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FACT VS. SPIN: DEBUNKING USTR’S “State Government Procurement and Trade Agreements: The Facts”

The U.S. Trade Representative’s Office (USTR) is desperately trying to spin its way out of mounting criticism over its efforts to convince States to “voluntarily” sign onto government procurement restrictions in a list of pending trade agreements. USTR’s campaign to sign-up States, as well as the process it used to get States to bind themselves to the procurement rules contained in numerous trade agreements – such as the U.S.-Australia pact and the Central America Free Trade Agreement (CAFTA) – has come under attack as State officials have learned that by signing onto the pacts, they would lose control over how State tax dollars are spent. USTR’s response to the growing awareness among State officials has been to post on its website a document notable for its omissions and misrepresentations which USTR calls a “Fact Sheet.” In this document, we repeat the USTR claim and then debunk it.

USTR “Fact Sheet” Item #1:

Myth: The federal government made a misleading request to states to cover their procurement under free trade agreements (FTAs).

- In September 2003, the U.S. Trade Representative sent letters to all Governors asking whether their state governments would permit the coverage of some state government procurement under FTAs that were and are being negotiated by the United States.
- Thirty-seven U.S. states had agreed voluntarily in the early 1990s to cover some of their state procurement under the WTO Agreement on Government Procurement (WTO GPA). This allowed suppliers from the other 27 countries that are Party to the GPA to have an equal opportunity to compete for purchases in those states.
- These states volunteered to cover their procurement because they understood that U.S. procurement agreements help U.S. workers and firms by requiring foreign governments to use the type of open, transparent and non-discriminatory purchasing procedures routinely applied by the states.
- Last September, USTR asked if those 37 states would be willing to extend to new FTA partners the same opportunities they currently extend to the 27 GPA signatory countries.
- USTR also asked the 13 states that are not covered by the WTO GPA whether they were willing to have their procurement covered under the WTO GPA, as well as under the free trade agreements under negotiation.

DEBUNKING USTR:

The USTR’s September 2003 request to States was misleading because the USTR failed to explain to State governments the full, broad consequences of agreeing to be covered by the procurement provisions contained in these trade agreements. What did this USTR letter omit? The “National Treatment” (anti-discrimination) provisions contained in the procurement agreements prohibit many local development policies now utilized by scores of States – and would prohibit the anti-offshoring legislation that has been introduced in 35 State legislatures. Indeed, USTR’s own Intergovernmental Policy Advisory Committee acknowledges that such policies are contradictory to trade obligations if a State agrees to be bound by these procurement provisions.

Since this problem has been raised, USTR makes vague declarations about States maintaining broad flexibility to do as they choose. Yet, when directed to describe *how* this is practically possible given the actual agreements' provisions, USTR's claims are shown to be false. USTR's latest rebuttal is to note that States could exclude such policies from coverage. Yet, the September letter offers States no such option, nor has USTR explained to States subsequently that they have the option of exempting such policies or how to do so.

It is also misleading for the USTR to imply that "voluntary" consent by State Governors is a legitimate tool for agreeing to preempt States' procurement policy with the terms of trade agreements. Indeed, the approach is a sleight of hand: Governors do not make State procurement policy, State legislatures do. Governors have no legal power to constrain the policy options of current and future legislatures by merit of sending a letter to the USTR. The constitutional mechanism for a State to "consent" to participate in a multilateral agreement would be the approval by the legislature of a compact. Article I, Section 10, Clause 3 of the United States Constitution provides that States may – subject to congressional approval – enter into compacts with other States and foreign countries. If such a compact were approved by the legislature, only then would the State be a full party to the broader agreement. Obviously, this process was not pursued by the USTR.

The USTR's end run now puts the burden on State legislators or attorneys general to take legal action to prove the illegitimacy of Governor's actions. Worse, as USTR well knows, if Congress approves a trade agreement, even if a State's initial "sign-on" is illegitimate, it would be quite difficult for a State to extract itself at a later date. The rules of a number of these pacts would require the United States to compensate its trading partners who are parties to the agreement for current and future lost business opportunities if a State withdraws. Plus, only the federal government is recognized under the pact, so a State would have to rely on the federal government to act on its behalf through the entire process.

