

INTERGOVERNMENTAL POLICY ADVISORY COMMITTEE

MEMORANDUM

**IGPAC Comments on the Updated US Submission to the WTO
on the General Agreement on Trade in Services (GATS) Negotiations**

Submitted to the United States Trade Representative:
Charles Hooker, Office of Services and Investment
Chris Padilla, Assistant USTR for Intergovernmental Affairs & Public Liaison
Christina Sevilla, Director for Intergovernmental Affairs

by Kay Wilkie, IGPAC Chair and IGPAC Membership

on May 25, 2005

Introduction

State and local governments generally support objectives to liberalize trade in services industries as a means of increasing market access for US firms and for reaching trade development objectives. IGPAC members are hopeful that USTR leadership in re-energizing the WTO Doha Round will successfully advance multilateral efforts to improve market access to services sectors under the General Agreement on Trade in Services (GATS). Along with this support for expanding trade and market access, IGPAC members urge the USTR to maintain a commitment to ensuring that GATS services trade and investment provisions, enforcement efforts and dispute settlement procedures respect the authority of states and local governments to regulate and interpret land-use, labor, health, safety, welfare, consumer protection, and environmental measures. While endeavoring to avoid discriminatory trade practices, it is essential for international agreements such as the GATS to respect rational, nondiscriminatory regulation at the state and local level, designed to protect the public interest. The independent exercise of state and local legislative and regulatory power is critical to protecting citizens' interests and safeguarding the federal system.

Some IGPAC members raised major concerns about this USTR request, objecting to the insufficient amount of time for GATS document review, the limited opportunity for state consultations with interested parties, and the inadequate level of federal-state consultations overall. IGPAC would like to emphasize to USTR services negotiators the importance of receiving more frequent briefings and establishing on-going dialogue about US negotiating objectives and state/local perspectives related to the GATS. State officials regularly receive inquiries and hence need accurate information about GATS implications for a range of critical areas, such as: government-provided services (e.g. energy, water, health, education, or public safety); potential privatization of such services; state/local regulation of monopolies; state/local regulation of professional services and other services sectors; government procurement; subsidies, and such sensitive areas of regulation as energy, water, zoning and land use controls. An improved and continuous information flow over time would better inform and prepare all parties, would serve to allay unwarranted concerns, would help ensure that descriptions of state and local provisions are accurate and complete, and could alleviate the constraints of receiving insufficient time for preparing comments to meet USTR and WTO deadlines.

IGPAC comments herein on the updated US GATS submission will reference recommended principles for negotiations, and specific areas of concern about which we would request USTR attention and clarification.

Core principles that should inform the USTR's GATS negotiations include:

- Inclusion of the phrase “no greater procedural or substantive rights” in trade agreements, notably with respect to international investment provisions of the GATS. Such language would ensure that non-US businesses do not receive preferential treatment when compared to domestic businesses, and would reference the US Constitution as the benchmark with respect to competing language in international agreements. As evidenced by disputes arising from the NAFTA Chapter 11 *Methanex* and *Mondev* cases, generalized expropriation language has allowed some foreign investors to file frivolous takings claims that challenge laws and regulations traditionally in the purview of state and local governments.
- Legal standards that are “rationally related to a legitimate governmental interest,” and that are consistent with the US Constitution and applicable case law, by ensuring state and local governments are not held to a higher standard in defending legitimate governmental interests with respect to international trade than domestic commerce. International agreements that include standards such as “least trade restrictive” or “least burdensome” for defining the permissible scope of governmental

regulation are inconsistent with constitutional standards for evaluating legislation, and may affect a state or municipality's ability to effectively regulate services and to implement economic development programs, zoning laws and to protect the public interest.

- Transparency in claim and dispute resolution processes. In the event of investor and services trade disputes under the GATS, greater attention must be paid to making dispute settlement procedures and panels more accessible to both the public and any affected governmental entity. The United States and relevant WTO panels or tribunals need to provide prompt notification to state and local governments when their regulation or law is being challenged, seek their input and assistance at all stages of the process, and allow impacted state and local governments to participate fully in the hearing and deliberation process. Affected state and local governments should be empowered to file *amicus* briefs in matters before the WTO in such cases, and have standing to effectively work with the federal government in defense of their laws and regulations. Attention should also be given to making the dispute settlement proceedings open to the public.
- No presumption of federal authority over state and local law should be made when dealing with matters of unclear constitutional authority. This would bolster due consideration for the principles of federalism, and the negotiating position of the US would be clarified if federal functions were clearly separated from those of state and local governments.
- Improvement by USTR of the federal-state-local trade policy discussion process. This process would be enhanced by implementation of IGPAC recommendations for improving federal-state trade policy consultations (memo dated 8/5/04), and by adoption of the standard set out in Federalism Executive Order 13132, Section 6, (which requires federal agencies to consult with state and local officials and representatives of their respective national organizations *before* issuing proposed rules or submitting legislative proposals to the Congress).

