
Louisiana	X	X	X	X	X	X		
Maine	X	X	X	X				
Maryland	X	X	X	X	X	O		
Massachusetts	X	X	X					
Michigan	X	X	X					
Minnesota	X	X	X					
Mississippi	X	X	X	X	X	X	X	X
Missouri	X	X	X					
Montana	X	X	X					
Nebraska	X	X	X	X	X	X		
Nevada								
New Hampshire	X	X	X	X	X	O		
New Jersey								

	WTO AGP	U.S.-Singapore FTA	U.S.-Chile FTA	U.S.-Australia FTA	U.S.-Morocco FTA	CAFTA	U.S.-Peru, Colombia, Panama FTAs*	U.S.-Ecuador FTA**
New Mexico								
New York	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
North Carolina								
North Dakota								
Ohio								
Oklahoma	**X**	**X**	**X**	**X**				
Oregon	**X**	**X**	**X**	**X**	**X**	**O**		
Pennsylvania	**X**	**X**	**X**	**X**				
Rhode Island	**X**	**X**	**X**	**X**	**X**	**X**		
South Carolina								
South Dakota	**X**	**X**	**X**	**X**	**X**	**X**		
Tennessee	**X**	**X**	**X**	**X**				
Texas	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
Utah	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
Vermont	**X**	**X**	**X**	**X**	**X**	**X**		
Virginia								
Washington	**X**	**X**	**X**	**X**	**X**	**X**		
West Virginia								
Wisconsin	**X**	**X**	**X**					
Wyoming	**X**	**X**	**X**	**X**	**X**	**X**		

X= Bound to government procurement rules.
O= Bound to government procurement rules despite state request to be withdrawn.

*The U.S.-Peru and U.S.-Colombia Free Trade Agreements have been negotiated and have been signed by the respective executive branches. However, these agreements have not yet been ratified by the U.S. Congress. Some in Congress are asking the U.S. Trade Representative to re-negotiate portions of the trade agreements as a condition for ratification. If the agreements are re-opened and re-negotiated, the list of states could be subject to change. The information regarding states listed as bound to these two pending agreements is based on letters from governors and other state officials obtained through a Freedom of Information Act request. Letters are on file at Public Citizen and available at: http://www.citizen.org/trade/subfederal/states/.

**A U.S.-Ecuador Free Trade Agreement has not been signed, and thus the list of states is subject to change. The information regarding states listed as bound to these two proposed trade agreements is based on letters from governors and other state officials obtained through a Freedom of Information Act request. Letters are on file at Public Citizen and available at: http://www.citizen.org/trade/subfederal/states/.

