Assessment Maine Citizen's Trade Policy Commission, 2009

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January 27, 2010

Outline & Table of Contents **Page**

Summary of Analysis **3**

Preface: Vague Standards, Unpredictable Tribunals, Missing Data **8**

Assessing the Impacts of International Trade Agreements on State and Municipal Laws in Maine **9**

International Investment Agreements **11**

Introduction

General Analysis of International Investment Agreements **12**

Coverage: Definition of Investment

Rules: Expropriation

Rules: Minimum Standard of Treatment

Exceptions

Case Study: Maine Water Policy **14**

Recent Developments **16**

2008 Campaign Promise by Barack Obama

U.S. House Ways and Means Committee Hearing

U.S. State Department BIT Review Committee Report

Ruling in *Glamis Gold*

Pending Agreements: Colombia, Panama, Korea, Trans-Pacific Partnership, China Bilateral Investment Treaty

International Services Agreements **21**

Introduction

General Analysis **21**

Case Study: Maine Water Policy **22**

Recent Developments **25**

March 2009 Report: Working Party on Domestic Regulation

Maine Citizens Trade Policy Commission communications.

Agreement on Technical Barriers to Trade (Notification Provisions) **27**

Introduction

General Analysis **27**

Case Study: Chinese Objection to Proposed State

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Product Safety and Electronic Waste Legislation **28**
Recent Developments **30**
NCSL resolution
Maine Commission communications
International Subsidies Agreements **32**
Introduction
General Analysis **32**
Case Study: The Foreign Sales Corporation Case **33**
Recent Developments
The Boeing/Airbus Litigation **33**
International Procurement Agreements **34**
Introduction
General Analysis **35**
Case Study: Maine Purchasing Policy **36**
Recent Developments
Maine adopts LD 1257 (Treat). **37**
International Agreements on Trade in Goods **37**
Introduction
General Analysis **38**
Case study: Maine Water Policy **39**
Recent Developments: Trans-Pacific Partnership **42**
Assessing the Impact of International Trade Agreements on Business and Workers in Maine
Maine Exports, Imports, & Foreign Investment **43**
The Effect of Trade Agreements and Globalization on the Maine Business Climate & Working Conditions **45**
Options for the Commission to Engage on Trade Policy in 2010 & 2011
Preservation of State Sovereignty and Authority to Regulate in the Public Interest **47**
Reform of Measures Related to Federal Preemption & Unfunded Mandates
Reform of International Services Agreements
Reform of International Investment Agreements and Treaties
Developing the Maine Economy by Promoting Exports and by Preserving and Expanding the Number of Jobs, Particularly in the Manufacturing Sector **49**
Reform of Border-Adjusted Value-Added Taxes
Reform of Policy to Assist Small and Medium Sized Exporters
Currency Manipulation Reform
State-Federal Consultation on Trade Policy **51**
The Positive List Approach
A Center on Trade and Federalism
The Decision Process for Initiating Trade Negotiations **51**

Assessment Maine Citizen's Trade Policy Commission, 2009

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Summary of Analysis

Vague Standards, Unpredictable Tribunals, Missing Data

With the possible exception of international agreements on government procurement, the language of trade and investment agreements is vague. International tribunal decisions are accordingly unpredictable. Especially without reference to the facts of a particular case and controversy, it is difficult to identify specific state and municipal laws that are definitely free from potential conflict with international rules (or that definitely conflict with international rules). Similarly, the effect of international trade and investment agreements on workers and businesses is difficult to estimate because the U.S. does not collect the necessary state and local level data on exports, imports, and the balance of investment flows.

Assessing the Impacts of International Trade Agreements on State and Municipal Laws in Maine

***Impacts of international investment agreements (IIAs) on state and municipal laws*.** Investors are allowed to file claims against national governments seeking money damages in compensation for economic regulation and other government measures adopted by state or municipal government in Maine and other sub-national jurisdictions.

Large numbers of state and municipal laws in Maine are covered by IIAs.

The July 2009 NAFTA tribunal ruling in *Glamis Gold v. United States* was a significant victory for states like Maine. The real significance of *Glamis Gold* is its narrow reading of NAFTA article 1105 on the minimum standard of treatment, including the element of fair and equitable treatment.

On another front, the Obama administration is currently considering either the adoption or the initial negotiation of investment agreements or treaties with several countries. Among the most significant are the pending free trade agreements with Panama and Colombia, and agreements with the economic powerhouses of East Asia: including bi-lateral agreements with Korea and China, as well as a multi-member Asian regional agreement, called the Trans-Pacific Partnership.

Impacts of international services agreements on state and municipal laws. The WTO services agreement (GATS) is the most local global agreement because it covers so many services that are regulated by states like Maine and provided by local governments.

On March 20, 2009 the chairman released the most recent draft report of the WTO Working Party on Domestic Regulation (WPDR). The draft continues to leave out a proposal from Australia, Hong Kong and New Zealand that would require domestic regulations to be "no more burdensome than necessary to ensure the quality of a service." The latest draft, nonetheless, retains disciplines from the prior drafts. Among the most significant proposals, several create a spectrum of possible meanings. These meanings *could be* consistent with constitutional authority to regulate in the United States, but they *could also be* interpreted as an obligation to regulate in the least-burdensome way.

Impacts of the Agreement on Technical Barriers to Trade (Notification Provisions) on state and municipal laws. The U.S. Commerce Department is concerned with proposed technical regulations, adopted by the Maine legislature or being considered for adoption by Maine administrative agencies. Only technical regulations that affect the actual product, or the product manufacturer's access to the U.S. market, are reported to the WTO.

On the basis of the provisions in the TBT agreement, the Peoples' Republic of China in 2008 demanded that bills in the Maryland and Vermont legislatures must be "cancelled" or "revised." In response to complaints, on October 22, 2008, a senior U.S. trade negotiator told state officials that his office would modify its procedures for notifying the World Trade Organization (WTO) about pending state legislation that regulates trade in goods.

***Impacts of international subsidies agreements on state and municipal laws*.** The Agreement on Subsidies and Countervailing Measures breaks its definition of a subsidy into three parts: (1) a financial contribution; (2) by a government or any public body within the territory of a WTO member; (3) which confers a benefit.

Good Jobs First reports that Maine localities may provide such subsidies for commercial development in the form of tax increment financing, while state subsidies may be in the form of business equipment tax reimbursement or employment tax increment financing plans.

Use of the SCM agreement by the European Union has already led to changes in U.S. tax law. The SCM is at the heart of the U.S. - EU battle over the fates of the globe's two largest aircraft companies. Also, the SCM is a potential tool for correcting unfair competition from Chinese and other foreign industrial firms. The SCM agreement allows the U.S. to take such enforcement action through WTO dispute resolution or through unilateral imposition of countervailing duties.

Impacts of international procurement agreements on state and municipal laws. In March of 2004, Peace through Interamerican Community Action (PICA) published an analysis of potential conflicts between Maine procurement policies and international trade procurement rules. The

analysis identified three major areas of Maine procurement policy that are at risk of being found in conflict with international procurement agreements: (1) environmental purchasing preference not based on product performance; (2) preferences for companies that uphold labor and human rights; and (3) policies that ban state contractors from shipping jobs overseas or other local development policies aimed at creating jobs in Maine.

Impacts of International Agreements on Trade in Goods (GATT) on State and Municipal Laws. It is generally agreed that a "good" is a product that can be produced, bought, and sold, and that has a physical identity.

In addition to the investment issues discussed above, negotiations on a Trans-Pacific Partnership free trade agreement will be very much about trade in goods: oil from Brunei: agricultural products from New Zealand: agricultural products, natural gas, iron ore, and other minerals from Australia; copper and agricultural products from Chile; textiles, electronics, and agricultural products from Vietnam; biotechnology, electronics, and chemicals from Singapore; and copper, zinc, gold, textiles, and fish meal from Peru.

Assessing the Impacts of International Trade Agreements on Business and Workers in Maine

Based on their analysis of 2006 data, the U.S. International Trade Administration and the Bureau of the Census estimate that "15.8 percent of all manufacturing workers in Maine depend on exports for their jobs," and that 3.9 percent of private sector jobs in Maine are supported by manufacturing exports. The Office of the U.S. Trade Representative and trade associations representing multi-national corporations often argue that export data, of the kind displayed above, support the argument for signing more trade and investment agreements on the current model.

But, Robert Scott, a trade economist at the labor-friendly Economic Policy Institute, says that the "problem with these statements is that they misrepresent the real effects on the U.S. economy: trade both creates and destroys jobs." Scott calculates that between 1994 and 2000, Maine gained 9,617 jobs from exports and lost 31, 974 jobs as a result of imports, for a net loss over six years of 22,357 jobs. In a more recent publication, Scott estimates that over the period of 2001 to 2007, Maine lost 11,700 jobs, or 1.92 percent of total state employment as a result of trade deficits with China alone.

The real problem here may be the lack of hard export and import data at the state and community level.

Options for the Commission to Engage on Trade Policy in 2010 and 2011

Preservation of State Sovereignty and Authority to Regulate in the Public Interest

Reform Measures Related To Federal Preemption & Unfunded Mandates. Maine may want to reiterate its call to Congress and the President for additional protections against federal preemption and unfunded federal mandates resulting from trade and investment disputes.

Reform of International Services Agreements. Maine may want to reiterate its call for Congress and the President to limit the coverage of state and local measures in international services agreements.

For example, the United States by legislation or executive directive could adopt a policy that it will never accept a GATS agreement on domestic regulation that requires domestic regulations to meet something similar to a "necessity test." Language addressing "disguised barriers to trade" might serve the same function as a necessity test. Provisions requiring domestic regulations to be pre-established, based on objective criteria, or relevant also might serve as de facto necessity tests.

Reform of International Investment Agreements and Treaties

Minimum standard of treatment – Maine may wish to support narrowing the minimum standard treatment to the elements of customary international law as explained in the U.S. brief in *Glamis*. Further, it may want to take the position that the expectation of a stable or unchanging legal environment is not to be understood as part of customary international law.

Indirect expropriation – Maine could support narrowing indirect expropriation so that it does not apply to nondiscriminatory regulations as explained in the *Methanex* award.

Protected investments – Maine may want to support narrowing the definition of investment to include only the kinds of property that are protected by the takings clause of the U.S. Constitution.

Exhaustion of remedies – Maine may want to call on the federal government to follow customary international law and require investors to exhaust domestic remedies before using investor-state arbitration.

Waiver of right to file an international investment claim – Maine might seek clarifications to ensure that no international investment tribunal will find that a contract provision, in which a foreign investor waives its right to pursue an international investment claim, is unenforceable.

Developing the Maine Economy by Promoting Exports and by Preserving and Expanding the Number of Jobs, Particularly in the Manufacturing Sector

Reform of Border-Adjusted Value Added Taxes. Maine may want to explore trade policy reform options for neutralizing the trade distorting effects of border-adjusted Value-Added Taxes (VATs) implemented by U.S. trading partners.

As noted above, the United States lost the *Foreign Sales Corporation (FSC) case*, putting the U.S. at a competitive disadvantage to the large number of countries that rebate VATs for their exports (in effect providing an export subsidy), while imposing VAT levies on imports from the United States (a de facto tariff).

Reform of Policy to Assist Small and Medium Sized Exporters. U.S. Senator Olympia Snowe of Maine has introduced legislation to encourage exports by small and medium sized businesses. According to the U. S. Senate Small Business Committee: "S.2862 would strengthen and improve support for American entrepreneurs seeking opportunities to expand their business, create new jobs and compete in the international market."

Currency Manipulation Reform. Maine may want to consider the pros and cons of supporting a currency manipulation reform bill similar to the one reported to the floor by the U.S. Senate Finance Committee in 2007.

Reform of State-Federal Consultation on Trade Policy

Maine may want to reiterate its call to Congress and the President for greater state-federal consultation on trade and federalism issues, including the following options:

The Positive List Approach. Any new legislation establishing negotiating objectives for the Office of the United States Trade Representative might instruct USTR to wherever possible utilize the "positive list" approach for making services, procurement, and investment commitments in international agreements that apply to states. This approach would allow states to know more precisely the areas in which they need to consult with the federal government. The "negative list" approach, currently used in most agreements except for procurement, commits the United States to implement trade disciplines on all covered sectors unless policy areas or state laws are specifically exempted in the annexes of the agreement. The "negative list" approach leads to great uncertainty about which state measures are covered.

A Center on Trade and Federalism. Improving federal consultation with states on trade will require more resources and in particular greater capacity to produce unbiased legal and economic analysis on trade and federalism issues.

Reform of the Decision Process for Initiating Trade Negotiations

Just as important as questions about the provisions of new trade and investment agreements are questions about choosing negotiating partners. Maine may, therefore, want to consider the pros and cons of federal trade policy reforms, such as establishing readiness criteria for the President to use in determining whether a country is an appropriate one with which to enter into an agreement.

