

1 **POLICY: FREE TRADE AND FEDERALISM**
2 **COMMITTEE: LABOR AND ECONOMIC DEVELOPMENT**
3 **TYPE: DRAFT; NCSL POLICY; EXPIRES AT 2010 LEGISLATIVE**
4 **SUMMIT**
5

6 The National Conference of State Legislatures (NCSL) ~~believes that trade has the~~
7 ~~potential to improve the livelihoods of Americans and thus supports efforts to expand~~
8 U.S. exports through well-crafted international trade agreements. ~~However,~~ NCSL also
9 believes that these agreements must be harmonized with traditional American values of
10 constitutional federalism. In particular, state legislative, judicial and ~~reservations can be~~
11 ~~made to trade and investment agreements that limit preemption of state law and that~~
12 ~~preserve the authority of state legislatures. Further, implementing legislation for trade~~
13 ~~and investment agreements can and should be crafted to include protections for our~~
14 ~~constitutional system of federalism. These measures, among others, are necessary to~~
15 ~~ensure that international trade agreements do not adversely impact state budgets or~~
16 ~~constrain state regulatory authority~~ must be protected. Without them, NCSL will be
17 ~~unable to~~ not support such international trade and investment agreements, trade
18 promotion authority, or implementing legislation unless they include such federalism
19 protections.

20
21 ~~Trade that Protects State Sovereignty~~ Federalism Protections
22

23 NCSL supports federal legislation that promotes consultation between the states and
24 the federal government on trade policy. In particular, NCSL urges the U.S. Trade

25 [Representative \(USTR\) to consult with state legislatures as well as governors about](#)
26 [state procurement practices. USTR should only be able to bind a state to an](#)
27 [international procurement agreement following formal consent from the state legislature.](#)

28 ~~The states are committed and prepared to treat foreign firms that do business within~~
29 ~~their borders in a nondiscriminatory fashion, under a standard based on the broad~~
30 ~~protection afforded by the Commerce Clause and the Foreign Commerce Clause of the~~
31 ~~U.S. Constitution. What the states are not prepared to accept, however, is a challenge~~
32 ~~to their sovereignty and to state authority based on arbitrary and unreasonable~~
33 ~~standards of discrimination against foreign commerce, similar to that employed by the~~
34 ~~GATT panel in the so-called Beer II decision. In order to better safeguard state~~
35 ~~sovereignty, the USTR should be guided by the following recommendations in all trade~~
36 ~~negotiations.~~

37
38 ~~First, reservations must be made to trade and investment agreements to “carve out”~~
39 ~~state laws that might otherwise be subject to challenge. Particular care must be~~
40 ~~exercised to ensure that state tax laws and revenue systems are not subject to~~
41 ~~unjustified challenge under international agreements. Provisions must also be made in~~
42 ~~federal implementing legislation that commit the federal government to protect state~~
43 ~~lawmaking authority when it is exercised in conformity with accepted U.S. constitutional~~
44 ~~principles of nondiscrimination against foreign commerce.~~

45
46 [NCSL supports the creation of a standing federal-state commission on international](#)
47 [trade or a national center on trade and federalism to conduct unbiased legal and](#)

48 [economic analysis of the effect of international trade policy on states and localities. The](#)
49 [Commission must have trade policy capacity with resources relevant to state level](#)
50 [concerns, and promote information sharing and trade policy dialogue between USTR](#)
51 [and the states.](#)

52 ~~Second, NCSL encourages the Office of the United States Trade Representative~~
53 ~~(USTR) to utilize the “positive list” approach for making services, procurement, and~~
54 ~~investment commitments in trade agreements. [Only state laws that are specifically](#)~~
55 ~~[committed should be covered in the agreement.](#) This approach allows states to know~~
56 ~~more precisely the areas of the economy and state authority implicated in a trade~~
57 ~~agreement and would avoid the kind of serious problems we now face in the area of~~
58 ~~internet gambling. A “negative list” approach commits the United States to implement~~
59 ~~trade disciplines on all covered sectors unless areas or state laws are specifically~~
60 ~~exempted in the annexes of the agreement. USTR should acquiesce to a “negative list”~~
61 ~~approach only as a last resort. If the federal government agrees to a “negative list”~~
62 ~~approach, then the annexes listing exemptions should retain the unbound sectors and~~
63 ~~the limits of U.S. commitments that exempt state laws.~~