ENDNOTES

[1] For instance, 60 percent of Americans say trade is bad for creating jobs in the United States, 72 percent feel that the loss of jobs to other countries has a negative impact on the United States, results from *The United States and the Rise of China and India, Results of a 2006 Multination Survey of Public Opinion*, The Chicago Council on Global Affairs in partnership with Asia Society and in association with East Asia Institute and Lowy Institute for International Policy, 2006. Additionally, 53 percent of American respondents think that, on the whole, the United States has been a loser as a result of NAFTA, results of the Ipsos-Reid poll for the Woodrow Wilson International Center for Scholars and Canada Institute on North American Issues cited in "Canadians, Americans Feel Losers in NAFTA," *Angus Reid Global Monitor*, Oct. 9, 2006. Global competition and the off-shoring of jobs was the top concern of Americans during the 2006 elections, no less important statistically than the Iraq War, results of the Greenberg Quinlan Rosner Research poll cited in "Outsourcing of Jobs is Top Concern in U.S.," *Angus Reid Global Scan*, March 22, 2006. 87 percent of voters were concerned about offshoring and 81 percent gave the government a C, D or F in its handling of the issue, results of a poll cited in "Confidence in U.S. Foreign Policy Index 2," *Public Agenda*, Winter 2006.
[2] Bureau of Labor Statistics Current Employment Survey, accessed on Sep. 29, 2006.
[3] Alan S. Blinder, "Off-shoring: The Next Industrial Revolution?" *Foreign Affairs*, March/April 2006.
[4] Thus far, the U.S. monthly agricultural trade balance has been in deficit in two months of 2006 – a rare occurrence.
[5] Since 1959, the United States has maintained a positive annual agricultural trade balance. But this balance is trending downwards. Since 1979, there have only been 10 months were the monthly trade balance was negative – eight of these were in the past three calendar years. S*ee* U.S. Department of Agriculture's Economic Research Services Oct. 2006 trade balance update.
[6] Edward T. Hayes, "A Comparative Analysis of the Regulation of State and Provincial Governments in NAFTA and GATT/WTO," 5 Chi. J. Int'l L. 605, 607, Winter 2005.
[7] Michelle Sager, *One Voice or Many– Federalism and International Trade*, (New York: LFB Scholarly Publishing LLC, 2002), at 94.
[8] *See* Letter to U.S. Trade Representative Rob Portman from Attorney General Mark Shurtleff and 28 other state attorneys general, May 31, 2005, available at: http://www.citizen.org/documents/29AGs_GATS_May2005.pdf.
[9] General Agreement on Trade in Services, Article 1-3.
[10] Agreement Establishing the World Trade Organization, Article XVI-4.
[11] It also appears that rather than engage in enormously costly litigation, WTO nations have preferred to continue their negotiating efforts to bind more and more aspects of state law to the terms of the trade agreements. The EU, for instance, continually targets U.S. state law in the context of the on-going WTO service negotiations. The EU wants to eliminate state oversight of the insurance industry to facilitate the entry of insurance firms who could then only apply for one national license to practice. The EU would also like to see an end to state oversight of alcohol, as they perceive state restrictions on alcohol, especially state stores, as "barriers to trade" in alcohol distribution services.
[12] For more information on the Burma case, please visit: http://www.citizen.org/trade/issues/burma.
[13] For more information on the Antigua Internet Gambling case, please visit: http://www.citizen.org/documents/CCPA_Gambling_Brief.pdf.
[14] *See* General Agreement on Tariffs and Trade Panel Report, "United States – Measures Affecting Alcohol and Malt Beverages" DS23/R-39s/206, Feb. 7, 1992, available at: http://www.worldtradelaw.net/reports/gattpanels/usmaltbeverages.pdf.
[15] Office of the United States Trade Representative, "State Government and Free Trade Agreements: A New Sub-Federal Reciprocity Approach That Preserves State Sovereignty and Provides Direct Benefits to States," Feb. 24, 2005, available at: http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file46_7283.pdf.
[16] For example, the state of Maryland, in agreeing to be bound by the WTO's procurement agreement, requested that laws giving preferences for recycled products and selective purchasing laws targeting South Africa and Namibia, among other policies, be listed as *exceptions* to the state's commitment because they violated the clear terms of the agreement. No such exceptions were listed in the WTO procurement agreement's text.
[17] *See* Letter to Ambassador Robert Zoellick from Washington Governor Gary Locke, June 17, 2004, and Letter to Governor Gary Locke from Ambassador Robert Zoellick, Aug. 13, 2004, available at: http://www.citizen.org/trade/subfederal/states/articles.cfm?ID=11548.
[18] *See* Letter to Ambassador Robert Zoellick from National Conference of State Legislatures, Jan. 19, 2005, available at: http://www.citizen.org/documents/NCSL_Procurement_Letter_0105.pdf.
[19] IGPAC was created by a 1984 addition to the Trade Act of 1974, 19 U.S.C. §2114c(2)(A)(ii), for the purpose of consultations on matters affecting the regulatory authority and procurement of nonfederal governments.

[20] Congress first established the private-sector trade advisory committee system as part of the1974 Trade Act that also established Fast Track and has modified the system a number of times since. It is the primary mechanism by which the USTR consults U.S. exporting businesses on trade. Currently, the system encompasses five policy advisory committees; six technical advisory committees on agriculture issues; and 16 industry advisory committees. While a separate federal law, the Federal Advisory Committee Act, requires balance on all U.S. advisory committees, trade advisory committees are notably lacking in balance. Multiple lawsuits have been pursued just to get one environmental representative on a few key committees, such as those dealing with chemicals, paper and wood.

[21] S*ee*, for instance, Uruguay Round Agreements Act (Public Law 103-465), Section 102, Dec. 8, 1994.

[22] In the NAFTA Chapter 11 Glamis Gold mining case, a California regulation requiring the backfilling of open-pit mines has been challenged by a Canadian mining enterprise, which plans to develop a giant open-pit cyanide gold mine in Imperial Valley, California, and which owns and operates similar mines around the world. In this instance, the U.S. Interior Department had given the go-ahead for the mine, while the state of California objected, expressing concerns about the environmental impacts and the impacts on nearby Native American sacred sites. In short, the federal government does not necessarily support the California law they are charged with defending. For more information, see: Public Citizen's *NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005* available at: http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf.

[23] In Canada, ongoing federal-provincial consultations over trade take place in large part at the Federal-Provincial-Territorial Committee on Trade (C-Trade), which meets at the level of senior officials on a quarterly basis, at a minimum. In addition to the quarterly meetings, C-Trade participants confer by telephone on a weekly, or even daily, basis. Provinces can place subjects on the agenda for a C-Trade meeting, and more importantly C-Trade participants acting on behalf of provinces have the authority to veto the plans of federal trade negotiators when it comes to matters under provincial jurisdiction.

[24] For U.S. subcentral entities in the WTO's GPA the procurement threshold for 2006-2007 period is $526,000 for goods and services, and $7,407,000 for construction services.

[25] Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. Also see Annex III for list of states bound to other agreements.