Forum on democracy & trade

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Preface: Vague Standards, Unpredictable Tribunals, Missing Data

The language of trade and investment agreements is vague, with the possible exception of international agreements on government procurement. International tribunal decisions are accordingly unpredictable. Especially without reference to the facts of a particular case or controversy, it is often difficult to identify specific state or municipal laws that are definitely free from potential conflict.

Similarly, the impact of international trade and investment agreements on workers and businesses in Maine and other jurisdictions is difficult to estimate because the U.S. does not collect the necessary state and local level data on exports, imports, and the balance of investment flows. As a consequence, analysis of the causal relationships between international agreements and economic growth and employment are often speculative or conditioned on the ideology of the analyst.

An important reform related to trade policy might be to require great specificity, more concrete detail, and far greater clarity in the terms of international trade and investment agreements. This could help states and municipalities to reach some reasonable conclusion about of how they are affected and how they want to advise the President and Congress to proceed.

Just as important, the rules governing dispute resolution by international tribunals might be reformed. Possible reforms include limiting the discretion of arbitrators and ensuring that arbitrators are free from conflicts of interest. Another reform could provide that arbitrators will not interpret agreements with a bias in favor of maximizing the volume and value of international commerce, at the expense of other competing values, such as local democracy, human and labor rights, and environmental responsibility.

Most important of all may be reforms that ensure that Maine and other jurisdictions in the United States have the detailed local import, export, and investment data. They also need the analytic capacity to develop reality-based, non-ideological trade and economic development strategies. Canada does this very well, which may explain why their trade and development strategy seems to be working effectively.

Assessing the Impacts of International Trade Agreements on State and Municipal Laws in Maine

The Maine Citizens Trade Policy Commission was established to evaluate "the impacts of international trade agreements on Maine's state laws, municipal laws, working conditions and business environment." [2] Since its founding in 2003 and over the 2008-2009 period covered by this assessment, the Commission has focused on issues of trade policy and state sovereignty and in particular the impacts of trade agreements on state laws and municipal laws. This is no doubt in recognition that the World Trade Organization (WTO), the North American Free Trade Agreement (NAFTA), and similar international agreements are designed to limit the authority of legislatures, agencies, and courts, at every level of government, in the interest of maximizing the volume and value of international commerce.[3]

The Commission's statutory charge also recognizes the impact of international trade policy on Maine's business environment and working conditions in the state. [4] Small and medium sized businesses in the state have been striving mightily to open new international markets for Maine goods and services. At the same time, some paper, timber, and other traditional industries in the state have been reducing capacity and laying off workers in the face of foreign competition, some of it unfair competition that may violate U.S. and international trade law.

The Maine Commission's focus on issues of trade law and state sovereignty has served as a model for other states, including the neighboring states of New Hampshire and Vermont, which have established similar commissions. The work of the Maine Commission has also influenced national associations of state officials. As stated in a policy resolution adopted by the National Conference of State Legislatures, "NCSL also believes that these [trade] agreements must be harmonized with traditional American values of constitutional federalism. … [Measures] are necessary to ensure that international trade agreements do not adversely impact state budgets or constrain state regulatory authority."[5]

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[2] Public Law 2007 c 266, available at http://maine.gov/legis/opla/citpolleg.PDF.

[3] Prior to 1994, states had little reason to monitor the course of trade negotiations closely because they focused on tariffs, quotas and similar "at the border" discrimination against foreign products, almost always the business of the federal government. The post-1994 agreements deal not only with "at the border" discrimination, but also impose strict rules related to "behind the border" government regulation, taxation, purchasing and economic development policies that are regarded as non-tariff barriers to trade by the drafters of the agreements. Maine's policy jurisdiction is now affected by international law.

[4] Public Law above.

[5] NCSL policy on Free Trade and Federalism (policy resolutions under the jurisdiction of the Labor and Economic Development Committee), available at http://www.ncsl.org.

Over the 2008-2009 period, the Maine Commission has effectively voiced its concerns to Congress and the U.S. Trade Representative on trade and federalism issues, including issues of state/federal consultation. For example, on March 11, 2009, the Maine commission sent a letter to Ambassador Ronald Kirk, the U.S. Trade Representative, concerning state/federal consultation on trade policy, which states in part: "…we request your consideration of the following: [1]The establishment of a *Federal-State International Trade Policy Commission*, and/or the creation of a *Center on Trade and Federalism*, supported by both the federal government and the states, with adequate personnel and resources to ensure that the major provisions of trade agreements and disputes that impact on states can be analyzed, and their findings communicated to and discussed with key state actors on trade. [And 2] *Changes in the structure and role of USTR trade advisory committees.* All state and local government input has been limited to a single committee, the Inter-Governmental Policy Advisory Committee (IGPAC); the membership of that committee was determined exclusively by USTR and not by the states themselves. IGPAC was designated few resources and a time line for input that resulted in no meaningful consultation for states. More than half of all states lack any representation on IGPAC."[6]

Over the past two years, members of the Maine Commission have also been spreading the word about trade and state sovereignty issues throughout the northeastern United States, participating in discussions at the Council of State Governments Eastern Regional Conference and at meetings of the Eastern Trade Council. On September 19, 2008 at Manchester, New Hampshire, members of the Maine Commission played a significant role in organizing and leading discussion at the third north-eastern regional meeting of state officials concerned about trade policy and state sovereignty. Participants included legislators and state officials not only from Maine, Vermont, and New Hampshire, but also Massachusetts and New Jersey.

Mainers and other northeastern legislators were also successful in 2009 in winning support at NCSL for a new resolution to lobby the Obama administration on issues related to trade policy and federal agency preemption. As the Progressive States Network reports, "…at their 2009 Legislative Summit, NCSL adopted a new resolution asking the Obama administration to extend its executive order to restrict preemption directly to the Office of the United States Trade Representative, which was not covered by the original order."[7]

Over the summer of 2009, Maine and other northeastern states were busy communicating their views to Congress and national associations on state/federal trade policy consultations and capacity building. Different states proposed different approaches to accomplishing this objective. Vermont called for a brand-new federal-state consultation process co-managed with USTR that is simple in structure, respects principles of state sovereignty, and allows for additional state access to trade data and texts.

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[6] Maine Citizens Trade Policy Commission, Letters on Trade agreements, http://maine.gov/legis/opla/citpoltradedocs.htm.

[7] Progressive States Network, "Trade and the States: Promoting Collaboration on Negotiating and Implementing Trade Deals," available at http://www.progressivestates.org/mode/23322.

Members of the Maine commission closely followed the 2009 re-introduction of the Trade Reform Accountability Development and Employment (TRADE) Act by a member of the Maine congressional delegation.[8] The TRADE Act, introduced by Representative Mike Michaud of Maine, envisions a top-to-bottom review of U.S. trade commitments.

International Investment Agreements

Introduction: International investment agreements[9], such as chapter 11 of the North American Free Trade Agreement , establish systems of investor-to-state dispute resolution. The investor-state process allows foreign investors to circumvent domestic courts in Maine and other jurisdictions. It also allows foreign investors to file claims against national governments seeking money damages in compensation for economic regulation by state and local governments, including Maine.

As an alternative to domestic courts, international agreements, providing for investor-to-state dispute resolution, grant foreign corporations the right to challenge government policy, in Maine and other jurisdictions, before a tribunal of three arbitrators. International investment tribunals operate on the model of international arbitration of commercial contracts.[10] Each of the two parties to the dispute picks one arbitrator, and the third is either mutually agreed upon by both parties or appointed by a World Bank official.[11] .

[8] Progressive States Network above.

[9] The modern model for protecting foreign investments, embodied in NAFTA chapter 11, has its origins in the 1970s when the United States concluded bi-lateral investment treaties (BITS) with several developing countries. Among the distinguishing features of BITS are: (1) broad and largely undefined provisions for protecting the property rights of foreign investors, such as "indirect expropriation," (2) an investor-to-state dispute resolution mechanism, which provides standing for an individual foreign investor to invoke international arbitration against a nation-state, based on allegations that a governmental measure violates treaty provisions protecting foreign property rights, and (3) enforcement of international tribunal decisions with awards of money damages to foreign investors in compensation for such treaty violations. *See*, Matthew C. Porterfield. "International Expropriation Rules and Federalism," Stanford Environmental Law Journal, Vol. 23, No. 1, January 2004, pp.36-39.

[10] NAFTA allows an investor to submit a claim under one of three sets of arbitration rules: the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank, the ICSID Additional Facility, also administered by the World Bank, or the United Nations Commission on International Trade Law (UNCITRAL). *NAFTA a*rt. 1120. ICSID and ICSID Additional Facility arbitrations are "administered" and UNCITRAL arbitration is "ad hoc." In other words, ICSID provides for a fee services and administrative support for the conduct of arbitration. UNCITRAL provides rules but no institutional support, thus putting an administrative burden on the tribunal and the parties, but potentially reducing costs. Clyde C. Pearce and Jack Coe, Jr. *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon The First Case Filed Against Mexico*, 23 Hastings Int'l & Comp. L. Rev. 311 (2000).

[11] *C*onsider these characteristics of the arbitrators themselves:

- Arbitrators do not enjoy tenure and are not subject to confirmation by the legislative branch
- Arbitrators may alternately serve as arbitrators in one case and plaintiff's counsel in the next, thus raising questions of conflict of interest;
- Arbitrators may have little or no familiarity with the U.S. constitutional principles of federalism;

International investment tribunals can effectively enforce their decisions by ordering the federal government to pay money damages to the foreign investor.[12] The federal government has refused, so far, to assure Maine or other states and localities that it will not seek reimbursement of any monies paid from the U.S. Treasury to satisfy international tribunal judgments. Moreover, the federal government is authorized to sue to preempt any state or local measure in Maine that is a violation of a tribunal decision or that is otherwise inconsistent with an international investment agreement.[13]

General analysis. IIAs place multinational corporations and other investors on an equal footing with nation-states. Investors are allowed to file claims against national governments seeking money damages in compensation for economic regulation and other government measures adopted by state or municipal government in Maine and other sub-national jurisdictions.

Coverage: definition of investment. IIAs signed by the United States contain complex definitions of investment that cover a broad range of economic interests. Large numbers of state and municipal laws in Maine are thus covered by IIAs. These definitions of investment are broader

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- Arbitrators make their decisions based on the text of an international investment agreement and customary international law, both of which are to be interpreted in light of the purpose of the agreement to promote international investment (see NAFTA article 1131).

[12] NAFTA art. 1135; Any award by a NAFTA investment tribunal will be automatically appropriated. Congress has created a "judgment fund," a standing appropriation to pay damages resulting from the judgments of the U.S. Court of Claims, federal district courts, and international tribunals. It is a permanent and indefinite appropriation similar to that available to pay interest on the national debt. Payment of a judgment is automatic. 31 U.S.C. §1304 (1997); *see* U.S. General Accounting Office, Office of the General Counsel, Principles of Federal Appropriations Law (Nov. 1994) (GAO/OGC-94-33). Nonetheless it must be kept in mind that even if the foreign investor is awarded damages, the NAFTA panel ruling does not automatically result in preemption of state or local law. Nor is there any right of action for private parties to enforce panel rulings in U.S. courts. 19 U.S.C. §3312(c); 19 U.S.C. §102(c). If state officials are unwilling to amend policies that are popular with the public, federal officials may simply leave the state policy in place, pay damages to the investor, and hope the issue does not arise again as a NAFTA case. In the alternative, the federal government may seek to quietly resolve the issue. For example, federal officials acting behind the scenes might apply political or economic pressure on state officials to "voluntarily" bring state policy in line with the panel ruling. If the investor wins, the United States also has the option of suing to preempt the state law. Unlike private investors, the federal government can sue a state or locality at any time and seek the preemption of state or local measures that do not comply with NAFTA. State law is in an inferior position to federal law under NAFTA. If a dispute resolution panel finds that a federal law violates NAFTA's investment chapter, an act of Congress is required to comply with the ruling. North American Free Trade Agreement Implementation Act, Title I, §102 (a), 19 U.S.C. §3312 (1993).

[13] International investment agreements do not directly apply to U.S. states and localities as a matter of domestic law. Implementing legislation for executive-legislative agreements like NAFTA and CAFTA denies a right of action in U.S. courts for private parties to enforce investment agreement obligations against state and local governments (even though that may not be the case with treaties). Such implementing legislation, however, does authorize the U.S. Department of Justice to sue states and localities in domestic court and to seek preemption of any measures inconsistent with U.S. obligations under international investment agreements. *See,* North American Free Trade Agreement Implementing Act section 102 (c), 19 U.S. C. 3372(c) (1993).

than the constitutional standards used under domestic constitutional law in the United States. The U.S./Peru FTA definition, for example, includes "assets having characteristics of an investment" such as expected profits, assumption of risk, and the commitment of capital.[14] Forms of investment include not just enterprises, but also stocks, bonds, debts, contracts, resource-extraction concessions, and business licenses.