64
65 Following appropriate consultations with USTR, the states must be able to set and
66 adjust their commitments – a right the states have and which USTR has repeatedly
67 recognized. USTR should therefore make clear to trade negotiating partners that U.S.
68 states retain the ability to make adjustments to commitments regarding state-level
69 services, procurement, and investment policies.

70 [NCSL supports the authorization and appropriation of adequate resources so that](#)
71 [USTR is best equipped to fully consult with state legislatures in order to represent their](#)
72 [interests and the American public in trade negotiations while protecting and preserving](#)
73 [American constitutional principles.](#)

74
75 ~~Finally, NCSL encourages USTR and its trade negotiation colleagues in the federal~~
76 ~~government to develop economic and non-economic impact statements for agreements~~
77 ~~under negotiation. These could resemble the state and local analyses conducted by the~~
78 ~~Congressional Budget Office. NCSL recognizes that such analyses could be politically~~
79 ~~sensitive and could affect negotiation strategies employed by other countries; therefore,~~
80 ~~it would be understandable if such analyses were shared exclusively with the~~
81 ~~Intergovernmental Policy Advisory Group (IGPAC). It is important that state officials~~
82 ~~have access to such information before determining whether they can support an~~
83 ~~agreement.~~

84 85 **~~Private Rights of Action and Investor-State Disputes~~**

86 [NCSL encourages Congress to require the ~~General Accountability Office~~Government](#)
87 [Accountability Office to develop state economic and sovereignty impact statements for](#)
88 [international trade and investment agreements under negotiation.](#)

89
90 [NCSL will not support Bilateral Investment Treaties \(BITs\) or Free Trade Agreements](#)
91 [\(FTAs\) with investment chapters that provide greater substantive or procedural rights to](#)
92 [foreign companies than U.S. companies enjoy under the U.S. Constitution. Specifically,](#)

93 NCSL will not support any BIT or FTA that provides for investor/state dispute resolution.
94 NCSL firmly believes that when a state adopts a non-discriminatory law or regulation
95 intended to serve a public purpose, it shall not constitute a violation of an investment
96 agreement or treaty, even if the change in the legal environment thwarts the foreign
97 investors' previous expectations.

98 ~~Following the passage of the North American Free Trade Agreement (NAFTA) in the~~
99 ~~1990s, several foreign investors have used the "investor-state" provisions of that~~
100 ~~agreement to attack state laws and state court decisions before an international tribunal.~~
101 ~~By providing access to international investment arbitration by foreign investors, NAFTA~~
102 ~~and various related Free Trade Agreements (FTAs) provide greater procedural rights for~~
103 ~~review of claims against U.S. law and policy than would be provided to a U.S. investor~~
104 ~~under similar circumstances. Consequently, the decisions of these tribunals have had~~
105 ~~an adverse impact on state sovereignty and federalism. Unfortunately, the "no greater~~
106 ~~rights" language in the 2002 Trade Promotion Authority (TPA) has been interpreted to~~
107 ~~cover only substantive rights. The ability of foreign investors to bring claims in front of~~
108 ~~an international investment tribunal, as opposed to through the U.S. courts, is clearly a~~
109 ~~greater procedural right than that enjoyed by U.S. investors; and NCSL is concerned~~
110 ~~that these tribunals, because they are frequently unfamiliar with U.S. federalism and~~
111 ~~jurisprudence, would in any case provide foreign investors with greater substantive~~
112 ~~rights. At present such language is not inserted into the operational text of investment~~
113 ~~chapters of these trade agreements, but rather, is only found in the preamble. NCSL will~~
114 ~~only support a grant of presidential trade negotiating authority if such a grant of authority~~
115 ~~includes a "no greater procedural or substantive rights" mandate. NCSL is committed to~~

