

The TRADE Act

A Path Towards a New Trade and Globalization Model that Safeguards States' Rights

The **Trade Reform, Accountability, Development and Employment (TRADE) Act** was introduced by U.S. Sen. Sherrod Brown (D-Ohio) and Rep. Mike Michaud (D-Maine) in June 2009 with 106 original cosponsors. This landmark legislation offers a path towards a new globalization policy that can harvest the benefits of trade without undermining the principles and practice of American democracy, including our systems of federalism and checks and balances. The TRADE Act:

- Sets forth in detail what future good trade agreements must and must not include;
- Requires the review and remedy of our existing trade agreements;
- Provides groundbreaking new protections for state sovereignty, recognizing that existing “trade” pacts have inappropriately encroached into states’ domestic non-trade policy space;
- Describes a new presidential trade negotiating process to replace Fast Track that dramatically improves state-federal consultations by providing states with authority to determine to which investment, service sector and procurement regulatory terms in trade pacts states will be bound.

TRADE Act Provisions of Special Interest to States:

Replacing “Fast Track” Trade Promotion Authority with a New Process that Gives States and Congress a Greater Role in Determining Agreements’ Contents:

The Fast Track authority President Bush won by one vote in 2002 expired in 2007. President Bush sought new Fast Track powers, but thanks to efforts by many state and federal officials, this request was rejected. Under Fast Track, Congress delegated away its constitutional authority to set trade terms to the executive branch. Moreover, the legislature was limited to merely voting “yes” or “no” with no amendments and limited debate on finished agreements *after* they had been signed and entered into by the president. While Fast Track’s design strictly limited Congress’ role, it completely *excluded* any meaningful role for states in trade policy-making, despite the array of non-trade regulatory issues under state authority that today’s “trade” pacts affect. The end of Fast Track offers a rare opportunity for state legislators and Congress to work together to devise a new system of presidential trade authority – one that provides states with meaningful consultation about provisions of trade agreements that limit state regulatory authority. Section 7 of the TRADE Act lays out such a new process, which explicitly empowers states with the right to determine to what investment, procurement and service sector regulatory terms they will be bound during the course of negotiations. It also ensures that Congress votes on agreements *before* they are signed, thus ensuring that negotiating objectives set by Congress are met.

TRADE Act Provisions of Special Interest to States

Stops International Pre-emption of State Regulatory Authority by Trade Agreements:

The TRADE Act lays out a new model for state-federal consultation regarding how states are – or are not – bound to certain non-tariff provisions. In contrast to the current system under which federal negotiators simply bind states to comply with service-sector and investment rules without consultation, Sections 7(6) and 4(14) of the TRADE Act establish that **states would be bound to procurement, investment, and service provisions of future trade agreements only when states have been fully consulted and have given consent.** Further, the TRADE Act’s services, investment and procurement provisions make it clear that public interest priorities including human rights, labor, health, safety and environmental standards that apply equally to domestic and foreign goods and firms could no longer be subject to trade challenges as “non-tariff barriers.” Under the trade agreements the TRADE Act envisions, states could implement common state purchasing policies (such as “Buy-local” policies that encourage local economic development), or ban lead or dangerous plastic additives in children’s products without fear of a trade challenge.

Reestablishes State Authority to Regulate Domestic – and Foreign – Service-Sector Firms:

The TRADE Act also includes provisions that would reestablish states’ authority to regulate foreign service-sector firms operating within their territory the same way domestic firms are regulated. This includes safeguarding local control of land-use and development policy by prohibiting “market access obligations” existing in current pacts that give special rights to foreign firms and their governments to challenge zoning, hours of operation, or other rules that limit the number or size of service providers including “big-box” retail stores.

Shields States from Costly Investor-State Battles:

States have spent enormous sums of taxpayer dollars defending public health, environmental and land-use policies against foreign-investor challenges in trade tribunals. This is a privilege given to foreign investors under the current NAFTA-style trade agreements. 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. Three lawyers from the California Attorney General’s office worked on the MBTE NAFTA case but never received any compensation for their time. The investment provisions of the TRADE Act ensure that future trade agreements will not permit such challenges by foreign investors against domestic regulatory policies.

Reinforces NCSL Position that Negotiations Should Use “Positive List” Method:

Current NAFTA-style trade agreements use a “top-down” or “negative list” structure. This means that policy in every sector of the U.S. federal and state service economy are committed to comply with trade agreement constraints *unless* an exception is written into the agreement before it is passed. The same goes for investment policy for all sectors, and all procurement contracts over a certain dollar threshold. The top-down system means states must convince federal negotiators to carve out a particular sector or service – which to date federal negotiators have refused to do even when requested. The TRADE Act switches the presumption by requiring future agreements be negotiated using a “bottom-up” approach, which would require that states – and the federal government – explicitly list which service, investment and procurement sectors will be covered by the agreement. This is the system used in certain World Trade Organization agreements, proving it is entirely feasible.

