



Peace through Interamerican Community Action

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Open Letter: Maine's Obligations under the Procurement Rules in the New Trade Agreements

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To: Governor John Baldacci

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

Executive Summary

Maine has traditionally used state government procurement as a public policy tool to meet a variety of objectives of concern to citizens: for example, to strengthen Maine's economy, reduce environmental damage, and promote fair labor standards. These practices may conflict with international trade rules that only allow governments to set standards for the performance or quality of the purchased materials, but not for the methods of production. Trade rules also do not allow favorable treatment to in-state suppliers in order to create local jobs. On request from the U.S. Trade Representative Office, the state of Maine recently authorized U.S. trade negotiators to bind Maine to the procurement rules in a series of new trade agreements, some of which have not yet been completed. The Executive Office alone, without public discussion or legislators' involvement, offered this authority.

Setting government procurement policy and deciding whether or not to accept the constraints on procurement policy imposed by international trade rules is a matter for the state legislature. Maine's ability to use government procurement for public policy, including economic development, is at risk should Congress enact the new trade agreements. We urge the Governor to write to the Office of the U.S. Trade Representative to retract the state's consent to be bound by the procurement rules in the new trade agreements before they are passed by Congress and signed into law. At this point we can revoke our consent as easily as we gave it. After they are signed, those rules bind us permanently.

We have everything to gain and nothing to lose from withdrawing our consent to the new procurement rules. After publicly examining and debating each trade agreement separately, the State Legislature can decide which of the trade agreements, if any, benefit the people of Maine and add Maine as a party to those agreements that do not threaten our policy objectives.

Please find below:

- A tabular analysis of potential conflicts between Maine procurement policies and trade procurement rules.
- A critique of the consultation process between the U.S. Trade Representative Office and the Governor's Office.
- Recommendations for action.

Conflicts between Maine Procurement Policies and Trade Procurement Rules

MAINE PROCUREMENT POLICY	TRADE PROCUREMENT RULE ¹	THREAT TO MAINE POLICY	RECORD OF UNDERMINING HUMAN RIGHTS
<p><i>Preferences for products that promote high environmental standards:</i></p> <ul style="list-style-type: none"> • When equal in quality and competitively priced, purchase products and materials made with recycled materials (Title 5 §1812). • At least 50% of dollar amount spent on paper and paper products shall be spent on such products with recycled material content (Title 5 §1812-B). • To maximum extent practical use composted and recycled organic materials (Title 5 §1812-C). • Purchase cars with mileage ratings of at least 45 miles per gallon, and light duty trucks with at least 35 miles per gallon (Title 5 §1812-E). 	<p><i>Limits on technical specifications</i></p> <p>“Procuring entities shall not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade between the Parties. Procuring entities shall prescribe any technical specifications...in terms of performance requirements rather than design or descriptive characteristics.”</p>	<p>The State Division of Purchases cannot require products of a certain design or content unless that design and content is directly linked to the performance of the product. Since products without recycled, composted, or organic materials can perform as well as products with such content, and since vehicles that are not fuel-efficient can perform as well as those that are, Maine’s preferential purchasing policies to protect the environment are at risk.²</p>	

¹ The procurement rules listed below are quoted from Chapter Nine of the January 28, 2004 draft of the Central America Free Trade Agreement (CAFTA). There are similar rules in the World Trade Organization’s Agreement on Government Procurement, the North American Free Trade Agreement (adopted in 1994) and in several other multilateral and bilateral agreements under negotiation, such as the Free Trade Area of the Americas, and the agreements with Chile, Singapore, and the South African Customs Union.

² CAFTA states that no state entity shall be prevented from “applying restrictions that promote the general environmental quality in that state,” but adds: “as long as such restrictions are not disguised barriers to international trade.” This safeguard for environmental protections is shaky considering that the WTO has ruled against every domestic environmental policy that has been challenged, invoking both the technical specifications limits (e.g., forcing the U.S. to allow imports of gasoline with higher nitrous oxide emissions and weaken the Clean Air Act) and the limits on supplier qualifications (e.g., forcing the U.S. to allow imports of shrimps caught without turtle exclusion devices and weaken sea turtle protections in the U.S. Endangered Species Act). In these cases, GATT’s Article XX, which contains environmental exceptions to WTO rules worded similarly to the CAFTA exceptions, has been ruled to be inapplicable (see http://www.wto.org/english/tratop_e/envir_e/issu4_e.htm#gatt20).

