



NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

STANDING COMMITTEE ON
ECONOMIC DEVELOPMENT, TRADE & CULTURAL AFFAIRS

PRESIDENTIAL TRADE PROMOTION AUTHORITY

The National Conference of State Legislatures supports efforts to negotiate trade agreements that secure free and open access to overseas markets for American products. In negotiating new agreements, adequate federalism protections must be included. NCSL has sought to work closely with the United States Trade Representative (USTR) and Congress to ensure that these concerns are taken into account in recent trade and investment agreements and their implementing legislation. In 2002, NCSL worked with the U.S. Congress and other national state and local government organizations to ensure that necessary protections for state and local authority are understood and appreciated. Anticipating a strong and cooperative partnership, NCSL supported the 2002 renewal of Presidential Trade Promotion Authority.

Implementing legislation for the Uruguay Round of the General Agreement on Tariffs and Trade reflects a partnership between USTR, Congress and NCSL in providing federalism protections while at the same time opening overseas markets to American products. NCSL supports continued cooperation and opportunities to build on this relationship as future trade agreements are negotiated. However, NCSL is concerned that investment chapters containing investor-state dispute resolution provisions similar to Chapter 11 of the North American Free Trade Agreement, services chapters, and procurement chapters could threaten basic state policy and regulatory authority and practices. NCSL believes that states must receive assurances that federalism protections similar to those provided in implementing legislation for the GATT are incorporated into any new trade or investment agreement and its implementing legislation.

With earnest caveats for strong mandates that future trade agreements grant “no greater rights” to foreign investors than those granted to U.S. citizens, NCSL supported the Presidential Trade Promotion Authority (TPA) adopted in 2002. However, NCSL fears that the Central American Free Trade Agreement (CAFTA), signed in May 2004 and put into effect by Congress in the summer of 2005, does not fully enshrine the principle of “no greater rights” as it was intended. In particular, NCSL is concerned that investment provisions in CAFTA may have opened new and troubling opportunities for challenges to the sovereign states’ policymaking and regulatory authority. Further, NCSL is concerned with the inadequate mechanisms for state notification and consultation utilized by USTR, as evidenced by USTR’s rejection of suggestions made by the Intergovernmental Policy Advisory Committee (IGPAC) for improving consultation and, in particular, the suggestion that USTR carbon copy requests made of state governors to that state’s legislative leaders.

NCSL continues to support the “no greater rights” doctrine and enjoins trade negotiators to interpret TPA’s “no greater rights” in the broadest sense possible for the protection of state sovereignty and American federalism in negotiations for both goods and services. NCSL believes that this interpretation should incorporate substantive considerations as well as principles of takings

as interpreted by the U.S. Supreme Court and procedural matters consistent with U.S. constitutional due process. NCSL is committed to working with the U. S. Trade Representative (USTR) and other federal agencies as they interpret and apply TPA's "no greater rights" language to trade agreement negotiations.

NCSL supports the negotiation of free trade agreements that also safeguard the U.S. system of federalism and looks forward to working with the Congress in anticipation of the current TPA's expiration in 2007 to devise a trade promotion authority bill that contains adequate protections for state sovereignty. In particular, NCSL will support TPA legislation only upon the condition that it require that an agreement negotiated under TPA:

- grant "no greater rights" both substantively and procedurally to foreign investors than granted to U.S. citizens;
- protect state police and regulatory authorities;
- "grandfather" existing state laws;
- utilize an "opt in" or "positive list" process for making commitments relative to state-level authorities or interests;
- fully indemnify the states for any monetary claims brought against the United States under an agreement as a result of state action;
- require express congressional action to legitimize preemption of a state law to comply with a trade agreement;
- require federal or other reimbursement of state expenses incurred in trade disputes;
- include enforceable labor and environmental standards; and
- be briefed to the Intergovernmental Policy Advisory Committee (IGPAC) as the first round of negotiations concludes.

Federalism protections must be consistent with NCSL's policy on Free Trade and Federalism. These provisions include, but are not limited to: reservations to trade and investment agreements to "grandfather" existing state laws that might otherwise be subject to challenge and provisions that promote effective and meaningful consultation between the states and the federal government related to any dispute involving state law or any dispute that could prompt retaliation against states. NCSL supports efforts to include language in TPA legislation that requires agreements negotiated under that authority respect state sovereignty and state governmental functions. Provisions must also be made in federal implementing legislation that so far as possible commit the federal government to protecting and defending state authority when it is exercised in conformity with accepted U.S. constitutional principles of nondiscrimination against foreign commerce.

Revised from policy enacted 2002-2005.

Unanimously adopted by the NCSL Standing Committee on Economic Development, Trade & Cultural Affairs, August 17, 2005.

Unanimously adopted by the NCSL Annual Business Meeting, August 20, 2005.

Expires NCSL Annual Meeting 2008.