

International trade makes positive contributions to our national and local economies. As part of their economic development strategy, cities promote trade by developing relationships with international entities and by sending coalitions of government and business leaders to foreign cities. Examples of promoting international trade include providing incentives for a foreign car manufacturer to build a plant in one's community or encouraging tourism from abroad. Some American city officials have begun to work directly with other countries or regions to market their local American products and services and to purchase foreign products.

Nationally, the Office of the U.S. Trade Representative (USTR) represents our country in developing international agreements like the Free Trade Area of the Americas (FTAA). By reducing barriers to commerce, international trade agreements facilitate the ability of American and foreign companies to buy and sell their products and services across the globe. These agreements are intended to encourage more trade and advance economic development in American's cities and towns.

However, there is a downside. City leaders have all heard about the North America Free Trade Agreement and its potentially adverse effects on the environment and U.S. labor. Groups of international protesters have disrupted meetings of the World Trade Organization (WTO), attempting to stop negotiations of international agreements that the protestors believe will harm developing countries.

One significant aspect of international trade agreements has not been a focus of the press coverage of the debate - this is how NAFTA and some WTO agreements have the potential to affect local government authority to regulate and legislate. These represent areas of growing concern for local governments since the national government adopted Public Law 107-210 granting President Bush trade promotion authority – a streamlined process for negotiating with other nations.

International trade and investment agreements could limit the autonomy and sovereignty of state and local governments in our nation. Current and upcoming international negotiations and agreements could:

- have an impact on local economic development programs and federal government subsidies and regulations (e.g., the Community Reinvestment Act), and
- increase the risk of preemption or trade sanctions for state and local laws, regulations, zoning, spending policies, procurement programs, and licensing.

In particular, the USTR is currently expanding the WTO General Agreement on Trade in Services (GATS) and the WTO Agreement on Government Procurement (GPA) while accelerating negotiations on the Free Trade Area of the Americas (FTAA).

Currently Enforceable International Agreements

By reviewing pertinent language in a number of currently enforceable agreements, NLC members can educate themselves on how these international agreements could impact their local authority to legislate and regulate. These agreements, listed below, are being re-negotiated, expanded, or re-interpreted, so local officials still have an opportunity to participate in the discussions.

- WTO Agreement on Subsidies & Countervailing Measures (SCM)
- WTO Agreement on Government Procurement (GPA)
- General Agreement on Trade in Services (GATS)
- NAFTA - Chapter 11

WTO Agreement on Subsidies & Countervailing Measures (SCM)

The WTO Agreement on Subsidies (SCM) is intended to open foreign markets to multi-national companies. It achieves this goal by prohibiting government programs designed to favor domestic entities, such as subsidies. The agreement bans any financial contribution, including direct monetary benefits, tax credits, contributions of goods or services, and price supports that favor a particular city, region, or country. According to a study conducted by Georgetown University's Harrison Institute for Public Law, a number of California economic development laws could potentially be challenged under the SCM, including programs to help winegrowers, Silicon Valley start-ups, and disadvantaged areas.

There have been a few exceptions to the prohibition against subsidies. The SCM delineates three different kinds of subsidies - red light (prohibited), yellow light (caution, claims can be brought against you), and green light (allowable subsidies). Under the Green Light exception, allowable subsidies included certain types of research and development programs, assistance to disadvantaged areas, and aid to promote compliance with environmental quality standards. Unfortunately, the "Green Light" Subsidy Rules expired and were not renewed. Now there exist few exceptions to this prohibition.

WTO Agreement on Government Procurement (GPA)

The WTO Agreement on Government Procurement (GPA) requires countries to purchase goods and services based only upon price and performance criteria. Any other criteria placed on procurement policies could constitute a violation of the GPA.

Government policies regarding minority business preferences, domestic business preferences, recycled content preferences, and labor or human rights criteria may be affected by the GPA. In addition, if the GPA is expanded, many local purchasing programs may be influenced, including living wage, prevailing wage, local business first, small business preferences, women-owned preferences, and priorities on distressed areas.

Ongoing negotiations between the U.S. and other WTO members about potential expansion of the GPA could affect local procurement.

- 1) Currently, the GPA applies to national governments and 37 U.S. states. It does not cover local governments. However, the U.S. is discussing a European Union proposal in which the GPA may be expanded to include coverage of local government. Thus, local government purchasing standards and actions could be included in the Agreement, and local governments could be sanctioned for noncompliance.
- 2) The next round of WTO negotiations may include a mandate for all levels of government to disclose their purchasing policies to the WTO for review and compliance.



General Agreement on Trade in Services (GATS)

The GATS regulates fifteen categories of services, including business and professional services, tourism, education, health services, financial services and environmental services (including sanitation, sewage, and landscaping) and over one hundred sub-categories.