116 | ~~working with USTR and other federal agencies as they interpret and apply “no greater~~
117 | ~~procedural or substantive rights” language to trade agreement negotiations.~~

118 |

119 | NCSL believes that BIT and FTA ~~Trade agreement implementing~~ legislation ~~language~~
120 | ~~must include provisions that deny any new private right of action in U.S. courts or before~~
121 | ~~international dispute resolution panels based on international~~ to enforce ~~trade or~~
122 | ~~investment agreements. Implementing legislation must also include provisions stating~~
123 | ~~that neither the decisions of international dispute resolution panels nor international~~
124 | ~~trade and investment agreements themselves are binding on the states as a matter of~~
125 | ~~U.S. law. Implementing legislation for any agreement must include provisions that~~
126 | ~~promote effective and meaningful consultation between the states and the federal~~
127 | ~~government related to any dispute involving state law or any dispute that could prompt~~
128 | ~~retaliation against states. These provisions should include a timetable for prompt notice~~
129 | ~~to states of a potential state issue, as well as the right of attorneys for the state to~~
130 | ~~participate as part of the “team” defending a state law before international tribunals.~~
131 | ~~States must also be given the right to file amicus briefs before international dispute~~
132 | ~~resolution panels, both independently and collectively through state organizations such~~
133 | ~~as NCSL. It is imperative that when state laws are under challenge in international~~
134 | ~~proceedings, the federal government defend state laws as vigorously as it defends~~
135 | ~~federal law.~~

136 |

137 | ~~The federal government retains the power to sue a state to enforce international trade~~
138 | ~~agreements. However, NCSL urges the~~ will support ~~federal government to~~ legislation

139 | ~~assure~~ [assuring](#) states that the federal government will not seek to preempt state law as
140 | a means of enforcing compliance with an international agreement unless Congress has
141 | expressed clear intent to preempt state law in implementing legislation or other law.
142 | Likewise, the federal government must not withhold federal funds otherwise
143 | appropriated by Congress to a state as a means of enforcing compliance with
144 | provisions of an international agreement. ~~Specifically, the federal government must~~
145 | ~~indemnify the states for costs incurred relating to trade challenges and ensure that the~~
146 | ~~federal government will not seek to use administrative measures (such as withholding of~~
147 | ~~payments) to compel compliance or to pay a damage award.~~

148 |
149 | [NCSL similarly supports federalism protections related to enforcement actions by the](#)
150 | [federal government.](#) Because the federal government retains the power to sue a state to
151 | enforce international agreements, federal legislation implementing any new trade or
152 | investment accord must [continue to](#) include appropriate protections for the states
153 | related to rules of procedure, evidence, and remedies in such litigation. The federal
154 | government must [continue to](#) bear the burden of proof in court showing that state law is
155 | inconsistent with an international agreement, regardless of the finding of an international
156 | dispute resolution panel. - [As current law now provides, in any implementing legislation](#)
157 | [for new agreement,](#) ¶ the President must be required, at least 30 days before the Justice
158 | Department files suit against a state, to file a report with Congress justifying its
159 | proposed action. In the event of an unfavorable judgment, states must be protected
160 | from financial liability. If the federal government agrees to allow foreign firms to collect
161 | money damages for “harm” caused by a state law, then the federal government must

162 bear the burden of any such award by international tribunals and not seek to shift the
163 cost to states in any manner.

164
165 Additionally, states ~~Offices of Attorney General~~ must be fairly compensated by the
166 federal government for the time and expense associated with [assisting the federal](#)
167 [government in](#) defending against a foreign investor claim. The absence of such a
168 requirement has led to a kind of “unfunded mandate,” such as was experienced by the
169 California Department of Justice during its preparations for defense in the NAFTA
170 “Methanex” [and “Glamis Gold”](#) cases.