Rules: expropriation. Once it is determined that a Maine state law or municipal measure is covered by an IIA (and a large number of them are), then it is a question of whether the Maine state or local measure violates one of the rules or "obligations" under the agreement, including the "expropriation" article. International investment agreement (IIA) expropriation obligations are, in some respects, analogous to U.S Fifth Amendment takings law. The question is whether international expropriation law provides foreign investors with greater property rights than U.S. investors enjoy under the domestic 'takings' clause. Tribunals set up to hear these investment cases do not agree on the scope of IIA expropriation. Arbitrators have room to read the vague language of IIAs broadly or narrowly. Thus, one tribunal following the rule in the *Methanex* case might find no expropriation violation, while a second tribunal could come to the opposite conclusion. The vague expropriation standard in U.S. IIAs combined with the broad discretion enjoyed by tribunals means that state and local governments in Maine will not be able to predict with certainty when their laws and other measures may be in violation. [15]

Rules: minimum standard of treatment (MST). The "minimum standard of treatment," which includes the right to "fair and equitable treatment," is also a vague standard that permits foreign investors to challenge government actions on the grounds that they are either procedurally or substantively unfair. Again, these vague concepts allow international investment tribunals considerable discretion in their deliberations. Because there are no specific criteria underpinning the concept of the "minimum standard of treatment," it is very difficult to predict when a Maine law or measure violates the MST obligation. [16]

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[14] *See, e.g.,* section C., article 10.28, U.S./Peru Free Trade Agreement.

[15] The NAFTA tribunal decision in *Methanex v. United States* reads the rule relatively narrowly, concluding that:"as a matter of international law, a nondiscriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects…a foreign investor or investment is not deemed expropriatory or compensatory," unless specific commitments to refrain from regulation were made to the investor. *Methanex v. United States,* Final Award, part IV, chapter D, paragraph 7 (2005). In sharp contrast, the NAFTA panel in *Pope & Talbot* said economic regulation, even when it is an exercise of the state's traditional police powers, can be a prohibited indirect or "creeping" expropriation under customary international law if it is "substantial enough." *Pope & Talbot v. Canada,* Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter Eleven of The North American Free Trade Agreement Between Pope & Talbot Inc. and The Government of Canada (April 10, 2001), pp. 33-34, *available at* <<http://www.naftaclaims.com>>.

[16] *See generally* Matthew C. Porterfield, *An International Common Law of Investor Rights?* 27 U. Pa. J. Int'l Econ. L. 79 (2009). For examples of broad readings of MST consider the following cases: Azurix, a U.S. water services company won a multi-million dollar award against Argentina under the US-Argentina Bilateral Investment Treaty (BIT), based on the finding of the arbital tribunal that Argentine water regulators had violated the "fair and equitable treatment" provisions of the minimum standard of treatment article in the U.S./Argentine BIT. Other examples

Exceptions. The third stage of analysis is to determine whether a Maine measure, even though it is covered by the agreement and is in violation of an obligation, may nonetheless fall under an exception to the agreement. U.S. international investment agreements provide very few general exceptions. They provide exceptions only for essential security interests; for most (but not all) taxation measures; and for disclosure of confidential information.[17] Few state and municipal laws would be protected by these exceptions.

Case study: Maine water policy. NAFTA chapter 11, bi-lateral investment treaties, and similar international investment agreements (IIAs) cover groundwater measures. Water policy measures are a frequent topic of international investment litigation.

As state and local officials in Maine and from across the country have recognized for many years, IIAs raise serious sovereignty and federalism concerns.[18] Also, IIAs are a more likely basis for a

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include *Saluka Investments BV v. Czech Republic*, UNCITRAL, Permanent Court of Arbitration, Award (Mar. 17, 2006), available at http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf ; and *Occidental Petroleum Exploration and Production Co. v. Ecuador*, para. 191 (UNCITRAL Arb.) (2004). According to the United Nations Conference on Trade and Development: "On fair and equitable treatment, several recent decisions have upheld and reinforced a broad acceptance of the FET standard in line with the often-cited *Tecmed* award in 2003. In *LG&E v. the Argentine Republic*, for example, the tribunal affirmed that the "fair and equitable standard consists of the host State's consistent and transparent behaviour, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor."This reading is in line with the other awards rendered in 2006 in *Azurix v. The Argentine Republic* and *Saluka v. The Czech Republic.*" UNCTAD, Latest Developments In Investor-State Dispute Settlement, IIA Monitor No. 4, United Nations, New York Geneva, 2006, p. 4 (on file).

[17] *See* 2004 U.S. Model Bilateral Investment Treaty (BIT), articles 18, 19, 20, and 21, *available at* , http://www.state.gov/documents/organization/117601.pdf.

[18] State and local government groups that call for reform of international investment agreements in order to protect state sovereignty, include:

Intergovernmental Policy Advisory Committee. IGPAC, the state and local advisory committee to USTR, filed its most recent comments on investment under the pending Colombia FTA. IGPAC urges U.S. negotiators to codify the holding of the *Methanex* panel to limit expropriation, limit the minimum standard of treatment to procedural due process and reject substantive due process, require investors to exhaust judicial remedies, and reimburse the states (CA, MA, MS, VA) that have been "heavily taxed" in defending investor-state disputes. IGPAC, *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the US-Colombia Trade Promotion Agreement*, September 15, 2006, 3 and 20-22.

National Conference of State Legislatures. NCSL opposes investor-state arbitration: "Trade agreement implementing language must include provisions that deny any new private right of action in U.S. courts or before international dispute resolution panels based on international trade or investment agreements." NCSL also calls for U.S. negotiators to: (1) "carve out" state laws that might be subject to challenge, (2) use a "positive list" approach to defining the scope of covered investments, and (3) enable states to "make adjustments" to limit coverage of state policies. NCSL, Free Trade and Federalism, 2008 - 2009 Policies for the Jurisdiction of the Labor and Economic Development Committee, available at http://www.ncsl.org/standcomm/sclaborecon/sclaborecon_Policies.htm#FreeTrade .

Conference of Chief Justices. CCJ is concerned that investor-state arbitration "can undermine the enforcement and finality of state court judgments." CCJ, Resolution 26, adopted as proposed by the International Agreements Committee at the 56th Annual Meeting on July 29, 2004.

Cities, mayors CSG. National League of Cities, U.S. Conference of Mayors, Council of State Governments and National Conference of State Legislatures, joint letter to Ambassador Robert Zoelleck (September 23, 2003).

suit than WTO agreements. As noted above, these problems arise in part because: (1) IIA coverage is broad because definitions of "investment" are very broad[19]; (2) IIA rules regarding what constitutes a violation as a result of an "indirect expropriation" or a failure to meet the "minimum standard of treatment under international law" including "fair and equitable treatment" are vague and are interpreted broadly by some international tribunals; (3) IIAs provide few exceptions that would protect Maine measures, and (4) Foreign investors can sue the United States directly, without the need for another nation-state to bring suit.

Given the broad definition of investment in IIAs, these sovereignty concerns clearly apply to many Maine water policy measures, and not surprisingly water policy issues are a frequent topic of international investment litigation. Most of these cases deal with challenges to governmental authority to regulate threats to health and safety resulting from pollution of groundwater or surface water (for example, *Methanex v. United States* and *Metalclad v. Mexico*)[20] or water utility privatization (for example, *Azurix v. Argentina*, *Aquas del Tunari v. Bolivia*, and *Biwater v. Tanzania*). [21] There is at least one example of bulk water transport case being filed under NAFTA

National Association of Attorneys General. NAAG asked Congress to "ensure that … foreign investors shall receive no greater rights to foreign compensation than those afforded to our citizens." NAAG, Resolution, Spring Meeting, March 20-22, 2002, Washington, DC.
Association of Towns and Townships. Tom Haliki, Executive Director, NATaT, letter to U.S. Senators (April 4, 2002).

[19] 2004 U.S. Model Bilateral Investment Treaty, article 1 provides: "investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;
(b) shares, stock, and other forms of equity participation in an enterprise;
(c) bonds, debentures, other debt instruments, and loans;
(d) futures, options, and other derivatives;
(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
(f) intellectual property rights;
(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges. *Available at,* http://www.state.gov/documents/organization/117601.pdf.

See also, U.S. Department of State, Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annex B, "As noted in the Subcommittee report, the definition of "Investment" in Article 1 of the Model BIT is much broader than the real property rights and other specific interests in property that are protected under the U.S. Constitution."

[20] *Metalclad v. Mexico, available at,* http://naftaclaims.com/Disputes/Mexico/Metalclad/Metalcladfinalaward.pdf; Award, *Methanex v. United States, available at,* http://naftaclaims.com/disputes_us_methanex.htm.

[21] *Azurix, above*. Investment Treaty News, 'Azurix Wins Claim Against Argentina ," International Institute for Sustainable Development, July 26, 2006, *available at* http://www.iisd.org/investment/itn.; Jim Schultz, "Bechtel v. Bolivia: The People Win" (Bechtel settles for only symbolic damages), Latin America Solidarity Centre, January 19, 2006, *available at,* http://www.lasc.ie/news/bechtel-vs-bolivia.html.;Award, *Biwater Gauff Ltd. v. Republic of Tanzania, available at* http://www.worldbank.org/icsid/cases/awards.htm#awardarbo0522; Epaminontas E. Triantafilou, "No Remedy for an Investor's Own Mismanagement: The Award in the ICSID Case Biwater Gauff v. Tanzania,"International Disputes Quarterly, White & Case, Winter 2009, *available at,* http://www.whitecase.com/idq/winter_2009_4/.

chapter 11, although that claim has been alleged to be frivolous and never went to arbitration (*Sun Belt Water v. Canada*).[22]

Recent developments. Several recent developments provide opportunities for the Maine Citizens Trade Policy Commission to communicate its views to the Obama administration and Congress with some hope of achieving at least incremental reforms in IIA policy.

During the presidential campaign of 2008, Barack Obama made a promise to reform IIAs, using language that, while very general, seems to echo the very favorable investment tribunal ruling in *Methanex v. United States*. The Obama administration subsequently constituted a State Department advisory subcommittee to look at revision of the U.S. model Bilateral Investment Agreement (BIT). Interestingly, the Trade Subcommittee of the U.S. House Ways and Means Committee, generally regarded as defender of the status quo on this issue, also got into the act and held a hearing on IIA and BIT reform.

Perhaps the most significant and favorable development was the NAFTA investment tribunal decision in *Glamis Gold v. United States*. The tribunal firmly rejected the argument that the "fair and equitable treatment" element of the minimum standard of treatment (MST) obligation in NAFTA chapter 11 was breached in this case because the United States failed to provide a "stable legal and business environment."

The greatest area of uncertainty and concern relates to the investment chapters in the still pending free trade agreements with Colombia, Panama, and Korea and similar provisions that may be negotiated with China and other emerging Asian economic powers.

2008 campaign promise by Barack Obama to reform international investment agreements. During the campaign, President Obama stated, "I will ensure that foreign investor rights are strictly limited and will fully exempt any law or regulation written to protect public safety or promote the public interest. And I will never agree to granting foreign investors any rights in the U.S. greater than those of Americans. Our judicial system is strong and gives everyone conducting business in the United States recourse in our courts."[23] Obama's campaign statement seems to echo in a more general way the favorable tribunal ruling in *Methanex v. United States*, in which the tribunal read NAFTA chapter 11's expropriation rule relatively narrowly, concluding that: "as a matter of international law, a nondiscriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects … a foreign investor or investment is

[22] Notice of Intent to Submit a Claim to Arbitration, November 27, 1998 and Notice of Claim and Demand for Arbitration, *Sun Belt Water v. Canada*, October 12, 1999, *available at*, http://sunbeltwater.com/docs.shtml.

