

Memo

May 6, 2004

To: Alan Stearns

From: Cynthia Phinney and Bjorn Claeson on behalf of the Maine Fair Trade Campaign

Re: Procurement rules in the new trade agreements

Introduction

Having studied the issues raised by the U.S. Trade Representatives Office and the Maine International Trade Center in response to our March 23, 2004 letter, we continue to believe that Governor Baldacci should retract Maine's consent to be bound by the procurement rules in CAFTA and other trade agreements currently in negotiation before they are signed and before they are passed by Congress and become binding federal law. We should publicly evaluate the risks and benefits of each agreement as they are written and become available before committing to them.

In terms of our economy, such a period of reflection and public debate on the trade agreements involves a very minimal risk. In terms of our democracy, we have potentially much to lose as a variety of current and future public policies could conflict with the new trade agreements. This is our main concern in the March 23 letter and we will not repeat the arguments of that letter here. Instead, we respond directly to the issues raised by the USTR and the MITC in response to our March 23 letter, as seen in the April 5, 2004 letter from MITC to Alan Stearns; the "Trade Facts" on State Government Procurement and Trade Agreements published by the USTR in April 2004; and an April 28 e-mail from State of Maine Director of Procurement Betty Lamoreau to Alan Stearns which is based on her conversation with Jean Grier, senior procurement negotiator for the United States.

Don't Give Our Trading Partners a Blank Check

While it may be safe to assume that some of the language in existing agreements will be repeated in future agreements, there is no way to know which language or provisions might be changed or how. Just one example of this might be the threshold for coverage of state government procurements. While the threshold in currently existing agreements is \$477,000 for goods and services and \$6.7 million for construction, there is no way to know what will be negotiated in future agreements.

As it now stands, the Governor's signature binds Maine to these future agreements, without exceptions, regardless of what provisions or language those agreements ultimately contain. Put another way, we are currently committed to agree that all present

and future State procurement policy must conform to international rules not yet even written.

We continue to believe that it is in the best interest of Maine to withdraw this prior consent and to evaluate the risks and benefits of committing to each agreement as they are written and become available.

Exemptions: An Unrealized Opportunity

The U.S. Trade Representatives Office argues that we may protect sensitive areas of procurement by exempting specific goods and/or services and procurement policies from the agreements. This is, in fact, another good reason to step back and take the time to study and decide which exemptions Maine might want to attach to any commitment we make.

Currently, we have made commitments to several future agreements without listing any exemptions or restrictions. That means that our government procurement market would be completely open to foreign suppliers of goods and services, without any limitations, if the agreements were signed and passed by Congress. While it is easy to *add* goods and services to an agreement after it takes effect, the process for *withdrawing commitment* for goods or services could be prohibitively difficult because 1) The federal government would have to withdraw access on the state's behalf and, 2) The federal government would have to compensate trading partners for the loss of the value of a potential export market.

Exceptions: Not Sufficient Protections

USTR also points out that there are exceptions to the rules in the current agreements designed to protect certain public policy, such as environmental protections, that could otherwise be challenged as unnecessary barriers to trade. However, the USTR does not provide evidence that the exceptions are in fact adequate to protect public policy. Nor is there any guarantee that the present exceptions will be included in the agreements that have not yet been completed.

While CAFTA provides exceptions to its rules, the "exceptions" language is noticeably weaker than the "rules" language.¹ CAFTA's rules limiting the sort of technical specification that procuring entities use includes a clause (Article 9-7-5) stating that "for greater certainty, this article is not intended to preclude a procuring entity from preparing, adopting or applying technical specifications to promote the conservation of natural resources." The clause "is not intended" provides discretion for a trade tribunal to rule against a suspect measure. To be effective, the exception would have been written in the

¹ The following analysis summarizes an April 29, 2004, memo from Public Citizen's Global Trade Watch to the National Caucus of Environmental Legislators.

same definitive tone as the agreement's other rules: e.g., "Nothing in this article precludes a procuring entity..."

Furthermore, CAFTA's exceptions language concerning environmental considerations is circular. "Notes to United States - Section B, Annex 9.1" includes an exception which reads: "Nothing in this Section shall be construed to prevent any State entity from applying restrictions that promote the general environmental quality in that State, as long as such restrictions are not disguised barriers to international trade." A long history of GATT-WTO jurisprudence interprets environmental policies based on how a good is made or harvested as disguised barriers to trade, raising doubts that this CAFTA exception can protect procurement policies requiring product or producer environmental specifications which conflict with other CAFTA procurement rules.