171
172 **Consultation**

173
174 The President, the U.S. Trade Representative, and other federal agencies involved in
175 negotiating trade agreements must remain cognizant of the intimate role that state
176 legislators play in crafting state laws, policies, and programs directly affected by today’s
177 international commercial agreements. ~~It is imperative that the~~ [In particular, NCSL urges](#)
178 [the United States Trade Representative \(USTR\)](#) ~~and other agencies to~~ consult with state
179 legislators ~~and NCSL prior to the outset of trade negotiations in order to ensure that~~
180 ~~both the negotiators and state legislators are aware of any state laws, policies, or~~
181 ~~programs that may be impacted by a negotiated agreement~~ [as well as governors prior to](#)
182 [the onset of trade negotiations about state procurement practices, investment, and](#)
183 [services issues.](#)

184

185 | In general, NCSL remains very concerned about the manner in which the federal
186 | government consults with states on trade issues. NCSL applauds efforts by the U.S.
187 | Trade Representative to work with IGPAC and looks forward to full and active
188 | participation in this body. We are also encouraged by USTR's move away from solely
189 | relying on the Single Point of Contact (SPOC) system for collecting information from
190 | states and for relaying important information to states. NCSL encourages USTR and
191 | other federal agencies involved in trade negotiations to develop effective systems of
192 | communication with state and local officials that respect the fact that many public policy
193 | decisions require approval or action by both legislative and executive governmental
194 | institutions, that incorporate all branches of government and that, as appropriate, rely on
195 | state and local officials' national associations for information collection and
196 | dissemination. Such information collection and dissemination efforts must respect both
197 | the needs and time frames of negotiations, but also the many demands on the time and
198 | attention of state policymakers by allowing enough time for sufficient study and
199 | appropriate response.

200

201 | NCSL notes that a number of states have created oversight committees or state
202 | commissions that study the impact of international trade agreements on the state's
203 | economy and regulatory authority. It is appropriate for USTR to consult with these state-
204 | level bodies.

205

206 | NCSL also notes the proposal put forward by IGPAC in August 2004 for the creation of
207 | a standing federal state commission on international trade. IGPAC also proposed: 1)

208 | ~~trade policy capacity with resources relevant to state level concerns; 2) information~~
209 | ~~sharing between USTR and states and trade policy dialogue between states; 3)~~
210 | ~~improvement of trade data and analysis; 4) discussion of procurement from the state~~
211 | ~~perspective; 5) improvement in the state/federal trade development partnership; and 6)~~
212 | ~~assessment of the costs and benefits assessment of the costs and benefits of federal~~
213 | ~~trade development funding allocated to agriculture, industries, services and~~
214 | ~~technologies. NCSL strongly supports the content of this proposal, the outline of which~~
215 | ~~has been included in recent IGPAC reports to USTR regarding new free trade~~
216 | ~~agreements. NCSL requests that USTR provide a statement of its position on the~~
217 | ~~IGPAC proposal or a written response detailing USTR concerns regarding aspects of~~
218 | ~~the standing commission proposal. It is unfortunate that this good faith effort by IGPAC~~
219 | ~~to model possible new approaches to federal-state consultation has been ignored.~~

220 |

221 | **Procurement**

222 |

223 | ~~The United States is party to the World Trade Organization's Agreement on~~
224 | ~~Government Procurement (GPA). When negotiating the GPA, USTR solicited the state~~
225 | ~~governors for permission to include state procurement and to bind state procurement~~
226 | ~~processes to the GPA. USTR asserts that 37 states were voluntarily bound through this~~
227 | ~~process to the GPA. In September 2003, USTR requested governors to make similar~~
228 | ~~commitments to several FTAs being negotiated at the time.~~