[23] Pennsylvania Fair Trade Coalition, 2008 Presidential Candidate Questionnaire, answer of Sen. Barack Obama, Question 10, available at http://www.citizenstrade.org/pdf/QuestionnairePennsylvaniaFairTradeCoalition040108FINAL_SenatorObamaResponse.pdf (viewed August 24, 2008); *see also* Barack Obama for President, *A Blueprint for Change*, Strengthening the economy: Trade, 13, available at http://www.barackobama.com/issues/ .

not deemed expropriatory or compensatory," unless specific commitments to refrain from regulation were made to the investor.[24]

U.S. House Ways & Means hearing on investment agreements, April 14, 2009. The Trade Subcommittee of the U.S. House of Representatives for the first time in recent memory held a hearing in April at which critics as well as defenders of the current U.S. model for IIAs were allowed to testify. While a few members of the subcommittee like Rep. Lloyd Doggett (D-Texas) expressed concern about the effect of IIAs on government regulatory authority, there was no indication that a majority of the subcommittee felt likewise. Indeed, Republican members of the subcommittee argued for IIA reform that would make it easier for corporations to challenge environmental, labor and other governmental regulations. Nonetheless, the debate was spirited.[25]

State Department BIT review committee report. As the Institute for Policy studies reports, "In June 2009, the State Department and Office of the United States Trade Representative asked the Advisory Committee on International Economic Policy to review the Model BIT, the template document that the U.S. uses as a starting point when contemplating the negotiation of a new BIT. (BITs include rules similar to those in the investment chapters of U.S. trade agreements)…Acknowledging the absence of significant consensus within this diverse group, the Subcommittee made the decision both to make recommendations and also to expound on the various viewpoints. In addition to the Report on behalf of the whole, the particular viewpoints of several members of the Subcommittee are annexed to this report to provide a platform for the interests and suggestions that these individuals wished to bring to the attention of the administration."[26]

Eight subcommittee members, including Matt Porterfield from Georgetown Law's Harrison Institute, issued a joint report as an annex to the main subcommittee report, making recommendations for a general overhaul of the U.S. model for bi-lateral investment treaties (and implicitly investment chapters of free trade agreements like NAFTA chapter 11) in order to preserve government authority to protect the environment, maintain labor and human rights standards, and preserve a federal system of government.

July 2009 ruling in Glamis Gold v. United States. The tribunal in *Glamis Gold* ruled for the United States in this landmark case, in which Glamis, a Canadian corporation, sued under NAFTA's chapter 11 on investment for $50 million in compensation for actions taken by the U.S. Department of Interior and the State of California to impose environmental and land use regulations on Glamis's proposed open-pit gold mine in the Imperial Valley of California.

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[24] *Methanex v. United States*, Final Award, part IV, chapter D, paragraph 7 (2005).

[25] Notes of William Waren, Forum on Democracy and Trade, on file.

[26] Report by Sarah Anderson, IPS, on file Harrison Institute, Georgetown University Law Center; Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding Model Bilateral Investment Treaty, September 30, 2009, available at, http;//www.state.gov/e/eeb/rls/othr/2009/131098.

Depending on the outcome of future cases, the tribunal decision in *Glamis may* represent an important advance when it comes to preserving governmental regulatory authority in the face of property rights protections in NAFTA's chapter 11.[27] The real significance of *Glamis Gold v. United States* is its narrow reading of article 1105 on the minimum standard of treatment, including the element of fair and equitable treatment. It is particularly noteworthy that Glamis argued that the "fair and equitable treatment" element of the minimum standard of treatment was breached in this case because the United States failed to provide a "stable legal and business environment." Glamis relied on a line of international investment tribunal decisions *not* involving the United States, *all of which* concluded that the minimum standard of treatment imposes a duty on governments not to change regulatory standards that were in effect when a foreign investment was made. This would have constituted an alarming departure from U.S. due process analysis and presumably is at odds with due process principles embodied in other legal systems. Governments are generally free to change regulatory standards in response to changed circumstances or priorities.

Pending agreements. The Obama administration is currently considering the adoption or negotiation of investment agreements with several countries. Among the most significant are the pending free trade agreements (FTAs) with Panama and Colombia, and agreements with the economic powerhouses of East Asia: including bi-lateral agreements with Korea and China, as well as a multi-member Asian regional agreement, called the Trans-Pacific Partnership.

Colombia FTA investment chapter. In February 2008, the Maine Citizens Trade Policy Commission unanimously adopted a resolution in opposition to the proposed U.S. / Colombia Free Trade Agreement. On March 24, 2008, the Commission wrote a letter to Senator Snowe, Senator Collins, Representative Michaud, and Representative Pingree opposing the Colombia Free Trade Agreement: "The Colombia FTA would continue to expand investor rights of foreign corporations by allowing them to challenge democratically established laws. This can force countries and states to weaken their environmental, labor and public health laws, among others, to avoid the potential of costly litigation thereby giving foreign corporations undue influence in shaping domestic public policy. The commission has established opposition to these investor-state rights and continues to oppose this infringement on state sovereignty."[28]

Representative Sharon Treat represented Maine at the spring 2008 National Conference of State Legislatures meeting where the NCSL Labor and Economic Development Committee soundly rejected a proposed resolution to endorse the Colombia FTA. Rep. Treat shared the Maine resolution with members of the NCSL committee. Rep. Treat emphasized that chapter 10 on investment in the Colombia agreement, just like NAFTA's investment chapter, gives foreign investors greater rights than U.S. investors enjoy under the U.S. constitution. Members of the

[27] Transcripts, submissions, and tribunal orders in *Glamis Gold v. United States* may be found at //www.state.ghttp:oc/s/1/c10986.htm .

[28] Maine Citizens Trade Policy Commission, Letters above.

NCSL committee noted that international tribunals may award money damages to corporations challenging state laws and that this is in contradiction to long-standing NCSL policy that such international investment tribunals have an "adverse impact on state sovereignty and federalism."[29] Rep. Steve Conway of Washington also pointed out that longstanding NCSL policy is clear that U.S. implementing legislation for agreements like the one with Colombia must include "provisions stating that neither the decisions of international dispute resolution panels nor international trade and investment agreements themselves are binding on the states as a matter of U.S. law." Again in direct contradiction to NCSL policy, implementing legislation for the Colombia trade promotion agreement authorizes the U.S. Department of Justice to sue to preempt any state law or policy that violates the agreement or that has been successfully challenged before an international investment tribunal. Finally, it was pointed out by Labor Committee members that longstanding NCSL policy insists that federalism protections must be included in U.S. implementing legislation for international trade and investment agreements like the Colombia deal to ensure that state budgets and state regulatory authority are not adversely affected. Without these protections, "NCSL will be unable to support such trade and investment agreements." The Colombia agreement does not contain these federalism protections.[30]

The Panama FTA investment chapter also raises serious concerns. Panama has a small economy, but it serves as the legal domicile of companies (over 350,000 as of 2006) that seek a tax or regulatory haven. So long as any of these companies do "substantial" business in Panama, they would be able to use their Panama subsidiaries to challenge domestic regulations in the United States under the Panama FTA investment chapter. In a June 3, 2009 letter to Senator Snowe, Senator Collins, Representative Michaud, and Representative Pingree, the Maine Citizens Trade Policy Commission expressed its opposition to the Panama Free Trade Agreement*:* "The Panama FTA provides foreign-investors special privileges and a private enforcement system that promotes off-shoring and subjects our environmental, zoning, health and other public interest policies to challenge by foreign investors …"[31]

The Korea Free Trade Agreement Investment Chapter. The Citizens Trade Campaign argues that the Korea FTA investment chapter "still affords foreign investors greater rights than those enjoyed by U.S. investors. Not one word was changed in the Korea FTA's foreign investor chapters that promote off-shoring, and subject our domestic environmental, zoning, health and other public interest policies to challenge by foreign investors in foreign tribunals. The Korea

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[29] Relevant section of NCSL policy on Free Trade & Federalism: *"* Following the passage of the North American Free Trade Agreement (NAFTA) in the 1990s, several foreign investors have used the "investor-state" provisions of that agreement to attack state laws and state court decisions before international tribunals. By providing access to international investment arbitration by foreign investors, NAFTA and various related Free Trade Agreements (FTAs) provide greater procedural rights for review of claims against U.S. law and policy than would be provided to a U.S. investor under similar circumstances. Consequently, the decisions of these tribunals have had an adverse impact on state sovereignty and federalism."

[30] Notes of William Waren (on file).

[31] Maine Citizens Trade Policy Commission Letters above.

FTA also allows challenges by foreign investors in foreign tribunals of timber, mining, construction and other concession contracts with the U.S. federal government."[32] The same can be said for the pending Colombia and Panama FTAs.

The Trans-Pacific Partnership Agreement (TPP). This is among the most ambitious being considered, although it is not clear as of today whether the President will make it a negotiating priority. The proposed TPP raises some troubling questions about investor-state dispute resolution vis-à-vis Australia. All recently-concluded regional and bi-lateral free trade agreements negotiated by the United States, with one exception, include provisions for "investor-state dispute resolution." The exception is Australia, an English-speaking country with a common-law legal system. U.S. negotiators had proposed an investor-state provision for the investment chapter of the U.S./Australia free trade agreement, but this move was opposed not only by U.S. state and local governments, but also by Australian states, which viewed investor-state arbitration as a deal breaker. Consequently, it was dropped. There was concern that Australian investors would aggressively file claims against the United States in the same fashion that Canadian investors sued under NAFTA chapter 11 after that agreement was approved. Australia has a large investor class with economic interests in the United States and a sophisticated international corporate bar that might pursue claims outside of the U.S. court system to protect Australian investments, particularly in mining, media, and services industries in the United States. [33]

The China BIT: the proposed negotiations with China on a bi-lateral investment treaty raise the most serious issues for Maine and other states. A U.S./China bi-lateral investment treaty would give Chinese firms the right to circumvent U.S. courts and to challenge state and local regulations before international investment tribunals. This is a particular concern because in about 35 years, the Chinese economy is projected to exceed the U.S. economy in size.[34] China's ownership of U.S. investments grew by 62 percent over the five years prior to the recession. China has invested its global trade surplus primarily in foreign exchange reserves such as U.S. Treasury Notes. Some analysts expect China to follow Japan's development path, which would shift from cash reserves to acquiring foreign firms that are part of its distribution chain. For example, China could be looking for a stake in companies like Wal-Mart, Target or Sears.[35]

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[32] Citizens Trade Campaign, US-Korea Free Trade Agreement, available at http://citizenstrade.org/korea.php.

[33] The Forum on Democracy & Trade, "Why an Investment Chapter at a Time of Financial Crisis," Comments to the U.S. Trade Representative Regarding the Proposed Trans-Pacific Partnership Free Trade Agreement, Docket Number USTR-2009-0002, March 10, 2009. (on file)

[34] Albert Keidel, China's Economic Rise-Fact and fiction, Carnegie Policy Brief 61 (July 2008), Table 2 at p. 6.

[35] Robert Stumberg, Reform of Investor Protections, Testimony before the U.S. House Committee on Ways and Means, Subcommittee on Trade, May 14, 2009, p.2.

International Services Agreements.

Introduction. Ratified in 1994 as part of the Uruguay Round accord, the General Agreement on Trade in Services (GATS) is one of 20 international trade agreements administered by the World Trade Organization. Prior to 1994 and the creation of the WTO, the centerpiece of international trade law was the General Agreement on Tariffs and Trade (GATT), which was primarily largely related to trade in goods, like cars, radios, computers, or as it is often said, anything you can drop on your foot. With the addition of GATS, the scope of international trade law was substantially broadened to include trade in services, such as banking, insurance, telecommunications, transportation, and other state regulated service industries.[36]

The GATS agreement is also unusual in that it establishes a framework for what amounts to ongoing negotiations at the WTO in Geneva to add new rules and to add new sectors of the service economy under the coverage of the agreement. [37]

General analysis.

Coverage. GATS covers state and local measures in Maine and other jurisdictions that affect trade in services, except services supplied under "government authority." Only some government services are excluded: those that are neither commercial (free) nor in competition with another supplier. Some GATS rules cover measures in all sectors, and some cover measures in selected sectors ("commitments"). The United States has commitments in the many sectors that would cover state and municipal laws in Maine that manage or affect the environment, including waste water, solid waste, hazardous waste, electricity, pollution control, construction and engineering, to name a few. GATS is the most local global agreement because it covers so many services that are regulated by states like Maine and provided by local governments. [38]

When the Uruguay Round of GATS negotiations ended in 1994, the most controversial proposals were deferred through a built-in agenda for future negotiations, including: (1) sector commitments, and (2) domestic regulation. The first GATS sector commitments took effect in 1995. GATS builds in successive rounds of "progressive liberalization," negotiations to expand the number of sectors that are covered by market access and national treatment obligations. On a separate track of progressive liberalization, GATS authorizes negotiations to create new "disciplines" on domestic regulation (article VI). Negotiations on these disciplines began in 2000

[36] World Trade Organization, Services Rules for Growth and Investment, available at http://wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm.

[37] Id.

[38] World Trade Organization, The General Agreement on Trade in Services (GATS): Objectives, Coverage, Disciplines, available at http;//wto.org/English/taptop_e/serv_e/gatsqa_e.htm.

and are now far advanced. These domestic regulation rules will likely apply to those sectors where there is a commitment under market access or national treatment.[39]

Rules. Significant GATS rules include: (1) *most favored nation,* which prohibits discrimination for/against certain countries [40]; (2) *national treatment*, which prohibits discrimination in favor of domestic suppliers, including laws that change conditions of competition, even if they do not formally discriminate[41] ; and (3) *market access*, which prohibits quantitative limits on service suppliers such as monopolies, number of suppliers, volume of service and legal status of supplier.[42]

Exceptions. GATS excuses conflict with a trade rule if purpose of the measure is: (1) necessary to protect public morals; (2) necessary to protect human or animal health; (3) necessary to protect privacy or prevent fraud; and (4) necessary (in the view of each country) to safeguard essential security interests.[43]

Case study: Maine water policy. It is uncertain whether the WTO General Agreement on Trade in Services covers groundwater regulation. A strong argument, nonetheless, can be made that any regulation of water distribution by Maine and its subdivisions is covered by GATS, even if regulation of drinking water utilities remains beyond the scope of the agreement. In any case, the biggest concern should be the on-going WTO negotiations on GATS obligations related to "domestic regulation."