MAINE PROCUREMENT POLICY	TRADE PROCUREMENT RULE¹	THREAT TO MAINE POLICY	RECORD OF UNDERMINING HUMAN RIGHTS
<p><i>Preferences for products that promote human and labor rights:</i></p> <ul style="list-style-type: none"> • Purchase apparel, footwear, and textiles made in non-sweatshop conditions (Title 5 §1825). <p><i>No unfair advantage for businesses that do not provide health and retirement benefits.</i></p> <ul style="list-style-type: none"> • Cost savings due to cost differentials that derive from a bidder's failure to provide health and retirement benefits to its employees are not allowed (Title 5 §1825). 	<p><i>Limits on supplier qualifications</i></p> <p>“Each procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that the supplier has the legal, technical and financial abilities to fulfill the requirements and technical specifications of procurement.”</p>	<p>The State Division of Purchases cannot treat products differently depending on who made them, or in what conditions they were produced or harvested. Since requiring that products not be made with sweatshop labor, or taking into account health and retirement benefits provided to employees go beyond looking at the suppliers’ “legal, technical and financial abilities” to fulfill a procurement, Maine’s preferences for products made by businesses that uphold labor and human rights are at risk.</p>	<p><i>Forced and indentured child labor</i></p> <p>Executive Order 13126 signed by President Clinton on June 12, 1999 prohibited federal acquisition of products produced by forced or indentured child labor. However, signatories to the North American Free Trade Agreement (NAFTA) and the WTO Agreement on Government Procurement (GPA) were specifically exempted from the ban out of fear the order would violate trade procurement rules that limit possible qualification criteria of government suppliers to those necessary to ensure product quality and performance. Thus, the federal government may not buy products made by forced or indentured child labor, except if that labor took place in a country that is a signatory to NAFTA or the GPA.</p> <p><i>Forced labor under the Burmese military junta</i></p> <p>In 1996, the state of Massachusetts imposed a ban on purchasing contracts with companies doing business with Burma’s military dictatorship. The ban was similar to the selective purchasing initiatives in support of the South African antiapartheid movement - initiatives credited for helping to facilitate</p>

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			<p>democracy in South Africa. Japan and the European Union challenged the Massachusetts law at the WTO, arguing that Massachusetts' procurement policy violated the supplier qualification rule of the AGP by imposing conditions not essential to fulfilling the contract and imposing qualifications based on political rather than economic considerations.³</p> <p><i>Human and labor rights violations in Nigeria</i></p> <p>During the time of the EU and Japan's WTO challenge of the Massachusetts Burma law, Maryland was considering selective purchasing legislation targeting Nigeria's human and labor rights violations. Concerned that such a law would violate the WTO AGP, the Clinton administration lobbied against it. The Maryland legislature rejected the law by one vote.⁴</p>

³ The EU and Japan suspended their WTO challenge when the National Foreign Trade Council challenged the Massachusetts procurement policy in Massachusetts state court as a violation of the U.S. Constitution. Eventually the U.S. Supreme Court struck down Massachusetts law on very narrow grounds, holding that a state selective purchasing law against a particular country is preempted when Congress has imposed corresponding sanctions against the same country. Source: Wallach, Lori and Patrick Woodall, Whose Trade Organization, p. 237, forthcoming.

⁴ Wallach, Lori and Patrick Woodall, Whose Trade Organization, p. 238, forthcoming.

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<p>Preferences for local business:</p> <ul style="list-style-type: none"> Contracts or purchases to in-state bidders or to bidders offering commodities produced or manufactured in the State if the price, quality, availability and other factors are equivalent (Title 5 §1825-B). 	<p>National treatment or non-discrimination:</p> <p>“...[E]ach party and each procuring entity shall accord to the goods and services of another Party, and to the suppliers of another Party of such goods and services, treatment no less favorable than the most favorable treatment the Party of procuring entity accords to its own goods, services and suppliers.”</p> <p>No offsets:</p> <p>“...[P]rocurring entities shall not seek, take account of , or impose offsets in any stage of procurement. ...[O]ffsets means conditions or undertakings imposed or considered by a procuring entity that encourage local development...by means of requirements of local content, licensing of technology, investment, counter-trade or similar requirements.”</p>	<p>The State Division of Purchases cannot provide preferences to in-state or domestic suppliers. For example, 15% price preferences for domestic suppliers in publicly funded construction projects (LD 608) would violate the non-discrimination rule since such preferences constitute more favorable treatment for domestic than foreign suppliers. Legislation to ban state contractors from shipping jobs overseas or other local development policies aimed at creating jobs in Maine would also violate the non-discrimination rule.</p>	<p>Collapse of north-south cooperation</p> <p>The WTO Fifth Ministerial Meeting in Cancun, Mexico, September 2003 collapsed in part because of north-south disagreement over government procurement rules in trade agreements. Northern countries (primarily the U.S., Canada, and the EU) insisted on including government procurement rules such as non-discrimination in the draft text. A large block of southern countries refused to accept those rules since government procurement constitutes a large part of developing countries’ budgets and is an extremely significant tool of economic development.</p>

The Democracy Deficit

International procurement rules could be beneficial to Maine if they were developed through a public process that involves open debate and decisions by Maine legislators. Procurement rules in current trade agreements only meet the needs of those with access to the trade negotiations: transnational corporations that seek access to other countries' government procurement markets.