229 |

230 State procurement policy and practices often are set in state law and are sometimes
231 designed to serve social or economic purposes beyond the mere provision of goods and
232 services for state government use. Unfortunately, current FTAs could prohibit state and
233 local governments from passing new laws favoring local suppliers in government
234 contracts for goods and services and bar governments from imposing technical
235 specifications in its public contracts if those specifications pose an “unnecessary” barrier
236 to trade. The agreements’ national treatment rules will prohibit governments from
237 favoring local suppliers, even when there are good social and economic development
238 reasons to do so. The agreements’ rules on technical specifications and supplier
239 qualifications could allow foreign companies to ask their home government to challenge
240 procurement rules designed to achieve social or development goals, such as
241 incorporating living wage provisions and environmental quality standards into the
242 production of goods and services, assistance to minority-owned firms, and local
243 purchasing preferences. NCSL encourages USTR to ensure that states can retain the
244 ability to use procurement policy to promote these public interests while negotiating any
245 modifications to GPA or procurement chapters in FTAs.

246

247 It is unacceptable that state legislatures are not being consulted regarding GPA and
248 other procurement-related issues. Under most state constitutions, the legislature has
249 substantial power to enact spending measures and to set procurement policies. NCSL
250 demands that USTR consult with state legislatures about state procurement practices.
251 USTR should only be able to bind a state to an international procurement agreement
252 following formal consent from the state legislature. We are particularly troubled by the

253 | recently negotiated U.S. Korea FTA, which by reference binds all GPA states to the
254 | additional provisions negotiated under the procurement chapter of that agreement.

255 |

256 | **Services**

257 |

258 | ~~Services constitute an important and growing segment of the American and global~~
259 | ~~economies. NCSL believes that all international services agreements entered into by~~
260 | ~~the United States must include provisions that preserve the right of federal, state, and~~
261 | ~~local governments to provide and regulate services in the public interest on a non-~~
262 | ~~discriminatory basis. Nothing in any services agreement should bar measures rolling~~
263 | ~~back service privatization or require the privatization of public services. concurs that it~~
264 | ~~is critical that the United States remain competitive in services sectors. However,~~
265 | ~~international competition in service industries cannot compromise state constitutional or~~
266 | ~~traditional authority or in any way impinge upon states' ability to protect the public~~
267 | ~~interest. Prior, during, and after service sector related negotiations, USTR must~~
268 | ~~undertake consultations with state legislatures, where policies about government-~~
269 | ~~provided services, regulation of monopolies, provision of essential services (such as~~
270 | ~~energy, water, health, education, transportation, or public safety), or privatization are~~
271 | ~~set. Consultation with state legislatures is absolutely necessary prior to, during, and~~
272 | ~~after a~~

273 |

274 | With respect to ongoing negotiations on “domestic regulation” under the General

275 | Agreement on Trade in Services (GATS), ~~round or the negotiation of an FTA including~~

276 ~~services provisions.~~ NCSL believes that the United States should never accept an
277 agreement that requires domestic regulations to meet a “necessity test” even if drafted
278 in language requiring domestic regulation to be “pre-established, based on objective
279 criteria, or relevant.” It is the job of elected legislatures, not international tribunals to
280 decide when regulations are necessary. ~~applauds the consultations that have been~~
281 ~~undertaken related to electric utility services and encourages USTR to devote~~
282 ~~substantially the same attention and effort, potentially through similar mechanisms, to~~
283 ~~consultations related to other sectors. We are particularly concerned about the inclusion~~
284 ~~of higher education, which the United States has proposed to subject to WTO~~
285 ~~jurisdiction in the context of the Doha Round. This proposal may have consequences for~~
286 ~~state higher education subsidies and other state regulatory policies related to higher~~
287 ~~education that should be carefully examined before the sector is committed. The WTO~~
288 ~~gambling suit illustrates the dangers of committing service sectors without a thorough~~
289 ~~vetting by appropriate state officials.~~

290

291 ~~Regulation of gaming interests ranging from lotteries to horseracing has long been a~~
292 ~~prerogative of the states, and state policymakers have chosen vastly different~~
293 ~~approaches as they balance varying public morals, revenue, land use, and other~~
294 ~~considerations. As the World Trade Organization Dispute Resolution Body has ruled~~
295 ~~that the United States did make a commitment covering gambling under “other~~
296 ~~recreational services,” that the United States is in violation of that commitment, and that~~
297 ~~the United States has failed to comply with its ruling, NCSL appreciates USTR’s~~
298 ~~invocation of GATS article XXI to withdraw the U.S. commitment and calls on USTR to~~