The Secretariat of the World Trade Organization strongly denies that GATS restricts public water services or public interest regulation of privately-supplied water services: "The number of Members which have so far made GATS commitments on water distribution services is zero. If such commitments were made, they would not affect the right of governments to set levels of quality, safety, price, or any other policy objectives as they see fit, and the same regulations would apply to foreign suppliers as to nationals. A foreign supplier which failed to respect the terms of its contract or any other regulation would be subject to the same sanctions under national law as a national company, including termination of the contract. … It is of course inconceivable that any government would agree to surrender the right to regulate water supplies…"[44]

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[39] Id.

[40] All sectors, article II, GATS text available at http://wto.org/rnglish/docs_e/legal_e/26-gats_01_e.htm

[41] Committed sectors, GATS article XVII.

[42] Committed sectors, GATS article XVI.

[43] GATS article XIV.

[44] WTO, "GATS: Fact and Fiction: The WTO is not after your water,"' *available at,* http://www.wto.org/english/tratop_e/serv_e/gats_factfiction8_e.htm.

The WTO statement, itself, reveals reasons not to be entirely reassured.

First, while no country has made a commitment on water distribution services *per se*, they may choose to do so in the future.

Second, the United States has made or in the future may make commitments for distribution services, transport services and other service sectors that might result in GATS litigation *affecting* regulation of groundwater pumping and transport.[45] In other words, the WTO statement can be read to apply only to drinking water services provided as a public utility, and to be irrelevant to the issue of whether regulation of large-scale groundwater pumping and transportation violates other GATS obligations of the United States (rail transport of freight or distribution services related to wholesale trade).

Third, it is entirely conceivable, contrary to the WTO Secretariat's expectation, that a government might intentionally or unintentionally surrender its right to regulate water supplies. This could happen as a result of a public-private relationship between government officials and the foreign suppliers, or simply as a result of being unfamiliar with international trade law or of being "out-lawyered" by a foreign supplier.

Finally, the WTO statement on water services is only the view of the Secretariat and is not legally binding or even certain to be persuasive with a WTO tribunal deciding an actual case.

At the very least, the capacity of Maine to adopt groundwater measures and manage water resources in light of potential conflicts with the GATS bears watching. In particular, GATS negotiations on domestic regulation and the future interpretations of U.S. commitments related to distribution and transportation services that might *affect* trade in water should be monitored closely.

This is despite the European Union's decision not to seek inclusion of "water for human use" as a sector of economic activity that should come under the scope of GATS regulation of wastewater

[45] For example, the United States has made a GATS sectoral commitment for rail freight transport, *available at* http://www.citizen.org/trade/forms/gats_sector_list.cfm. The U.S. sectoral commitment for rail freight transport is to be understood in light of the services classification scheme of the United Nations Statistics Division, which at subclass 71122 includes transportation by railway of bulk liquids under class 7112 freight transportation, *available at*, http://unstats.un.org/unsd/cr/registry/regcst.asp?C1=9&Lg=1&Co=71122. With respect to distribution services at wholesale trade, Global Trade Watch appropriately notes that, "The WTO Secretariat explains that 'Wholesale trade services consist in selling merchandise to retailers, to industrial, commercial, institutional or other professional business users, or to other wholesalers;' and notes further that "[the United Nations]CPC 6222 covers wholesale trade in mineral water and corresponds to ISIC code 5122, which covers: "Bottling and labelling simple (tap) water (Wholesale of food, beverages and tobacco),if performed as a part of buying and selling at wholesale, and in class 7495 (Packaging activities), if performed on a fee or contract basis." The United States has committed both wholesale distribution services and packaging services." Available at, http://www.citizen.org/trade/forms/gats_results.cfm?s_id=91.

services and despite the fact that the United States has not made a commitment to subject drinking water services to GATS disciplines, up to this point.[46]

The United States Trade Representative (USTR) has assured states that the United States has no current plans to make a commitment on water services. But, could those plans change if such a compromise could restart Doha Round negotiations in ways that would be favorable to the United States in other sectors? Moreover as noted above, "water distribution services" might be understood narrowly to cover only drinking water utilities.

Of even greater concern to Maine should be the on-going WTO negotiations on GATS obligations related to "domestic regulation." The potential intrusiveness of obligations covering domestic regulations will depend on the test for when they constitute a barrier to trade. It was originally proposed that these standards, requirements and procedures should be "not more burdensome than necessary.[47]" Such a necessity test could have put a range of water policy measures and a range of other measures in the State of Maine and in other jurisdictions at risk of conflict with GATS obligations.[48]

The outcome of negotiations within the Working Group on Domestic Regulation will be vital for Maine and all other U.S. states and localities engaged in water policy and other forms of natural resources, public health, and public utility policy. [49]

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[46] According to the European Federation of Public Service Unions, "In its recent plurilateral requests on environmental services, EC [European Commission] and other demandeurs have categorically excluded "water for human use" as a result of strong civil society pressure. However water is still involved in many other areas of WTO negotiations that can be of equal threat to our demand for access to water as a basic human right. This is of concern to waste water treatment for example." *Available at,* http://www.epsu.org/a/1865.

[47] "The chairman's fourth draft continues to leave out the proposal from Australia, Hong Kong and New Zealand that requires domestic regulations to be "no more burdensome than necessary to ensure the quality of a service." This is no doubt due to resistance from the United States, Brazil and other nations who view the necessity test as incompatible with domestic regulatory authority. The strongest statement to date on this issue has been the March 2007 outline of negotiating principles by the United States Trade Representative (USTR)." Memorandum to Kay Wilkie, Chair, Intergovernmental Policy Advisory Committee (IGPAC) from: Robert Stumberg**,** February 12, 2008, re: WPDR chairman's fourth draft on domestic regulation, dated 23 January 2008, p.3, *available at,* http://www.forumdemocracy.net/downloads/Stumberg/WPDRdraftJan-08.

[48] If something similar to the necessity test is agreed upon in Geneva, the Center for International Environmental Law identified several areas where water policy could be threatened, including among others: qualifications of water service providers; the use of licenses, permits, and technical regulations and standards related to pollution discharges, operating permits, and other water policy measures; the use of environmental criteria related to water services in awarding concession contracts or assessing licensing fees; and requirements for water sustainability impact assessments before issuing licenses. CIEL (document on file, Harrison Institute for Public Law, Georgetown University Law Center) p.2.

[49] The Intergovernmental Policy Advisory Committee (IGPAC) Services Working Group (representing state and local governments in the USTR advisory process) has highlighted several of these disciplines as posing a significant risk of conflict with state regulations that neither discriminate nor limit market access. For example, the IGPAC group expressed:

In summary, whether groundwater regulation and related water policies are covered by GATS is uncertain. Rebecca Bates, an Australian trade law scholar observes that, "The existence … of continuing debate and uncertainty as to the interpretation of the agreement means that the power and impact of GATS will not be wholly known until it is applied to the water and sanitation market in a real world situation … greater certainty may be achieved through specifically excluding water and sanitation services from the scope of the agreement. The essential nature of water and sanitation for human health and survival sets this service area apart from many others when discussing liberalization of a service area and the existence of a human right to water means that extra care must be taken before water in any form is subject to free trade obligation."[50]

Recent developments.

March 20, 2009 release of chairman's most recent draft WTO Working Party on Domestic Regulation (WPDR). The chairman's most recent draft continues to leave out the proposal from Australia, Hong Kong and New Zealand that requires domestic regulations to be "no more burdensome than necessary to ensure the quality of a service." This is no doubt due to resistance from the United States, Brazil and other nations who view the necessity test as incompatible with domestic regulatory authority. [51]

While the chairman's recent draft of proposals fortunately took the "necessity test" off the table, the fourth draft states that one purpose is to ensure that regulations "do not constitute disguised restrictions on trade in services." [52]This purpose would inform how dispute panels interpret the

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(1)"Serious concern [about disciplines that require domestic regulations to be] 'pre-established, based on objective criteria and relevant...' given the potential for unacceptable constraints on the scope and exercise of state/local regulatory authority, particularly related to complex and emerging industries." IGPAC is referring to the fact that a term like "objective" has been interpreted by the WTO in ways that are inconsistent with regulatory practice in the United States, and

(2)"Active opposition to the extremely objectionable omission of any mention of sub-federal policy objectives from [the section that states a principle of deference to legitimate national policy objectives]." Instead, the IGPAC services working group recommends the following language: "National policy objectives include objectives identified at national or sub-national levels."

Memo from Kay Wilkie, chair of the Intergovernmental Policy Advisory Committee, Services Working Group, to Daniel Watson, Office of the U.S. Trade Representative (February 12, 2008).

[50] Rebecca Bates, 31 Sydney Law Review, 121, 142 (2009).

[51] Memorandum to Kay Wilkie, Chair, p3 , *available at,* http://www.forumdemocracy.net/downloads/Stumberg/WPDRdraftJan-08.

[52] Id.. See also, Working Party on Domestic Regulation (WPDR), Revised Draft, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman, 23 January 2008 (Room Document), available at http://www.tradeobservatory.org/library.cfm?refID=101417 .

disciplines. In recent disputes, the WTO has found disguised restrictions when countries have failed to consult and seek less-trade-restrictive alternatives in response to complaints that measures violate trade rules. In other words, avoiding "disguised barriers" could have a meaning that is similar to the necessity test."[53]

Like prior versions, the chairman's March 2009 draft recognizes the "right to regulate … in order to meet national policy objectives." However, the draft deleted language that referred to sub-national governments, and the third draft had weakened the previous version, which included the right to regulate in order to meet "domestic" policy objectives. To come within the GATS right to regulate, states would have to seek an endorsement of state policy from the federal government."[54]

The latest draft retains disciplines from the prior drafts. Among the most significant proposals, several create a spectrum of possible meanings. For example:

A relevance test could exclude criteria that are external to the quality of a service being supplied, criteria such as environmental, historical or aesthetic impacts;

A pre-established test could affect the law of when development rights or property rights vest, meaning at what point in time regulatory changes are applicable;

An objectivity test could exclude subjective standards such as "just and reasonable" authority that legislatures delegate to public utility commissions to regulate in the public interest;

A simplicity test could affect licensing and standards of operation in the most complex service industries, where typically, procedures reflect a balance of regulator vs. industry needs. [55]

June 3, 2009 Maine Citizens Trade Policy Commission letter to President Barack Obama. "We strongly support Maine's ability to regulate the siting and operation of LNG [liquefied natural gas] facilities in Maine without those regulations being subject to WTO challenges in foreign tribunals where WTO rules, not U.S. law, apply and the basic due process rights provided in our courts do not exist. We encourage USTR not to submit this service sector under the General Agreement to Trade and Services (GATS)."[56]

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[53] Another change in the recent draft is where it defines an obligation on governments to publish 'detailed information' on regulations. Mandatory details include applicable technical standards, appellate process, monitoring, public involvement, exceptions and normal time frames.

[54] Memorandum to Kay Wilkie, pp.3-4.

[55] Memo from Kay Wilkie, above.

[56] Maine Commission Letters, above.

June 6, 2008 Maine Citizens Trade Policy Commission letter to Christopher Melly and Daniel Watson, directors of services trade negotiations, Office of the U.S. Trade Representative. The letter expressed concerns about the effect on U.S. federalism and Maine's ability to regulate in the public interest in light of continuing GATS negotiation on domestic regulation and sectoral commitments related to Maine's capacity to regulate the siting of liquefied natural gas facilities.[57]

With respect to the WTO Working Party on Domestic Regulation, the Maine commission urged USTR to continue to reject any proposal for a "necessity test," and to seek the broadest definition of what regulatory measures relate to the "quality of the service," including the external impact of the service on people, commerce, and the environment. The commission also expressed its "extreme concern about the deletion of deference to sub-federal policy objectives as legitimate exercises of the right to regulate. Finally, the commission urged USTR to continue to safeguard state oversight of professional licensing.[58]

Agreement on Technical Barriers to Trade (Notification Provisions)

Introduction. The U.S. has an evolving system for dealing with its WTO transparency obligations on domestic regulation under the Agreement on Technical Barriers to Trade (TBT). The term "technical regulation" refers to a "document which lays down product characteristics or their related processes and production methods…"[59] Through its established inquiry point, the U.S. monitors and alerts the WTO Secretariat to proposed domestic technical regulation on non-agriculture products that could potentially affect trade.[60] In addition to that, the U.S. federal government has an obligation to report U.S. technical regulations to other WTO members if those U.S. regulations potentially affect trade.[61]

General analysis. The United States government's official inquiry point for the TBT is the National Center for Standard and Certification Information (NCSCI), a division of the U.S. Department of Commerce. NCSCI serves as the central national collection facility for information relating to standards, technical regulations, conformity assessment procedures and standards-related activities.[62]

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[57] Maine Commission Letters, above.

