State Legislator Survey:
Your Views on How to Improve the State-Federal Trade Consultation Process

This questionnaire is designed to survey areas of agreement among state legislators about priority reforms regarding the process by which U.S. trade agreements are negotiated. The new U.S. president is likely to request some form of trade negotiating authority, perhaps in the first half of 2009. It is critical for state legislators to develop a consensus now about what changes are necessary to ensure state officials have meaningful input regarding the many non-trade regulatory issues under state jurisdiction that are now touched by trade agreements. A new trade negotiating process that provides state officials meaningful input early on in the negotiating process would help ensure that future U.S. trade agreements respect the principles and practice of federalism.

We appreciate your taking the time to complete this survey. Please send your responses to Sarah Edelman at sedelman@citizen.org, fax to (202) 547-7392, or mail to Sarah Edelman, Public Citizen’s Global Trade Watch, 215 Pennsylvania Ave SE, Washington DC 20003. Ms. Edelman may be reached at (202) 454-5193.

Background Information

☐ Senator    ☐ Delegate/Assembly/Representative

Name: ________________________________________________________________

State: ___________ Phone Number: ________________________________

Email: ______________________________________________________________

Primary Staff Person: ________________________________________________

How many years have you been in office: ___________

☐ Sign me up for the state legislator trade working group! I want to be part of a network of state and local officials working to improve U.S. trade policy.

What are the issues you care about the most?

☐ Health care
☐ Education
☐ Environment & energy
☐ Economy & jobs
☐ Other: __________________________________________________________

1 ©
Establishment of a Formal Opt-in Procedure to Empower U.S. States to Decide Whether to Bind Themselves to Investment, Service, Procurement and Other Non-tariff Aspects of Trade Agreements

“Fast Track” is a trade negotiating process that was used to establish the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO). Fast Track granted enormous powers to the executive branch. States were rarely asked their opinion about agreements’ terms, despite frequently being bound to comply with the non-tariff rules in trade agreements (such as service-sector and investment rules). The one exception has been the area of government procurement. The Office of the U.S. Trade Representative (USTR) has requested letters of consent from governors to bind states to comply with pacts’ procurement rules.

In contrast, other nations with federalist systems have found ways to recognize and respect the authority of subfederal governments in an array of trade policy-making matters that affect state and local regulatory authority. Canada, for instance, has a process that allows provinces to decide whether to opt in to certain aspects of trade agreements. Thus, Canadian provinces are not bound to comply with certain non-tariff provisions unless they formally consent to do so in advance. They are, in effect, able to shape federal trade proposals that involve regulatory matters under subfederal jurisdiction – such as stopping a Canadian proposal to sign up the higher education service sector to WTO jurisdiction.

1 Would you support the inclusion in any future U.S. trade negotiating process of an “opt-in” mechanism to allow U.S. states to decide whether to be bound to pacts’ non-tariff regulatory constraints regarding services, procurement and investment? (An “opt-in” mechanism would require states to give their explicit approval before federal trade negotiators bind states to comply with the non-tariff regulatory constraints of trade agreements.)

☐ Yes
☐ No

2 If you answered yes to question 1, do you have a view about how a state should consider such federal government requests to be bound to trade pacts? Please select one:

☐ Governor sign-off
☐ Legislative action (for instance, passage of legislation authorizing the state’s consent)
☐ Other: ________________________________

3 If you answered no to question 1, can you please share your views on why an “opt-in” mechanism would not be a good approach for U.S. states:
Effective State-Federal Consultation on Broader Trade Topics

In addition to a formal mechanism to obtain states’ consent to bind them to certain non-tariff aspects of trade agreements that affect state and local regulatory authority, many state officials have shared the view that states need a continuing voice in shaping trade agreements as they are being developed. Many state and local officials have expressed serious concerns about the current process of state-federal consultations about trade policy. The current system was largely designed in the 1970s, when trade agreements covered only tariffs and quotas – matters over which states have no authority. With the 1990s advent of NAFTA and the WTO, the scope of “trade” agreements was greatly expanded to set binding constraints on service-sector regulation, investment, zoning policy, procurement and other subjects over which states and localities have regulatory authority.

Currently, there is a 32-member state and local government advisory committee on trade, called the Intergovernmental Policy Advisory Committee (IGPAC). This advisory committee is the primary consultative process for state and local input to federal trade negotiations, yet it does not represent all states. Participants must be appointed by the president and serve at his pleasure. The committee has no binding authority. In contrast, Canada has developed a more representative “supercommittee” to advise on federal trade negotiations that is comprised of subfederal representatives chosen by provinces. This supercommittee includes representatives for each jurisdiction that have authority to approve or veto certain proposed provisions in trade negotiations that could limit subfederal regulatory authority.