USTR "Fact Sheet" Item #2:

Local and municipal governments will be swept in by any state agreement to be covered in these agreements.

- False. Coverage of a state's procurement in an FTA does NOT affect the procurement of any city or county government in that state. USTR has not asked any cities or counties to cover their procurement under these trade agreements.

DEBUNKING USTR:

It is true that the procurement rules of the two agreements now completed (CAFTA and U.S.-Australia) do not cover local procurement. What is also true, however, is that the USTR's September letter requested blanket sign-off by States for all future agreements now being initiated - most of which are not yet negotiated. In this regard, it is worth noting that coverage of local governments has been included in a number of trade agreement procurement pacts. For instance, the WTO web page describes the 1996 WTO Agreement on Government Procurement (AGP) as follows: "The present agreement and commitments were negotiated in the Uruguay Round. These negotiations achieved a 10-fold expansion of coverage, extending international competition to include national and local government entities whose collective purchases are worth several hundred billion dollars each year. The new agreement also extends coverage to services (including construction services), procurement at the sub-central level (for example, States, provinces, departments and prefectures), and procurement by public utilities."

Indeed, the U.S. government actively recruited U.S. cities to sign up to the WTO AGP. Public Citizen has dozens of letters sent by then-USTR Mickey Kantor to cities that extol the virtues of the AGP, but fail to

explain the constraints the AGP would place on cities' procurement options. While the U.S. government did not exercise its option to sign up municipal governments to the AGP, the United States did sign up a number of U.S. port authorities and also developed a side agreement on government procurement with the European Union (EU). Seven U.S. cities signed onto that bilateral agreement. Congress, State legislators, city councils, and the general public have been largely unaware of this activity.

The coverage of State, county and local governments by trade procurement rules has also been proposed by the EU in the context of the ongoing WTO services negotiations and the proposals to add a government procurement annex to that agreement. Cities and counties need to stay alert to developments in this area.

USTR "Fact Sheet" Item #3:

Covering procurement under FTAs would force states to comply with "draconian constraints" on domestic purchasing policies and undermine state authority to make purchasing policies, including promotion of local development.

- False. State governments can decide the extent to which a state's government procurement would be covered under the FTAs. It is up to the states to designate the agencies they want to cover, and to identify any goods or services they want to exempt.
- For example, when the 37 states signed on to the WTO GPA, many reserved a number of sensitive procurement areas such as motor vehicles, construction-grade steel, printing, and construction services. The same reservations these states chose to take in the 1990s could be taken under FTAs.
- If any new states choose to sign on to 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. Preference programs for small businesses, distressed areas, minorities and women are excluded from the agreements.
- Moreover, the procurement agreements set very high thresholds for coverage of state government procurement. For goods and services, only contracts above \$477,000, and for construction services, only contracts above \$6.7 million would be subject to the agreements.

DEBUNKING USTR:

In an uncharacteristic outbreak of candor, USTR acknowledges above that local development policies are "sensitive" and that they would need to be explicitly exempted from the procurement rules in order not to be preempted. This is more information than USTR has provided to States to date. USTR did not bother to mention these options to States in its September 2003 letter asking for States to sign on.

Approximately 43 States have "Buy America" or "Buy Local" policies. The USTR did not explain to States that these and other local development policies are at risk if States sign up or there would be a vast list of State exemptions contained in the trade agreements. USTR should have notified Governors and State Legislatures that they needed to explicitly exempt these and a variety of other local development laws from these agreements before signing on. However, even if States had been provided this information, Governors and State legislators cannot exempt from these agreements future policies, such as the current offshoring bills being considered but not yet passed in 35 States. The only way for State officials to ensure existing and future laws are safe is to not sign up in the first place.

As regards women and minority business set-asides: it is clear that certain specific set-asides are exempted from the CAFTA's and U.S.-Australia's procurement rules. The issue is all of the *other* preferences – for instance, for companies that employ U.S. residents (versus offshoring) or for environmentally sensitive products or sweatfree products.

USTR "Fact Sheet" Item #4:

USTR is seeking blanket authority to cover state procurement under trade agreements.

- In its letter to state governments, USTR listed several agreements that were then under negotiation for which state participation was sought (bilateral free trade agreements with Australia, Central America, and Morocco). Several agreements still under negotiation were also listed (the Free Trade Area of the Americas and a free trade agreement with the Southern African Customs Union). It is up to each state to decide:
 - Whether to participate.
 - Which agreements to participate in.
 - The level of its specific commitment.