[58] Maine commission letters, above.

[59] World Trade Organization, text of Agreement on Technical Barriers to Trade (TBT Agreement), Annex 1, available at http://wto.org/english/docs_e/legal_e/17-tbt_e.htm.

[60] TBT Agreement, Article 3.2.

[61] TBT Agreement, Article 10.

[62] 19 United States Code (USC) 2544.

When NCSCI is alerted to a proposed technical regulation, a notice is sent to the WTO Secretariat in Geneva. The notification to the WTO is required to be made "at an early appropriate stage, when amendments can still be introduced and comments taken into account."[63] The WTO Committee on TBT then assigns the proposed regulation a unique coding number and circulates it to the 150 official inquiry points established by WTO members.

NCSCI, like its counterpart inquiry points in other WTO member states, is designated to receive all comments to WTO notifications on U.S. technical regulation of manufactured non-agriculture products. Comments in response to the proposed technical regulation from other WTO members are received by NCSCI and disseminated to the relevant federal regulatory agency, USTR, and the Department of Commerce's International Trade Administration (ITA).

If the WTO notification affects a proposed federal regulation, USTR forwards comments received directly to the relevant federal agency so that it can be considered within the deliberative process as required under the U.S. Administrative Procedure Act (APA).[64]

The process for disseminating comments relating to proposed technical regulation at the state level is not as clearly defined as the federal APA process. USTR has discretion to determine the manner in which comments to WTO notifications on proposed state technical regulations are shared with interested parties. However, there is no binding authority, similar to the APA that requires USTR to do so.[65]

Case study: Chinese objection to proposed state product safety and electronic waste legislation. On the basis of the provisions in the TBT agreement outlined above, the Peoples' Republic of China in 2008 demanded that bills in the Maryland and Vermont legislatures must be "cancelled" or "revised."[66]

The People's Republic of China sent a fax transmission to the Maryland General Assembly on January 30, 2008, in which it objected to Maryland House Bill Number 8 (HB 8), a bill introduced in 2007 by Delegate Jim Hubbard. HB 8 would have restricted the sale of lead-

[63] TBT Agreement, Article 2.9.2.

[64] See Administrative Procedure Act, www.archives.gov/federal_register/public_laws/acts.html#apa; The APA requires that federal agencies go through a "notice and comment" process open to all interested parties, both foreign and domestic. Before agencies can issue a final regulation, they must respond to the comments, give equal treatment to all comments received, and make sure that the final regulation follows logically from the proposal and the public record, and is not arbitrary or capricious. The public record may be used by the courts in settling any challenge to the regulations brought by interested parties.

[65] Memorandum from Ingrid White, Harrison Institute of Public law (on file).

[66] The Chinese communications are on file at the Harrison Institute, Georgetown University Law Center.

adulterated consumer products and toys in order to protect the public health and the health of children in Maryland in particular. The Chinese complaint about the Hubbard bill remains of concern to Maine because in 2009 it enacted the "Kids Safe Product Law," regulating toxic chemicals in children's products (Title 38, 1609).[67]

Similarly, Vermont State Senator Virginia Lyons received a letter in the spring of 2008 from the People's Republic of China (PRC) demanding that she "cancel" or "revise" her bill related to control and disposal of electronic waste (S. 256). Electronic products, such as computers and televisions, contain lead, mercury, cadmium, and similar hazardous materials. Senator Lyons says. "My bill simply provides a system for the recycling of electronic products as a means of limiting the release of these dangerous heavy metals from landfills and thereby protecting the environment and public health in Vermont."[68] Again, Maine remains concerned because it adopted legislation similar to the Lyons bill, requiring that electronic waste must be recycled or disposed of safely with proper reporting (Title 38, 1610).[69]

In response to such complaints, on October 22, 2008, a senior U.S. trade negotiator told state officials that his office would modify its procedures for notifying the World Trade Organization (WTO) about pending state legislation that regulates trade in goods. Jeff Weiss, Director for Technical Barriers to Trade (TBT) in the Office of U.S. Trade Representative (USTR), made these assurances in a meeting with the NCSL Labor and Economic Development Committee and in a conference call with various state officials.

China was responding to notices of pending state legislation sent by the U.S. Department of Commerce to the WTO Secretariat in Geneva, Switzerland. Mr. Weiss explained that the TBT Agreement requires such notice under two conditions when a government (at any level) proposes to regulate trade in goods: (1) when the proposal is not based on international standards and (2) the proposal could have a significant impact on trade with even one country. "The bar is low," said Mr. Weiss. He explained that the notice to the WTO is designed to back up trade rules that require regulations to be "not more trade restrictive than necessary" and to be based on relevant international standards.

After observing that the Commerce Department had not been sending the WTO notice of pending bills in Congress, Mr. Weiss said that sending notice of state bills in Vermont and Maryland had been "inadvertent." In the future, he said that his office at USTR would screen out all notices of proposed legislation. This would limit notices to agency rulemaking – both state and federal – after legislation has been adopted. Mr. Weiss said that at the agency level, "we try to notify everything … to be as transparent as possible. We want to see other countries become

[67] Report of Sarah Bigney to the Maine Citizens Trade Policy Commission (on file).

[68] On file, Harrison Institute.

[69] Report of Sarah Bigney, above.

transparent." It is also clear that the Commerce Department will continue to notify the WTO of state legislation that has been enacted.[70]

Recent Developments Regarding the TBT Agreement. The Maine Citizens Trade Policy Commission was especially active in 2008 in addressing the issue of U.S. Commerce Department notification of the WTO and WTO members like China about pending state legislation. This effort was successful, thanks in large part to the leadership of Maryland, Vermont and Maine. Delegate Jim Hubbard of Maryland even appeared on the nationally broadcast Lou Dobbs show on CNN. Pending state bills will not be subjects of notification. Here are examples of Maine's leadership on this issue.

NCSL resolution on China TBT issue. Vermont Senator Virginia Lyons introduced a policy resolution at the July 2008 annual meeting of the National Conference of State Legislatures (NCSL) condemning China's challenge to state law-making authority in Maryland and Vermont, with the support of the Maine delegation to the meeting. The Lyons resolution was approved by the NCSL Labor and Economic Development Committee at the July 2008 meeting, but was unexpectedly re-referred in the NCSL Steering Committee to the NCSL Communications, Financial Services, and Interstate Commerce Committee and held over for consideration at the NCSL 2008 Fall Forum, thus denying the full membership of NCSL a chance to consider the resolution at the annual business meeting. Senator Lyons was unable to attend the NCSL fall forum, but Maine Representative Sharon Treat then took the lead in successfully steering the Lyons resolution through the Interstate Commerce Committee and the Fall Forum business meeting, where it was adopted unanimously. The resolution provides in part that: "NCSL deplores China's interference in the normal exercise of state lawmaking authority by raising the specter of possible trade challenges to state measures that are designed to limit the exposure of children to possible carcinogens and toxic chemicals. Also disquieting is the evidence that USTR provided China the information necessary for the PRC to prepare its written challenges—which in one case even included the home address of a state legislator." The resolution concludes with a very strong warning to USTR: "At a minimum, NCSL seeks a statement from USTR affirming that states' abilities to pass laws and regulations protecting human health and the environment should not be abridged, and that USTR will aggressively defend states' regulatory powers as a matter of U.S. federalism."[71]

Maine Citizens' Trade Policy Commission/Vermont Commission on International Trade and State Sovereignty, December 24, 2008 letter to Kay Alison Wilkie, Chair, USTR Intergovernmental Policy Advisory Committee: According to the letter: "We know that you share many of our concerns about the communications by the Peoples' Republic of China to the Vermont and Maryland legislatures related to pending legislation that would regulate toxic toys and e-waste

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[70] Peter Riggs, USTR Says It Will Limit WTO Notification, October 22, 2008, available at, http://www.forumdemocracy.net/article, php?id=520.

[71] NCSL resolution on file.

disposal, and we thank you for creating the opportunity to discuss these issues with USTR staff. The PRC's actions, putting Maryland and Vermont "on notice" as a matter of international trade law, are perceived as intrusions on the state legislative process, albeit ones that are sanctioned by the TBT agreement. While the notification issues are important, our primary concern remains the extent to which trade agreements restrict state legislative authority. **China's notices reference two of the most powerful restrictions on state legislative authority incorporated into the TBT agreement: (1) the requirement that technical standards not be more trade restrictive than necessary, and (2) the presumption that state technical standards ought to conform to international and national standards.** [emphasis added] The PRC's actions are also a matter of concern, as you know, because the TBT notification process and restrictions on legislative authority are models for some of our trading partners in ongoing WTO negotiations related to domestic regulation of services."[72]

April 22, 2008 letter to Ambassador Susan C. Schwab, United States Trade Representative: The Commission requested information about the process by which the U.S. federal government informs the World Trade Organization (WTO) of impending state legislation. According to the Commission letter: "This issue came to our attention after the People's Republic of China (PRC) challenged legislation proposed by Maryland (House Bill 8) to regulate lead in toys and other products likely to be handled by children. We were alarmed by the fact that the PRC appeared to be applying pressure on the Maryland General Assembly to not pass this law. The commission members feel this is an absolutely unwarranted intrusion into the decision-making processes of states."[73]

December 24, 2008, joint letter of the Maine Citizens Trade Policy Commission and the Vermont Commission on International Trade and State Sovereignty to Ambassador Susan Schwab, the United States Trade Representative. "We would like to thank you and Senior Director Jeff Weiss for convening an open conference call with states to discuss the notification process under the Technical Barriers to Trade agreement. … At a joint meeting conducted on September 19 in Manchester, New Hampshire and conference calls on October 14 and November 12, the trade policy oversight commissions of Maine, New Hampshire, and Vermont resolved to work cooperatively to communicate our concerns about the PRC's action and the federalism implications of the TBT agreement to the U.S. Trade Representative, the U.S. Secretary of Commerce, and IGPAC. We are therefore writing at this time to ask for your help in establishing formal federal/state consultations on the TBT process in the coming year."[74]

[72] Maine Commission Letters above.

[73] Id.

[74] Id.

International Subsidies Agreements

Introduction. The WTO Agreement on Subsidies and Countervailing Measures (SCM) is a key component of the global economic system, and its provisions penetrate deeply into questions of tax and industrial policy.

Use of the SCM agreement by the European Union has already led to changes in U.S. tax law. The SCM is at the heart of the U.S. - EU battle over the fates of the globe's two largest aircraft companies.

The purpose of the SCM is to curb government financial contributions to domestic industries that disadvantage foreign industrial and agricultural competitors (the SCM covers not only industrial producers but also agricultural producers to the extent the WTO agreement on agriculture is not controlling). The SCM aims to restrain subsidy programs that distort the efficiency of international markets. For example, the SCM is a potential tool for correcting unfair competition from Chinese and other foreign industrial firms. The SCM agreement allows the U.S. to take such enforcement action through WTO dispute resolution or through unilateral imposition of countervailing duties.[75]

General analysis.

Coverage. The Subsidies and Countervailing Measures agreement breaks its definition of a subsidy into three parts:

- A financial contribution;
- By a government or any public body within the territory of a WTO member;
- Which confers a benefit.

Examples of subsidies listed in the SCM include: (1) direct transfers of funds; (2) foregone government revenue, such as tax credits; (3) grants of goods and services, excluding infrastructure; and (4) entrustment of the transfer or granting of funds, goods, or services to a third party. [76]

Good Jobs First reports that Maine localities may provide such subsidies for commercial development in the form of tax increment financing, while state subsidies may be in the form of business equipment tax reimbursement or employment tax increment financing plans. [77]

Rules. The SCM agreement prohibits certain narrowly-defined export and local content subsidies and allows other subsidies to be challenged if a complaining country can meet a rigorous standard of proof that its interests have been adversely affected.

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[75] Peter Riggs, Subsidies and Taxation, available at http://forumdemocracy.net/article.php?list=type&type=118.

[76] World Trade Organization, Agreement on Subsidies and Countervailing Measures (SCM), part I, article 1, available at http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm.

[77] Good Jobs First, "Wal-Mart Subsidies Report for Maine,"available at, http://www.walmartsubsidywatch.org/state_detail.html?state=ME.