299 | ~~consult effectively, meaningfully, and timely with the states as USTR negotiates~~
300 | ~~compensatory concessions to our trading partners. Further, NCSL endorses the use of~~
301 | ~~article XXI to withdraw other commitments under GATS that may run counter to state~~
302 | ~~policy, regulatory, or police authority.~~

303

304 | ~~Adjusting to Free Trade~~

305

306 | ~~NCSL acknowledges that trade can bolster economies, and increase standards of living.~~
307 | ~~However, there are many who may suffer as states, localities, manufacturing or service~~
308 | ~~industries, small farms, families and communities may suffer in the adjustment to the~~
309 | ~~new realities of open international markets. NCSL, therefore, supports federal efforts to~~
310 | ~~provide meaningful Trade Adjustment Assistance (TAA) to affected workers. NCSL~~
311 | ~~encourages Congress and the implementing federal agencies:~~

312

- 313 | • to ensure that the funding for TAA programs is sufficient to meet current and
- 314 | future needs;
- 315 | • to expand benefits eligibility to service-sector and agricultural workers impacted
- 316 | by trade; and
- 317 | • to work with NCSL and state legislatures to ensure that TAA programs are
- 318 | flexible to suit different states' needs; and
- 319 | ~~• to engage in aggressive outreach to ensure that workers, employers, and~~
- 320 | ~~communities are informed of the benefits of the TAA program and are able to~~
- 321 | ~~effectively utilize the program;~~

- 322 • ~~to ensure that adversely affected workers are provided the full income support,~~
- 323 ~~training, reemployment services and other services and benefits to which they~~
- 324 ~~are entitled, and that claims for such benefits are reviewed expeditiously and~~
- 325 ~~objectively;~~
- 326 ~~to simplify procedures for determining TAA eligibility; and~~
- 327 • ~~to refrain from modifying TAA in any way that would jeopardize the program's~~
- 328 ~~mandate to help trade-affected workers who have lost their jobs as a result of~~
- 329 ~~increased imports or shifts in production out of the United States.~~

330

331 ~~In general, the federal government should work with the states and the private sector to~~

332 ~~develop lifetime educational and workforce training opportunities that prepare~~

333 ~~Americans to compete successfully in a changing global economy.~~

334

335 **Building Capacity in Trading Partners**

336

337 NSCL recognizes that many developing countries do not have the institutions or

338 capacity to implement and enforce the numerous [FTA](#) obligations, ~~assumed under an~~

339 ~~FTA. NSCL supports federal efforts to fund programs to assist in building the trade~~

340 ~~capacity and trade agreement compliance of developing countries, [including](#). Moreover,~~

341 ~~NSCL recognizes that developing countries need additional assistance to help them~~

342 ~~take advantage of opportunities created by trade in order to alleviate poverty. We~~

343 ~~therefore support federal funding for infrastructure and rural development, so that any~~

344 ~~benefits of trade may be more broadly shared. Funds should also be directed to [and](#)~~

345 | ~~ensure~~ [ensuring](#) that laws and institutions related to labor and the environment are
346 | improved and strengthened.

347

348 | **~~Support for Trade Negotiating Representation~~**

349

350 | ~~NCSL recognizes that the negotiation of trade agreements—whether bilateral,~~
351 | ~~multilateral, or global—on such a range of goods, services, and investment~~
352 | ~~opportunities as America’s trillion-dollar economy demands is a monumental~~
353 | ~~undertaking. NCSL supports the authorization and appropriation of adequate resources~~
354 | ~~so that USTR is best equipped to fully consult with state legislatures in order to~~
355 | ~~represent their interests and the American public in trade negotiations while protecting~~
356 | ~~and preserving American constitutional principles.~~