DEBUNKING USTR:

The USTR also failed to delineate these options in its September 2003 letter to Governors. After listing a raft of agreements including the Free Trade Area of the Americas and agreements with Morocco, Australia, the Central American Common Market, and the South African Customs Union, the letter states, "While several of these negotiations are more advanced than others, to be most efficient we are requesting that [X State] consider coverage for all the countries with which the United States is currently negotiating." In other words, the USTR was requesting the deposit of a signature card for all these agreements, which may or may not contain the exact same set of provisions and constraints on State policymaking.

But, at least the USTR sent a letter to Governors asking for a broad signature card: in 2003, the USTR signed up 37 States to the U.S.-Chile Free Trade Agreement (FTA) with no consultation or authorization. Apparently, the USTR copied the list of States on the 1996 WTO Procurement Agreement and appended it to the Chile FTA. The majority of these States have different Governors than signed the WTO deal who were not only unaware that their States' procurement policy was at issue with the trade pact, but were likely also completely unaware that their States had been signed up to the WTO AGP so many years ago. Governors and concerned public officials are demanding that the USTR explain this underhanded move.

USTR "Fact Sheet" Item #5:

FTAs would undermine green procurement policies of state governments.

- False. The trade agreements ensure that state officials can make purchases that protect the environment. The agreements explicitly permit states to make purchases in accordance with their own state environmental policies.

DEBUNKING USTR:

The actual provisions of the CAFTA procurement text demolish USTR's bold pronouncements about green procurement policy. USTR simply cannot substantiate this claim because both the National Treatment and Technical Specifications rules prohibit distinctions between similar goods and services based on their process and production methods. These rules mean that State-level procurement requirements based on *how* a good is made (such as requiring recycled content in paper) or *how* a service is provided (such as requiring a portion of energy procurement be from renewable sources) simply are prohibited. In addition, any nonconforming policy or any qualification that might have the unintended *effect* of creating an obstacle to trade (such as environmental or consumer safety labels or certain packaging requirements) is subject to challenge as a barrier to trade in the dispute resolution bodies that accompany the agreement. CAFTA's procurement agreement does contain three different non-binding

“green-wash” clauses, but these rhetorical sops do not provide exceptions to the many binding rules which would undermine existing environmental requirements and all future ones.

For a more technical analysis of the specific CAFTA rules and why the green-wash language fails to safeguard environmental procurement measures, see <http://www.citizen.org/documents/MemoToNCEL.pdf>

USTR “Fact Sheet” Item #6:

The WTO Government Procurement Agreement’s “track record includes the demise of states’ procurement policies aimed at avoiding business with the Burmese dictatorship.”

- Wrong. In June 2000, the U.S. Supreme Court unanimously struck down under the Supremacy Clause of the US Constitution a Massachusetts state law that effectively barred companies doing business with Myanmar (formerly Burma) from doing any business with the state. The WTO never ruled on the Massachusetts Burma case.

DEBUNKING USTR:

This is what was written with regard to the Burma case in Public Citizen’s March 2004 procurement memo to State legislators:

“State procurement policies have already been challenged as “barriers to trade” at the WTO as not in compliance with the WTO’s Agreement on Government Procurement. In 1997, Japan and the European Union (EU) challenged a Massachusetts law barring purchases from companies doing business in Burma.

The serious human rights violations and the deliberate suppression of democracy perpetrated by the military junta ruling Burma (which the junta has renamed Myanmar) since it came to power in 1988 are well-known throughout the world. Burma’s pro-democracy movement, led by Nobel Peace Prize holder Aung San Suu Kyi, has called for South Africa-style foreign divestment from Burma to financially starve the military dictatorship. Some two dozen U.S. municipal and county governments, and the State government of Massachusetts, acted on this request and terminated purchasing contracts with companies doing business in Burma, including European and Japanese corporations.

In its WTO complaint, the EU argued that not only was Massachusetts covered by the AGP, but that the Burma law contravened the Agreement by imposing conditions that were not essential to fulfill the contract, imposing qualifications based on political instead of economic considerations, and allowing contracts to be awarded based on political instead of economic considerations.