Prohibited subsidies: Prohibited or red light subsidies are of two narrow types: (1) *export subsidies* that aid domestic companies contingent on export performance, or (2) *local content subsidies* that provide a preference for the use of domestic over imported goods.[78]

Actionable subsidies: Actionable or yellow light subsidies are not prohibited. They are however *subject to challenge*, either in WTO dispute resolution or through countervailing measures, if they are specific and if they are proved to adversely affect another WTO member. Proving that a subsidy adverse affects the interests of another country can be difficult, usually requiring quantities of detailed information and sophisticated economic analysis. A causal link must be established between the subsidy and the injury.[79]

Case study: The Foreign Sales Corporation case. U.S. tax law formerly allowed U.S. firms to reduce their tax liability on profits from exports by setting up an off-shore subsidiary called a 'foreign sales corporation." In 1999, the European Union sued the U.S., claiming the foreign sales corporation provision in the internal revenue code violated the WTO's agreement on Subsidies and Countervailing Measures. In March 2000 the WTO appellate tribunal found that the FSC provision was a prohibited export subsidy under the SCM. Later that year, Congress repealed the FSC provision but also adopted the Extraterritorial Income Exclusion Act that allowed U.S. corporations to avoid some U.S. taxes on overseas earnings. The E.U. sued again, and the WTO tribunal again found that the new U.S. overseas income exclusion law was a prohibited export subsidy. Under threat of retaliatory trade sanctions, on May 11, 2006, the U.S. Congress passed a tax bill that included provisions repealing the Extraterritorial Income Exclusion Act. This whole process has been dispiriting for U.S. exporters like Boeing that relied on the FSC and the ETI to remain competitive in world markets with European and other exporters. Under European systems of taxation, manufacturers are allowed rebates on Value Added Taxes (VAT) on their exports.[80]

Recent Developments: The Boeing/Airbus litigation. The WTO case pits the world's two largest commercial aircraft companies against each other. The European Union and the United States submitted dueling complaints to the WTO in the fall of 2004. In September 2009, the WTO issued an interim report finding that Airbus received billions in SCM illegal subsidies from European countries. A second interim report on a European Union complaint that U.S. federal and state governments illegally subsidized Boeing is expected shortly. A ruling on the EU complaint will have implications for state and local governments in the United States that provide tax and financial incentives designed to attract or retain industry. Critical to state and local governments is whether the WTO will take up the 'legality' (WTO-compliance) of state-local incentive programs. The European Union alleges that state and local governments in Washington, Illinois and Kansas provided billions of dollars in subsidies to Boeing in violation of the WTO agreement on Subsidies and Countervailing Measures (SCM).

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[78] SCM, Part II, articles 4,5.

[79] SCM, Part III, articles 5,6,7; for non-actionable subsidies, see SCM part IV.

[80] Forum on Democracy and Trade, Subsidies and Taxation, above.

According to the Office of the U.S. Trade Representative, Airbus over its 35 year history has benefited from massive amounts of EU member state and EU subsidies that have enabled the company to create a full product line of aircraft. ... Every major Airbus aircraft model was financed, in whole or in part, with EU government subsidies taking the form of 'launch aid' - financing with no or low rates of interest, and repayment tied to sales of the aircraft. If the sales of a particular model are less than expected, Airbus does not have to repay the remainder of the financing. EU governments have forgiven Airbus debt; provided equity infusions; provided dedicated infrastructure support; and provided substantial amounts of research and development funds for civil aircraft projects. USTR claims that EU subsidies to Airbus are "prohibited export subsidies" and "actionable subsidies adversely affecting the United States," in violation of the SCM agreement.

The core of the EU's challenge is the research and development support provided by the U.S. Department of Defense and NASA through various means, as well as Boeing-specific support provided at state and local levels, such as subsidy packages tailor-made for Boeing in the states of Washington, Kansas and Illinois. The EU alleges that the State of Washington gave Boeing $3.4 billion in tax incentives; the City of Everett gave Boeing $67.5 million in tax reductions; and state and local governments in Washington provided another $395 million in other subsidies including workforce training, infrastructure improvements, and assumption of legal costs, among others. The EU also alleges that the City of Wichita, Kansas, provided tax breaks to Boeing worth $783 million; and, the State of Kansas pays the interest on bonds financing aircraft production facilities worth another $122 million to Boeing. The EU alleges that the State of Illinois, the City of Chicago, and Cook County provided tax incentives and direct payment of relocation and other costs to Boeing worth $24.8 million.[81]

International Procurement Agreements

Introduction. Government procurement is regulated by the World Trade Organization's Government Procurement Agreement (GPA). [82] And, state purchasing has also been covered by recent free trade agreements. All of this is controversial because states are beginning to build labor, human rights, and environmental criteria into their purchasing decisions that might or might not run afoul of international rules.

For example, in 2001, the State of Maine passed landmark 'anti-sweatshop' legislation. According to Peace through Interamerican Community Action:

> The Maine Anti-sweatshop Purchasing Law, the first of its kind for a state, requires businesses seeking contracts to sell footwear, apparel and textiles to the Maine state government to sign an affidavit that to the best of their knowledge

[81] Forum on Democracy & Trade, Subsidies and Taxation, available at http;//www.forumdemocracy.net/article.php/list=type&type=118.

[82] World Trade Organization, text of Agreement on Government Procurement, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm.

> products they supply to the state were not made in a sweatshop as defined by the Purchasing Code of Conduct. Businesses need to make a good faith effort to learn about working conditions. The Code of Conduct is defined as compliance with all applicable laws at the site of assembly as well as with international human rights and labor rights treaties which both the U.S. and the country in which the goods are assembled have signed. The law is crafted to withstand legal challenges similar to those that overturned the Massachusetts law barring state purchases of products from Burma.[83]

Similarly, environmental procurement preferences such as preferences for recycled content that have been adopted for the State of Maine and Maine localities that are based on the environmental implications of how products are made, could violate provisions in international procurement agreements requiring the use of performance-based standards.

General analysis

Coverage. The WTO Agreement on Government Procurement applies to any law, regulation, procedure or practice regarding procurement of goods or services above a certain threshold amount.[84] Maine is covered under the GPA, in the view of the WTO, because the Governor of the State of Maine made a commitment at the time of the ratification of the Uruguay Round Agreement establishing the WTO.

*Rules***.** Maine and other committed jurisdictions must ensure: (1) that it does not treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; (2) that it does not discriminate against locally established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a party to the Agreement on Government Procurement; and (3) that technical specifications are based on performance, not design or descriptive standards. [85]

Exceptions. Nothing in the GPA may be construed to prevent any party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.[86]

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[83] GEO Newsletter, 2001, Riverdale, Maryland, available at http://www.geo.coop/archives/nosweat.html; see also Campaign for Labor Rights, Sweat Free Communities, May 2003, available at, http://clrlabor.orgindex,html/mau03/1-5.html.

[84] GPA, Article I (scope and coverage).

[85] GPA, Article III national treatment (non-discrimination); article IV rules of origin; article VI technical specifications.

[86] GPA, article XXIII.

Also, provided that they are not an arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing prevent a party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labor.[87]

Case study: Examples of Impact of GPA on Maine Purchasing Policy. In March of 2004, Peace through Interamerican Community Action (PICA) published an analysis of potential conflicts between Maine procurement policies and international trade procurement rules. The analysis identified three major areas of Maine procurement policy that are at risk of being found in conflict with international procurement agreements.[88]

Environmental purchasing preference not based on product performance."The State Division of Purchases cannot require products of a certain design or content unless that design and content is directly linked to the performance of the product. Since products without recycled, composted, or organic materials can perform as well as products with such content, and since vehicles that are not fuel efficient can perform as well as those that are, Maine's preferential purchasing policies to protect the environment are at risk."

Preferences for companies that uphold labor and human rights. "The State Division of Purchases cannot treat products differently depending on who made them, or in what conditions they were produced or harvested. Since requiring that products not be made with sweatshop labor, or taking into account health and retirement benefits provided to employees go beyond looking at the suppliers' "legal, technical and financial abilities" to fulfill a procurement, Maine's preferences for products made by businesses that uphold labor and human rights are at risk."

Policies that ban state contractors from shipping jobs overseas or other local development policies aimed at creating jobs in Maine. "The State Division of Purchases cannot provide preferences to in-state or domestic suppliers. For example, 15% price preferences for domestic suppliers in publicly funded construction projects (LD 608) would violate the nondiscrimination rule since such preferences constitute more favorable treatment for domestic than foreign suppliers. Legislation to ban state contractors from shipping jobs overseas or other local development policies aimed at creating jobs in Maine would also violate the nondiscrimination rule."

Recent developments.

Maine adopts LD 1257 regarding state commitments to trade agreements. On June 24, 2009, Sarah Edelman of Global Trade Watch reported in the Eyes on Trade blog: "Last Friday, Maine became the fifth state to safeguard democratic decision-making in international trade negotiations.

[87]Id.

[88] Peace through Interamerican Community Action, Open letter: Maine's Obligations Under the Procurement Rules in New Trade Agreements, March 23, 2004, available at, http://www.citizen.org/documents/maine_pica_letter.pdf.

LD 1257, introduced by Rep. Sharon Treat (D-Hallowell), passed unanimously by the legislature, and signed into law by Governor Baldacci on June 12, establishes a sensible process for responding to requests from the United States Trade Representative regarding state commitments to non-tariff provisions of trade pacts like sub-federal procurement provisions. In short, since committing to these provisions of trade pacts has the potential to affect state laws, the state government has decided to let the Maine legislature make the call … a Governor cannot bind the state to [an international trade agreement or treaty] … without specific legislation authorizing that action. … Maryland, Rhode Island, Hawaii, and Minnesota are the other states that have established legislative approval processes similar to Maine." [89]

International Agreements on Trade in Goods

Introduction. The General Agreement on Tariffs and Trade (GATT) sets the basic rules for international trade in goods.[90]

Growth in trade was one of the original goals of the 1948 GATT agreement. The architects of the agreement believed that the trade wars and protectionism of the 1920s and 1930s were underlying causes of the Great Depression and ultimately World War II. They theorized that GATT would lay the foundation for an expanding world economy and an increasing economic interdependence and unity among nations.

The Uruguay Round Agreement built upon the GATT and created the WTO. Congress approved the new GATT by passing implementing legislation in 1994. The Uruguay Round Agreement is the most ambitious attempt, to date, at international trade liberalization. The Uruguay Round Agreement focused as never before on nontariff barriers to trade.

The GATT standards for nondiscrimination contrast with the traditional U.S. constitutional standards. The Commerce Clause and Foreign Commerce Clause bar states from discriminating against out-of-state and foreign commerce. But, the Constitution also establishes a system of federalism. U.S. constitutional law has developed, through 200 years of Supreme Court decisions, a careful balance of federalism and free trade values.

A good example of the potential unpredictability of GATT nondiscrimination standards and how they may differ from U.S. constitutional law is presented by the *Beer II* decision (rendered by a GATT panel before the adoption of the Uruguay Round accord). In February 1992, a GATT panel issued its report on Canada's challenge to U.S. federal and state laws providing for the regulation and taxation of the beer industry. Many, perhaps most, of the challenged state laws clearly discriminated against out-of-state or foreign commerce and would have been quickly struck down

[89] At the summer meeting of Maine Citizens' Trade Policy Commission an update was provided on LD 1257 "An Act to Require Legislative Consultation and Approval Prior to Committing the State to Binding International Trade Agreements." Rep. Sharon Treat gave a summary of the legislation that she submitted. A motion made by Cynthia Phinney to support the legislation and seconded by John Patrick was adopted unanimously by the commission.

[90] The text of the GATT may be found at http://www.wto.org/english/docs_e/legal_e.htm.

in a U.S. court under the Commerce Clause or Foreign Commerce Clause. But not all of the state laws found to be discriminatory under GATT would have been regarded as discriminatory under U.S. constitutional law. For example, the GATT panel found against a Minnesota statute offering favorable excise tax treatment of microbreweries. Favorable tax treatment was conditioned solely on the size of the brewery. Minnesota's statute was absolutely neutral with respect to whether the microbrewery was located in Minnesota, another state, Canada or anywhere else. Yet the dispute resolution panel in Geneva found the Minnesota tax preference discriminated against large Canadian producers. It is unlikely that a U.S. court would have reached a similar finding. What the GATT panel did, in effect, was view Minnesota's law in terms of the economic competition between microbrewers, primarily in the United States, and large Canadian breweries, both of whom target the same market of upscale beer drinkers. *Beer II* alerted state officials to the possible effect of trade agreements on state sovereignty and American federalism.[91]

General analysis

Coverage: The GATT does not clearly define the term "good."[92] But it is generally agreed that a "good" is "a product that can be produced, bought, and sold, and that has a physical identity."[93]

Rules The next step in analyzing the potential risk of a successful international lawsuit is to determine whether a specific rule or "obligation" has been violated. Among the relevant provisions here are:

- GATT article I on "most favored nation" treatment provides that " … any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties";[94]
- GATT article III on "national treatment" requires non-discrimination between domestic and foreign products;[95]
- GATT article XI on market access provides that, "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or

[91] See Ruth Wallick, GATT and Preemption of State and Local Laws, Government Finance Review, October 1, 1994, available at http://www.allbusiness.com/Finance-insurance/475880-1.html.