[26] *See* Letter to Pennsylvania Governor Ed Rendell from U.S. Trade Representative Robert Zoellick, Jan. 5, 2006, available at: http://www.citizen.org/documents/USTR_to_Pennsylvania.pdf. The letter stated the United States was in the midst of negotiations with Australia, Morocco, the five Central American nations (CAFTA), the five nations of the South African Customs Union and 34 countries in the Western Hemisphere regarding the Free Trade Area of the Americas.

[27] Dominican Republic – Central America Free Trade Agreement, Article 9-7.

[28] Dominican Republic – Central America Free Trade Agreement, Article 9-8.

[29] *See,* Tracy Taylor, "The Legislature, The Governor, & International Trade Agreements: An Analysis of Washington Law," Dec. 2004.

[30] Negotiations underway in the WTO Working Party on Domestic Regulation (WPDR) would apply new "disciplines" not included in the original GATS agreement that limit the domestic regulatory authority of governments in all service sectors bound to comply with the GATS. The mandate of the WPDR is to restrict licensing requirements and procedures, qualification requirements and procedures, as well as technical standards, to those that are "no more burdensome than necessary to ensure the quality of a service." A WTO tribunal would be the ultimate arbiter of what constitutes "a burden" to foreign commercial interests. The proposed new WTO regulatory constraints would place a broad swath of services law and regulation at risk of trade challenge in service sectors bound under current U.S. commitments or proposed to be bound in the new round of negotiations. This includes licensing, qualifications and technical standards for: a variety of professionals (including investigation and security services, lawyers, accountants, engineers, architects and more); certain hospitals (and nurses and doctors within those hospitals); certain mining operations; energy utilities; big-box stores and other large retail establishments; certain hazardous waste disposal facilities, incinerators and landfills; highly controversial liquified natural gas (LNG) terminals and tank farms; certain wastewater treatment facilities; institutions of higher education; banks; insurance providers; TV and radio stations; building and construction permits for a wide array of construction projects; transportation licenses for rail and road, and many more.

[31] Public Citizen interview with William Waren, Forum on Democracy and Trade, Dec. 1. 2006.

[32] Andrea Foster, "Colleges, Fighting U.S. Trade Proposal, Say It Favors For-Profit Distance Education*," Chronicle of Higher Education,* Jan. 18, 2002.

[33] *See* Memorandum, "U.S. offers under the General Agreement on Trade in Services (GATS) negotiations-Request for information from states by Friday, February 21, 2003," to State Single Points of Contact (SPOCs) and Intergovernmental Policy Advisory Committee (IGPAC) from Assistant U.S. Trade Representative Christopher Padilla, Jan. 17, 2003, available at: http://www.citizen.org/documents/USTRgatsmemo.pdf.

34 *See* Letter to U.S. Trade Representative Rob Portman from Utah Attorney General Mark Shurtleff and 28 other state attorneys general, May 31, 2005, available at: http://www.citizen.org/documents/29AGs_GATS_May2005.pdf.

35 Representative George Eskridge (Idaho), Chair, *Interim Report: GATS and Electricity*, Working Group on Energy & Trade Policy, March 25, 2005, available at: http://www.forumdemocracy.net/public_leadership/documents/gatsandelectricity0405.pdf.

36 Orly Caspi, *GATS & LNG Facility Siting in California: Case Study of Proposed Trade Rules on Domestic Regulation*, Harrison Institute for Public Law, Georgetown University Law Center, Draft of June 16, 2000, available at: http://forumdemocracy.net/public_leadership/impact_GATS_rules_domestic_regs.html.

37 *See* Letter to U.S. Trade Representative Rob Portman from Maine Governor John Baldacci, Apil. 5, 2006, available at: http://www.citizen.org/documents/baldacci_letter_portman_040506.pdf.

38 Sandra Day O'Connor, "Federalism of Free Nations," 28 N.Y.U. J. Int'l. L. & Pol. 35, Fall 1995-Winter 1996.

39 Conference of Chief Justices International Agreements Committee, "Resolution 26: Regarding Provisions in International Trade Agreements Affecting the Sovereignty of State Judicial Systems and the Enforcement of State Court Judgments," 56th Annual Meeting, July 29, 2004.

40 *See* Letter to U.S. Trade Representative Rob Portman from Utah Attorney General Mark Shurtleff and 28 other state attorneys general, May 31, 2005.

41 "International Trade Agreement -Procurement Rules," SB 401, Senator Paul Pinsky, Gwendolyn Britt, et. al, April 11, 2005, Annapolis, Maryland.

42 "An Act Relating To Public Property and Works–State Purchases," H 6885, Representatives Edith Ajello, Arthur Corvese, Grace Diaz, et.al, June 23, 2006, Providence, Rhode Island.

43 Dominican Republic-Central America Free Trade Agreement, Article 9-16.