GATS Issues Concerning IGPAC Members for USTR Attention and Clarification:

- The USTR has diligently endeavored to identify various state statutes and local measures that may not conform to certain provisions in the GATS, excluding them from coverage by listing them in annexes of non-conforming measures. In order to ensure that state and local governments are fully aware of their current and proposed future coverage under the GATS, the USTR should ensure that IGPAC and State Points of Contact are provided with complete information on all GATS exceptions and exemptions by each individual state and for service industry sectors within each state. It must not be presumed, however, that existing annexes are comprehensive, nor that future legislative and regulatory decisions must be consistent with commitments made in this agreement.
- The USTR also has endeavored to ascertain whether the descriptions of state and local measures contained in the schedules are current and accurate. Where provisions have changed since they were originally listed, IGPAC urges USTR to take this opportunity to modify the schedules so that they accurately reflect federal, state, and local law, especially since, on balance, the modifications made since 1994 further expand access to US markets.
- In this regard, IGPAC members would like USTR to specifically clarify the legal effect and text location in the existing GATS of explicit exclusions or reservations of subfederal subsidies and taxes from National Treatment provisions under GATS Article III, per the 6/30/94 Communication from the US on Subsidies and Taxes at the Sub-Federal Level to the Preparatory Committee of the WTO. Some state and local officials and associations, consulted during Uruguay Round negotiations in the mid-1990's, continue to operate under the assumption that these national treatment reservations are included in the GATS and have legal effect. The subsequent 1/30/96 WTO Interim Report on the

Status of Consultations on Taxes and Subsidies at the Sub-Central Level would seem to indicate that agreement on such exclusions was not reached, as other WTO members objected to them. Given the implications, IGPAC members need to be informed as to the legal status by USTR, and of any plans to include such national treatment reservations during current GATS Doha Round negotiations.

- The general “blanket” MFN exemption under GATS Article II for “existing” and subsequent state and local measures that do not increase the degree of non-conformity could leave open a myriad of potential disputes about future changes. This matter highlights the critical need for the USTR to educate and consult with state and local entities so that they remain aware of the constraints that may be imposed upon future legislative actions. If future measures are not covered by current exceptions for existing laws, it would be necessary to fit them within other exceptions, many of which are far narrower and risk being subject to problematic standards of review, such as being “no more burdensome than necessary.” The unintended consequence might be to freeze state and local legislation in ways that prevent it from adapting adequately to changing facts and circumstances.
- In light of the evolving implications of the recent WTO GATS ruling on the Antigua & Barbuda gambling case, and the uncertain impact of the market access findings related to US gambling commitments on other services sectors and on US GATS commitments overall, IGPAC members have a number of concerns:
 - Does the Appellate Body interpretation mean that the US made a commitment for the supply of gambling market access in all four modes? And how would “gambling services” be understood – to include all gambling operations with a commercial presence in the US, including state monopolies, tribal gaming, casinos, racing, slot machines, etc.?
 - Is it likely that the scope of the “public morals” exception will apply to state government decisions (noting that Utah and Hawaii, for examples, ban gambling completely)?
 - In the event that market access coverage for gambling may be withdrawn by the US under Article XXI provisions during upcoming negotiations, how might state and local interests be impacted by such a schedule alteration and/or by compensatory adjustments, and can IGPAC be assured that we will be consulted by the USTR as plans evolve?
 - Does the USTR plan to proactively modify all relevant Free Trade Agreements (FTAs), including CAFTA-DR, in order to clearly carve out market access coverage of all gambling sectors? There may be some urgency to making such modifications, since Bilateral Investment Treaties (BITs) and investment provisions of FTAs do not include public morals exceptions as in the GATS.
 - How is the USTR addressing the potential risk of investment agreement provisions being used by foreign investors to bring claims against internet gambling and/or other gambling regulation? The CAFTA-DR exchange of letters seems to relate to this concern, and IGPAC members note that various other FTAs have investor-state provisions that have been used by investors to challenge domestic laws.
- Clarification by USTR is urgently needed of the meaning and scope of current and proposed GATS coverage under the entire Energy Services Offer, including section 11.G., “Pipeline transportation of fuels,” 1F.j. of “Services Incidental to Energy Distribution,” 4.A “Commission Agents’ Services: sales of fuels, brokerage of electricity, 4.B. “Wholesale trade: solid, liquid and gaseous fuels and related products,” 4.C. “Retailing: fuel oil, bottled gas, coal and woods,”etc. IGPAC members, informed by the “Interim Report on GATS and Electricity” of the NCSL Working Group on Energy & Trade Policy and the USTR response thereto, have raised concerns about existing GATS coverage of electricity services and the potential pursuit of published US trade proposals that would apply GATS trade rules to the regulation of electricity by state and local governments. Since the GATS government authority exclusion would not apply if a service is supplied either on a commercial basis, or in competition with one or more service suppliers, it would seem that this exclusion would then not