CAFTA's Article 9.14 includes a clause purporting to safeguard environmental measures "necessary to protect human, animal or plant life or health," language also found in the GATT and other WTO agreements. An array of GATT and WTO case history has found this clause to be virtually useless in the defense of challenged environmental measures. In GATT/WTO jurisprudence the term "necessary" places the burden of proof on the defending party to show that there is no other less-trade-restrictive means of obtaining its environmental or public health goal. Faced with the daunting challenge of proving the negative – that another means does not exist – defending parties seeking to protect a challenged environmental law have lost all GATT/WTO dispute panel decisions and been forced to weaken their laws.

In a stunning example of how little protection "exceptions" offer, the Clinton administration acknowledged the constraints of the trade procurement rules when issuing its Executive Order banning the federal purchase of products made with child labor. The administration exempted from that order the NAFTA signatories and the 27 countries that had signed onto a WTO procurement agreement with similar language to the procurement rules currently in question. In other words, the administration acknowledged that the exceptions in trade agreements, though designed to promote human welfare, are not even strong enough to prevent a most heinous form of child abuse: forced child labor. In this case, protecting children's welfare placed second to respecting the integrity of the supplier qualification rule – limiting the possible qualification criteria of government suppliers to those necessary to ensure product quality – and the general "non-discrimination" principle of treating "like" goods (i.e., physically identical goods no matter who made them or in what conditions) in a like manner.

Jeopardizing Maine Businesses' Export Markets?

In deciding whether or not to withdraw Maine from the procurement provisions of the new trade agreements, are there real business opportunities at stake?

Consider the following:

Do we know whether or not the procurement provisions in the new trade agreements address real concerns for Maine companies? Have Maine companies encountered trade barriers preventing them from securing procurement contracts with foreign governments for the supply of Maine-made goods? If so, what trade barriers and for what products? These are key questions because the U.S. and large parts of the world have long been open to foreign trade without the procurement rules currently under consideration. In short: before giving approval to these new rules we should know whether or not they solve a real problem or can prevent future problems.

There is no economic imperative to rush into these rules because Maine companies can still bid on government procurement contracts with our trading partners and expect to receive the same “non-discriminatory” treatment as companies from other states *whether or not* Maine is signed on to procurement provisions. No foreign government will penalize Maine companies without violating anti-discrimination rules. If Maine withdraws its government procurement market from the trade agreements, our trading partners may, in return, withdraw a sub-federal government procurement market of equivalent value. This is the only possible loss that could result from Maine’s withdrawing its consent to be bound by the procurement provisions in the trade agreements. Such a loss in export opportunities appears to be a minimal risk for Maine that could adversely impact our economy only if: a) there is a Maine company that is interested in the particular sub-federal government procurement market a trading partner leaves unbound; and b) if that Maine company actually proposed to export Maine-made (and not foreign-made) goods and services. If this eventuality came to pass, we can at a later date add Maine’s government procurement market to the trade agreement in exchange for access to the desired foreign government procurement market.

In general, we should also keep in mind that the same trade policies that are increasing exports are also increasing imports. And they are increasing imports at a faster rate than exports, leading to mounting U.S. trade deficits. Thus, while increasing exports are indeed creating jobs in Maine and around the country, increasing imports are displacing workers at a faster rate. The result is a growing net deficit in trade and jobs. Between 1994 and 2000 every state in the country lost jobs because of trade deficits caused by NAFTA and WTO agreements. In all, trade deficits eliminated a net total of 3.0 million actual and potential jobs from the U.S. economy. During the same period of time, trade deficits cost Maine a net 22,357 actual and potential jobs. Maine’s 3.6% state labor force loss was the third highest percentage loss behind only Rhode Island and North Carolina. (See: Scott, Robert E, “Fast Track to Lost Jobs: Trade deficits and manufacturing decline are the legacies of NAFTA and the WTO,” Economic Policy Institute, Washington, DC: October, 2001).

Liberalizing trade in government procurement could have the same negative net result. We cannot discount the possibility that if Maine opens its government procurement market to international competition, Maine companies may lose more opportunities to supply goods and services to Maine’s government than they gain in contracts with foreign governments. Furthermore, it is likely that the companies losing business opportunities in Maine are small businesses that employ Maine workers, while any

companies gaining business opportunities in the foreign government procurement market are transnational companies that do not necessarily employ Maine workers to produce the goods they export. This is another good reason to analyze the impact on the government procurement rules in trade agreements before agreeing to operate in accordance with them.