4. Do you believe states should have a more robust, inclusive and formal process for advising federal officials on trade policy? Or, do you find the current system satisfactory?

☐ Consultation process needs improvement
☐ Current system is satisfactory

5. Would you support federal legislation that includes the creation of an “all-state trade committee” that has representation from every state, has access to trade negotiating documents, and meets regularly with federal negotiators to resolve state concerns?

☐ Yes
☐ No

6. If you answered no to question 5, why?
(Skip to question 10.)
If you answered yes to question 5, do you believe the “all-state trade committee” should be granted the authority to veto, by vote, certain provisions of prospective trade agreements that affect state and local regulatory authority? (One example might include the U.S. proposal to sign up the U.S. higher education service sector to WTO jurisdiction.)

□ Yes
□ No

Who should represent each state on such an “all-state trade committee” if each state only gets one seat? Please select one:

□ Governor
□ State Attorney General
□ State Legislators
□ Other: ___________________________________________________________

Who should fund such an “all-state trade committee”? 

□ Federal government
□ States
□ Both
Reinserting Checks and Balances in U.S. Trade Negotiations

In addition to marginalizing states, Fast Track delegates Congress’ exclusive constitutional authority to set the terms of U.S. trade policy to the executive branch and removes Congress’ right to use its normal oversight, debate or amendment rights. Under Fast Track, the executive branch is granted the authority to determine with which countries the United States will seek agreements, decide the desired content of the pacts, negotiate the agreements, and bind the United States by signing them – all before Congress votes. Congress is then required to vote on the completed deals within 90 legislative days. No amendments are allowed to either the agreement or the implementing legislation, which conforms U.S. policy to the agreements’ requirements through hundreds of pages of amendments to U.S. law. Many analysts think Fast Track’s design is outdated and inappropriate to the realities of today’s broad-ranging international commercial agreements, which implicate wide swaths of non-trade policy.

10 Would you support Congress establishing standing “readiness criteria” that every potential trading partner would have to meet before the executive branch can select a country for prospective trade negotiations? Readiness criteria could include factors such as: certification that a country meets International Labor Organization (ILO) standards; exclusion from State Department watch lists for human rights violations; a democratic form of government; and the prospect of economic opportunities for U.S. workers, farmers and firms.

□ Yes
□ No

11 In whatever new trade negotiating process replaces Fast Track, would you support the inclusion of mandatory goals – which must be met for the executive branch to obtain expedited congressional consideration of trade agreements – that specify what must and must not be included in trade agreements?

□ Yes
□ No

12 If you answered yes to question 11, would you support ensuring accountability over executive branch negotiations by Congress reviewing whether or not such mandatory goals have been achieved and voting on an agreement before it can be signed by the administration?

□ Yes
□ No
If a State Law is Successfully Challenged before a Trade Tribunal

State laws and regulations successfully challenged before trade tribunals and judged to violate the rules of the trade agreement must be changed or trade sanctions can be imposed on the United States. The federal government is obliged to use all constitutionally available powers – for instance, preemptive legislation, lawsuits and funding cut-off – to force state and local government compliance with such trade tribunal rulings. When the United States lost a WTO case against the federal ban on Internet gambling, the administration was able to resolve the case by choosing to withdraw the gambling sector from WTO jurisdiction. Given an array of current trade agreement provisions could result in rulings against state and local policy, some analysts suggest states should have a mechanism to similarly withdraw trade commitments that bind state regulatory authority.

Also of concern is how such policies are subject to trade agreement constraints in the first place. For example, USTR has repeatedly assured state officials that they have the flexibility to determine whether or not to bind state laws to the service-sector and procurement rules of trade agreements. USTR stated: “State governments can decide the extent to which a state’s government procurement would be covered under the FTAs... If any new states choose to sign on the procurement agreements, they would also be able to decide whether they want to reserve any sensitive procurement areas, such as measures to promote local economic development” (April 2004 “State Government Procurement” USTR fact sheet). However, when the governors of Washington, Oregon and New Hampshire requested that their state commitments be modified under CAFTA, USTR flatly refused and the demands were ignored.

Similarly, for service-sector commitments, USTR stated: “If a trading partner seeks changes in a state law, we will consult with the state. But if such a change is not possible, USTR simply responds to our trading partners that the United States in unable to remove that limitation at this time” (April 2005 “WTO GATS and the States” USTR fact sheet). However, in 2006 when governors in Iowa, Maine, Oregon and Michigan asked that their state laws be carved out from new service-sector commitments proposed under the WTO GATS negotiations, the USTR also denied these requests.

13 Should a mechanism be established to provide states a means to obtain action by federal trade officials to withdraw or renegotiate state commitments when state laws are challenged in trade tribunals?

☐ Yes
☐ No

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