This WTO action was preempted by a domestic court challenge which resulted in a narrow U.S. Supreme Court ruling which held that a State or local selective purchasing law sanctioning a nation is preempted only if Congress has passed a corresponding law sanctioning that nation (which Congress had done), and the two laws differ. However, the precedent of foreign governments challenging State procurement policy was set. Later, the Clinton administration successfully pressured the State of Maryland to withdraw selective purchasing legislation targeting Nigeria to avoid another WTO complaint.”

USTR “Fact Sheet” Item #7:

FTAs would put “at risk” preference programs and other local development policies.

- False. When states sign on to the FTAs, they may exclude sensitive local programs, as many states have (as noted above).
- Also, the thresholds for the application of the FTAs to state procurement are very high: \$477,000 for purchases of goods and services and \$6.7 million for construction contracts.

DEBUNKING USTR:

Once again, we are glad that the USTR now acknowledges that “sensitive local programs” are at risk under the agreement and need to be specially safeguarded in order not to be preempted. Unfortunately, USTR failed to mention this to States when requesting their consent. However, even if States knew to take such exemptions, such measures cannot protect future policies not yet implemented. The best way for States to maintain their policy discretion is to refuse to sign on to trade agreement procurement rules.

The threshold for goods and services and construction contracts are set at the above levels in the CAFTA. However, this threshold may not be the same in future trade agreements. Moreover, the CAFTA thresholds are regularly exceeded in State spending on essential goods and services and projects such as prison, road, bridge and new school construction (one study puts the average school construction cost in the Midwest at \$8.5 million). Indeed, it is through such high-end contracts that the most good is done by value-laden procurement policies such as recycled content laws, renewable energy provisions, and so on. States should look at the agreements on a case-by-case and threshold-by-threshold basis to determine how the commitments will impact their State contracts, something the USTR is not encouraging them to do.

USTR “Fact Sheet” Item #8:

States would not receive any benefits by participating in the trade agreements.

- False. Including state procurement in FTAs allows U.S. businesses comparable access in the state or other sub-central procurement markets of trading partners. Moreover, opening state procurement to a wider list of potential bidders can result in lower prices and more choices for state government agencies, thus saving taxpayer dollars.
- By voluntarily covering their procurement, states strengthen USTR’s leverage to persuade foreign countries to open their state or other sub-central procurement markets to U.S. suppliers. For example, in the negotiations for an FTA, Australia had been unwilling to cover its states and territories unless the United States covers a significant number of states. Non-discriminatory access to the procurement of Australian states and territories is a high priority for U.S. suppliers of goods and services

DEBUNKING USTR:

Yet another essential fact that USTR failed to convey in its letter is that U.S. companies based in *any* State would be qualified to bid for contracts in other countries that have entered into a trade agreement with the United States, regardless of whether or not their home State has signed up. Thus, the theoretical gain is that more procurement opportunities might be available to U.S. suppliers, because participation of U.S. States would lead to greater participation of subfederal governments in other countries. First, the notion that most State businesses could take advantage of whatever marginal, additional subfederal overseas procurement opportunities might exist is in itself questionable, as only large and/or multinational firms have the capacity to undertake major international projects. Second, what might be in the interest of a supplier – marginally more opportunities to bid overseas – is not likely to benefit a broad swath of a State’s population that stands to lose from seeing their tax dollars spent in a manner that will not recycle wealth in the community or satisfy environmental, labor or other principles typically reflected in a State’s purchasing law.

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 skyrocketing U.S. trade deficits – a record \$470 billion annually in 2003 and rising. Thus, while increasing exports may support jobs in some U.S. States, increasing imports are displacing U.S. workers at a much faster rate. The result

is a growing net deficit in trade and jobs which could be exacerbated by eliminating policies which give preference to procurement of domestically-produced goods and services. Between 1994 and 2000 every State in the country suffered a net loss of jobs because of trade deficits caused by NAFTA and WTO agreements. According to the Economic Policy Institute, trade deficits eliminated a net total of 3.0 million actual and potential jobs from the U.S. economy with 2.8 million jobs supported by exports but 5.8 million jobs destroyed by imports. There is no reason that the situation will be any different in the area of government procurement, as foreign companies snap up large government contracts.