Until 1993, government procurement had been a matter of local, state and national prerogatives and decision-making. With the WTO Agreement on Government Procurement (GPA), the U.S. gained access to the government procurement markets of other GPA signatory countries for U.S. companies and, in return, had to offer similar U.S. procurement markets to other countries' transnational companies. Those markets included state government purchasing. Since state procurement is a matter of state decisions, the U.S. Trade Representative Office decided to request governors' consent to sign onto to the GPA and relinquish their states' decision-making power over state procurement. When an international trade agreement is approved by Congress it becomes part of federal law and preempts inconsistent state law. In the end 37 U.S. states agreed, including the state of Maine. Maine expressed its consent to be bound by these new government procurement rules solely through the executive branch. There was no public process. The same holds true for 35 other states, the exception being Maryland where legislators did debate the issue.

In September 2003 the U.S. Trade Representative Office (USTR) again contacted state Governor Offices, requesting access to state government procurement markets for foreign suppliers of goods and services in countries with which the U.S. is negotiating trade agreements. Those countries include: Morocco and Australia; the countries of the Central American Common Market (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua); and the South African Customs Union (Botswana, Lesotho, Namibia, South Africa and Swaziland). The request also applies to the Free Trade Area of the Americas (FTAA), a \$13 trillion market consisting of 34 countries in the western hemisphere. In his letter to Governor Baldacci U.S. Trade Representative Robert Zoellick explained: *"Importantly, Maine is only being asked to extend to those new countries with which the United States is currently negotiating the non-discriminatory protections and procedural disciplines that are already offered by Maine to the 27 members of the GPA."* Zoellick went on to request blanket approval for the procurement rules in all the trade agreements the United States is negotiating even though *"several of these agreements are more advanced than others."* He neglected to mention that none of the agreements had been completed or was publicly available when he requested the state's consent to be bound by them.⁵ He also neglected to mention two agreements in which states' agreement was just assumed. In the recently negotiated Singapore and Chile Free Trade Agreements, the USTR simply copied the list of states and entities bound by the 1993 WTO Government Procurement Agreement, offering Maine's and other states' government procurement markets to foreign suppliers of those countries, without asking for consent.⁶

In December 2003 Governor Baldacci, along with over 20 other governors, agreed to the new procurement rules in CAFTA, the FTAA, and other trade agreements on Maine's behalf. Unfortunately, the public was not informed and legislators did not have the opportunity to debate the issue.

⁵ The CAFTA and U.S.-Australia Agreements were released in January 2004. The remaining agreements are still be negotiated at the time of writing.

⁶ See: <http://www.ustr.gov/new/fta/Chile/final/index.htm> and <http://ustr.gov/new/fta/Singapore/final.htm>

While trade agreements do not contain provisions that require states specifically to alter their procurement policies, states are required to conform to the policies contained in the agreements. Failure to do so could result in a challenge to state procurement laws and possibly trade sanctions until the laws in question came into compliance. The federal government would be held liable for the state's actions and required to use all means possible, such as preemptive legislation, law suits, and cutting off federal monies, to force the state's compliance with the terms of the agreement.

Recommendation

Once Congress votes to approve a trade agreement, Maine cannot retract its consent to be bound by it since the agreement is then binding federal law. The U.S. cannot remove states from the list that have committed to the trade agreement since it would have to offer compensation to trading partners for the lost business opportunities, a prohibitively expensive endeavor. However, before Congress signs these agreements, Maine is not legally bound by them and can withdraw its consent as easily as it was given.

Setting government procurement policy and deciding whether or not to accept the constraints on procurement policy imposed by international trade rules is a matter for the state legislature. Maine has traditionally used government procurement to meet a variety of objectives of concern to citizens: for example, strengthen the local economy, reduce environmental damage, and promote fair labor standards. Those measures are at risk in the new trade agreements, as is our ability to enact other public policy, including economic development, based on government procurement.

We therefore urge Governor Baldacci to write to the Office of the U.S. Trade Representative to withdraw Maine from the list of states volunteering to be bound by the procurement rules in CAFTA, the FTAA, and other trade agreements currently in negotiation. Since states are free to decide whether or not to consent to procurement provisions in the trade agreements, the decisions should be made by the state legislature after the public is adequately informed and has debated the issue. Furthermore, we believe that each trade agreement should be considered after it is completed given the possibility of differences in a particular agreement's language and scope. Maine should not provide blanket approval to a list of trade agreements not yet seen, let alone completed.

In withdrawing our consent to be bound by the procurement provisions in the trade agreements currently in negotiation, we have nothing to lose and everything to gain. Maine companies can still compete for other governments' procurement contracts without signing our state on to new trade agreements. Should Congress pass those agreements, we can add Maine as a signatory party if the Legislature deems it in the best interest of the people of Maine.

CAFTA is due to be signed by May 23, 2004. We urge Governor Baldacci to withdraw Maine from the list of states to be bound by CAFTA's procurement rules before that date so that there is no confusion as to the obligations of the United States under CAFTA.