apply to electricity services. Proposals under consideration by GATS negotiators could cover the regulation of services related to transmission, distribution and access of energy traders to the grid and, if implemented, might conflict with state energy policy objectives and impact the balance of domestic authority between states and the Federal Energy Regulatory Commission. Moreover, given that many electricity firms in the US are foreign-owned, the commercial presence provisions of GATS could impact state regulation of the domestic market. IGPAC members understand the USTR critique included in the Interim Report, and commend the USTR commitment to continued discussion of the issues raised. Though concerns about possible conflict between trade rules and state/local energy policy are speculative, given the often ambiguous language of trade rules and the absence to date of a WTO dispute panel interpretation on this sector, IGPAC members would welcome further USTR clarification of the existing text and commitments and would expect that any new commitments that might negatively impact state regulatory authority would be avoided in current negotiations.

- Regarding educational services and regulation, in addition to the state role of institutional accreditation and licensing, many states target higher education scholarships and subsidies to in-state students. State and private institutions also establish admissions policies consistent with domestic law. Part of the 1994 reservation language that preserved the ability of states to limit scholarships to in-state students may have been dropped in the GATS submission. IGPAC would like US negotiators to ensure that reservations for these scholarships, roles and subsidies be restored and maintained. Moreover, it would appear that the reference to affirmative action programs included in the USTR's summary of its proposed education services offer, in a letter dated April 24, 2003 from Chris Padilla to Raymond Scheppach of the National Governor's Association, has been dropped. In the 2003 letter, the US education services proposal contained the following language: "Admission policies include considerations of equal opportunity for students (regardless of race ethnicity or gender) *and affirmative action programs*, [emphasis added] as well as recognition of credits and degrees." Given the potentially restrictive language in the current submission that "admissions policies include considerations of equal opportunity for students (regardless of race, ethnicity or gender)," IGPAC members request that submitted language not restrict admission policy to a neutral standard, and be changed to include the affirmative action programs language per the USTR 4/24/03 letter. IGPAC members would also like the USTR to provide assurances that no GATS provisions will interfere with an institution's autonomy or its admissions policies. Further, the US submission should clarify that foreign institutions must comply with "all state laws and regulations," with respect to facilities and all aspects of institutional operations.
- With respect to audio visual services, many states require public, educational and governmental channels to be carried as part of their regulation of cable TV, and forbid cable service that is obscene or otherwise unprotected by the US Constitution. IGPAC members would like to be assured that states would not be precluded from such regulation by any GATS provisions.
- Regarding accounting and auditing services, it would seem that the effect of proposed submissions is to remove all in-state residency requirements. As states may require specific training and certification for accountants performing official accounting duties for local governments, and may apply other regulation to this sector, any such regulatory rights need to be reserved.
- With respect to transportation services, including cargo handling, storage and warehousing services, states have regulatory powers that need to be reserved. The US submission should make clear that no concession in services auxiliary to transport be construed as restricting state or federal regulations of warehouse or other services in the interest of domestic security.

- Moreover, given the myriad concerns related to homeland and public security services at the state and local level, IGPAC members suggest that the US provide a horizontal reservation for homeland security that would fully protect state and local regulatory jurisdiction in this area.
- As indicated by the recent Antigua & Barbuda internet gambling case ruling, the interpretation of many of GATS terms and concepts continues to evolve and is subject to dispute within the WTO framework. IGPAC members encourage the USTR to act expeditiously to work with the global community on forging a common view on these issues, so that state and local governments can make more informed assessments of their positions on future agreements.
- The USTR is urged to include the National Association of Regulatory Utility Commissioners (NARUC) as part of IGPAC and the trade policy consultation process in order to enhance substantive consideration of services provisions from the state and local regulatory perspective. NARUC members include governmental agencies engaged in the regulation of telecommunications, energy, and water utilities and carriers in the US, Puerto Rico and the Virgin Islands.