This Agreement is intended to reduce barriers to trade, including potential laws enacted by state and local governments.

- GATS could affect a local government's authority to limit the number of business licenses it approves.
- It could prohibit a local government from implementing a regulation requiring all health providers to be non-profit entities.
- The Agreement could limit municipalities' ability to regulate "commercial presence on land." In other words, local zoning regulations that keep out "big boxes" like Wal-Mart or IKEA or other zoning rules that limit commercial building in an historic district may come into question.

Under GATS, all domestic regulations must have a legitimate objective and be "no more burdensome on businesses than necessary." Thus, a local government may be forced to defend a particular law as "necessary" to burden multi-national companies. They would need to prove that all other possibilities were studied and rejected and that there are no other options for the local government. This could be burdensome for the local government to prove.

By contrast, unless certain circumstances apply, current U.S. constitutional law requires a local government to demonstrate only that it had a "legitimate reason" that was "rationally related" to its local law. Thus, a zoning law that limits commercial building in an historic residential district must, in fact, protect historic buildings from destruction when building new commercial sites.

Currently, the U.S. has only promised to follow certain rules (subjecting itself to only segments of the GATS matrix of services). However, the USTR is renegotiating GATS to expand the number of services that the U.S. agrees to follow. If the U.S. agreed to be covered by all the services listed in the GATS, local governments could have to justify their regulation of many more types of services, including liquor licenses, standards for contractors, and teachers' credentials.

NAFTA Chapter 11 - Investment Chapter

The North American Free Trade Agreement (NAFTA) is a currently enforceable agreement between the United States, Mexico, and Canada. Chapter 11 of NAFTA enables a private investor to bring a claim against a country for financial damages. The scope of investments covered is broad - "any interest arising from the commitment of capital." Furthermore, an investor can bring such a claim if the government's actions cause an "expropriation." This is potentially much broader than U.S. takings law because it includes "indirect expropriation" and "tantamount to expropriation." Finally, local law must provide a "minimum standard of treatment" for the investor - meaning that the law must be the "least trade restrictive" This could result in far-reaching major changes from current domestic law.

For example, a Canadian-owned company named Methanex has filed a NAFTA investment claim against the U.S. government for \$970 million. The company claims that the California law to ban the gasoline additive methyl tertiary butyl ether (MTBE) (proven to leak into the groundwater, taste like turpentine, and may be carcinogenic) is not adequate-

ly justified by scientific evidence and that the required phase-out amounts to an unauthorized "expropriation" of the company's expected profits. NAFTA is an agreement between national governments only, so the state of California is not entitled to participate in the case against the U.S. government (although the U.S. State Department has allowed the California Attorney General's office to "consult" or provide "advice" on the United States' position). There are NAFTA challenges to local policy as well, including a complaint involving Boston and its redevelopment authority.

CONCEPTS TO KNOW

Federal Preemption of Local Authority

Global agreements have no direct legal effect on local authority unless a national government decides to enforce the agreements against its sub-national governments (i.e., states and local governments).

Under both Trade Agreements and Investment Agreements, only a nation can be sued, not a "sub-nation" such as a province, state, or local government. However, legislation enacted by the U.S. Congress, using its preemption power allows the federal government to sue the local government to invalidate its local law. Bringing such a lawsuit would be a political decision that would be made by the U.S. Attorney General, as advised by his counsel at the U.S. Department of Justice. To date, our federal government has not initiated such a lawsuit.

Scope of Trade Agreements

When the agreement is being negotiated, the U.S. can ask for certain exceptions in the scope of the agreements. The following may represent areas where local governments should seek exemptions:

- 1) carve-outs – mean that an agreement does not apply to a specific industry or level of government. Carve-outs limit the scope of an agreement by indicating who or what is not covered at all;
- 2) general exceptions (more subtle distinction) – allow countries to defend measures that would otherwise be covered, but the burden is on the country using that defense;
- 3) country specific carve-outs.

Conclusion

The on-going and expanding process of negotiations over bilateral and multilateral trade agreements raise many questions concerning "top-down" rules on domestic regulation, the relevance of federalism to define a division of power among national, state and local governments, and the exact meaning of terms like "subsidy" and "exclusions" for government authorities. State and local governments can influence the debate over U.S. trade policy in a number of ways:

- Ask questions that require trade negotiators to explain the meaning and potential impact of proposed rules;
- Educate public officials at all levels so that they can understand how the trade rules may shift power away from state and local governments and conflict with state sovereignty and federalism;
- Assess the impact of trade policy through state-level oversight by legislatures, attorneys general, state leagues of cities, or through national associations of state and local government;
- Advise trade negotiators and Congress on ways to safeguard state and local authority.