[92] The text of the GATT may be found at http://www.wto.org/english/docs_e/legal_e.htm.

[93] Definition of good, Deardorff's Glossary of International Economics, *available at* http://www-personal.umich.edu/alandear/glossary/g.html; For published book, see Alan V. Deardorff, Terms of Trade: Glossary of International Economics, World Scientific Publishers, October 2006.

[94] Available at http://www.wto.org/english/docs_e/legal_e.htm.

[95] Available at http://www.wto.org/english/docs_e/legal_e.htm.

> export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the contracting party."[96]

Exclusions. Even if there is a violation of a specific rule (obligation), the third step in the analysis is to determine whether an exclusion, exception, or annex reservation (grandfathering particular existing measures) applies regardless of the violation of an obligation. Particularly relevant in this case are the general exceptions at article XX(b) (life and health of humans, animals and plants) and article XX(g) (conservation of natural resources).[97]

Case study: Maine water policy

Bottled water: Trade in bottled water is covered by the GATT.[98] Bottled water is produced (bottled), and it enters into the stream of commerce; it is 'bought and sold." According to Howard Mann, a leading expert on trade and the environment, "It is well understood that bottled water, for example, is covered by trade law, and that restrictions on exports of bottled water are, therefore, significantly limited."[99]

Given that bottled water is covered by the GATT and similar agreements on trade in goods (or products), the next question is what "disciplines" or limitations on government action are imposed. As noted above, in the case of the GATT, the "most favored nation" discipline at article

[96] Available at at http://www.wto.org/english/docs_e/legal_e.htm.

[97] GATT Article XX. General Exceptions. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: … (*b*) necessary to protect human, animal or plant life or health; … (*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; World Trade Organization, Legal Texts: GATT 1947, *available at,* http://www.wto.org/english/docs_e/legal_e/gatt47_02#articleXX.

[98] *For general background,* Edith Brown Weiss, *Water Transfers in International Trade Law, in* Edith Brown Weiss, Laurence Boisson de Chazournes, & Nathalie Bernasconi-Osterwaler, Fresh Water and International Economic Law. Oxford University Press, 2005.

[99] Howard Mann, "Implications of International Trade and Investment Agreements for Water and Water Services: Some Responses from Other Sources of International Law," a paper prepared for Agua Sustentable and funded by the International Development Research Center, Ottawa, Canada, May 2006, p. 9 (on file); According to Alix Gowlland Gualtieri, "The most common form in which water can be traded occurs after its transformation or removal from a natural or bulk state. This concerns most prevalently bottled water and other drinks containing water such as soft drinks and juices. An increasingly lucrative international market in bottled water has emerged as a consequence of growing demand for the good, with Nestlé, Danone, Coca Cola and Pepsi Cola as leading corporations in the field."Legal Implications of Trade in 'Real" and 'Virtual" Water Resources, IELRC Working Paper 2008-02, International Environmental Law Research Center, Geneva, Switzerland, p.2., *available at* *http://ielrc.org.content/w0802.pdf*.

I requires governments that accord "any advantage, favor, privilege or immunity" to any product destined for one country must accord that same benefit to like products destined to all countries belonging to the World Trade Organization. Similarly, article XI of the GATT bars governmental measures, other than taxes, duties, or similar charges, on the "exportation or sale for export of any covered product, absent an exemption."

So, what exemptions in the GATT would allow application of a government measure to a covered good or product such as bottled water in spite of the disciplines imposed by article XI, article III, and/or article I? Again, articles XX(b) and XX(g), for example, allow governments to impose measures that would otherwise be prohibited if the measures are "necessary to protect human, animal, or plant life or health" or if they relate to "the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." These two exceptions in article XX, however, are available only where governmental measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

In parsing the text of articles XX(b) and (g), it becomes clear that article XX(b) is more narrow and subjective in many respects than article XX(g). For example, a WTO tribunal will decide when a measure to protect human, animal, or plant life is "necessary" under article XX(b). Does that mean the measure must be no more trade restrictive than necessary? Furthermore, under both XX(b) and XX(g), a tribunal will make the subjective judgment about when a measure is a disguised restriction on international trade.

In summary, bottled water is clearly covered by the GATT. What is unclear is how a groundwater measure would violate "most favored nation" or other obligations under the GATT (such as export restrictions under GATT article XI or a de facto violation of article III) with respect to trade in bottled water. It might well require strong evidence that groundwater regulation was intended to operate as a disguised or discriminatory restriction trade in bottled water. And even then, the groundwater regulation might be permissible under an Article XX general exemption.

Bulk Water: Commentators disagree about whether bulk water exports are covered by GATT and by trade in goods chapters in free trade agreements such as NAFTA. One school of thought is that bulk water is not a covered good or product. The other school of thought is that while the language of the agreements may not be specific about whether bulk water is covered, given the modern commercial practice of treating water as a commodity, the logic of the GATT agreement leads to the conclusion that bulk water is covered.

The traditional view is that bulk water, in its "natural state," is not a good or product. For example, with respect to trade – but not investment issues – the parties to NAFTA (Canada, Mexico, and the United States) issued a joint statement in 1993 declaring that "water in its natural state … is not a good or product, is not traded, and therefore is not and never has been subject to

the terms of any trade agreement."[100] With respect to the GATT, the argument is that bulk water is not a good or product to which the agreement applies.[101] Water in its natural state, it is argued, is not "produced." As one commentator argues, the GATT implies that "something must be done to water to make it a product, and that mere diversion, pumping, or transfer does not suffice."[102]

Dissenters from this view ask how is it that water does not fit under the GATT definition of a product, when the common practice is to regard other unrefined natural resources as products and goods in international trade.[103] They also argue that as a matter of recent commercial practice, water is being exported as a commodity, just like crude oil, and that tribunals could find this to be a commercial reality that must be recognized. As a report of the International Environmental Law Research Centre notes, "New bulk storage and transfer technologies have now been developed to make it possible to move large volumes of water across long distances for commercial purposes, including trough massive pipelines, supertankers, or giant sealed water bags."[104] In other words, a distinction must be made by an international tribunal between "water in its natural state" and "bulk water." The process of transferring or transporting bulk water in large containers like tanker trucks, rail cars, ships, or maybe even pipelines might be regarded as the equivalent of a production process, with the result that bulk water that is in the stream of commerce and that has been transported in this way is a product covered by GATT. According to Matthew Porterfield, Senior Fellow at Georgetown's Harrison Institute, it is significant that "water is included within the tariff classification system used by the WTO."[105] If water is a "product," then government groundwater regulation in certain fact situations might violate GATT obligations related to nondiscrimination and export restrictions, unless article XX applies.

As Howard Mann explains," while common sense and some history indicates trade law cannot compel the trade in freshwater resources, the matter is not without doubt, doubt created at least in

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[100] 1993 Statement by the Governments of Canada, Mexico, and the United States (on file).

[101] Bryant Walker Smith, "Water as a Public Good: The Status of Water Under The General Agreement on Tariff and Trade, 2009, *available at* : http://works.bepress.com/bryant_walker_smith/2 pp.4-6

[102] Smith, pp.4-6.

[103] Smith, *pp.4-6.*

[104] Gualtieri, p.4; the author also notes on p.6, that "There is no information on the intent of the parties when negotiating the GATT relevant to the applicability of the [GATT] Agreement to bulk transfers of water, and this question has indeed never been discussed in the framework of the WTO. Indeed, the absence of an explicit exclusion of water from the GATT has been read as arguing for the applicability of the Agreement to trade in this resource. On the other hand, water might not be mentioned because trading large amounts of water between states was not envisaged until recent years."

[105] "The General Agreement on Tariffs and Trade is the centerpiece of the WTO system. It covers trade in goods. There's been a vigorous debate whether water in its "natural state" -- lakes, streams, aquifers -- constitutes a good or "product" and is therefore covered under the GATT. Water is included within the tariff classification system used by the WTO.", *available at,http://forumdemocracy.net/article.*

part by the trade lawyers themselves. This doubt can be compounded if a first export is allowed to occur, as additional limitations or conditions on exports after a first export may become more difficult to apply due to non-discrimination requirements under trade law."[106]

In summary, it is uncertain whether bulk water is covered by GATT. Nonetheless, a more expansive interpretation of GATT coverage by a future tribunal cannot be ruled out. This is especially true in circumstances where governments violate article XI export restriction obligations or allow one firm to export bulk water and then change the rules to restrict or stop large-scale groundwater pumping and transfers across national borders by a second foreign firm, thus violating a GATT principle of non-discrimination, such as the "most favored nation" principle.

Recent developments. *Trans-Pacific Partnership.* In addition to the investment issues discussed above, negotiations on a Trans-Pacific Partnership free trade agreement will be very much about trade on good: oil from Brunei: agricultural products from New Zealand: agricultural products, natural gas, iron ore, and other minerals from Australia; copper and agricultural products from Chile; textiles, electronics, and agricultural products from Vietnam; biotechnology, electronics, and chemicals from Singapore; copper, zinc, gold, textiles, and fish meal from Peru.

Issues on trade in goods, especially agricultural and manufactured goods, can be contentious, as has been demonstrated by the reluctance of Congress to move forward on the U.S.-Korea Free Trade Agreement because of concerns about non-tariff barriers to U.S. beef exports to Korea and the prospect of even more Korean auto imports to the United States.

On the other hand, access to Pacific markets will be a key to future growth of U.S. exports of agricultural and industrial goods.

Interestingly, the economic policies of most of the partners in the current TPP negotiations are, compared to the international norm, strongly market oriented. The libertarian Cato institute, as noted below, regards the Singapore, Chile, New Zealand, and the United States as among the five most "economically-free in the world (among the Cato top five, all are Pacific rim countries, except for Switzerland). For example, "socialist" governments of Chile, even as they increased social welfare spending, largely left untouched the economic policies of General Pinochet and his University of Chicago economists, with their emphasis on tight monetary policy, de-regulation, and reasonable business taxes.

[106] Mann, *above*, p. 10.

Maine exports, imports & foreign investment. Based on their analysis of 2006 data, the U.S. International Trade Administration and the Bureau of the Census estimate that "15.8 percent of all manufacturing workers in Maine depend on exports for their jobs," and that 3.9 percent of private sector jobs in Maine are supported by manufacturing exports.[107] These federal agencies also report that "1,390 companies exported goods from Maine locations in 2007. Of those, 1,193 were small and medium sized enterprises (SMEs), with fewer than 500 employees. SMEs generated nearly one-third (30 percent) of Maine's total exports of merchandise in 2007." The Bureau of the Census, in analyzing the transportation origin of exports, concluded that in 2008 Maine shipped $3 billion in exports of merchandise. Top export destinations were Canada ($942 million), Malaysia ($765 million), Saudi Arabia ($160 million), South Korea ($137 million), and China ($122 million). Top categories of exports were computer and electronic products ($895 million or 30 percent of the total), paper products ($615 million), transportation equipment ($423 million), and machine products ($108 million).[108]

The Bureau of Economic Analysis at the U.S. Department of Commerce reports that in 2006 foreign companies employed 24,400 Mainers, of which twenty-seven percent were jobs in manufacturing (6,600). Foreign companies employed 10.8 percent of manufacturing workers in Maine. Foreign investors employed 4.7 percent of Maine private sector workers in 2006. [109]

The Office of the U.S. Trade Representative and trade associations representing multi-national corporations often argue that export data, of the kind displayed above, support the argument for signing more trade and investment agreements on the current model. But, Robert Scott, a trade economist at the labor-friendly Economic Policy Institute, says that the "problem with these statements is that they misrepresent the real effects on the U.S. economy: trade both creates and destroys jobs." Scott calculates that between 1994 and 2000, Maine gained 9,617 jobs from exports and lost 31, 974 jobs as a result of imports, for a net loss over six years of 22,357 jobs.[110] In a more recent publication, Scott estimates that over the period of 2001 to 2007, Maine lost 11,700 jobs, or 1.92 percent of total state employment as a result of trade deficits with China

[107] Maine: Exports, Jobs, and Foreign Investment, August 2009, available at http://www.trade.gov/td/industry/otea/state_reports/maine.html.

[108] U.S. Bureau of the Census, Foreign Trade Division, Revised Origin of Movement State Export Series, reported in Maine: Exports, Jobs, and Foreign Investment, August 2009, available at http://www.trade.gov/td/industry/otea/state_reports/maine.html.

[109] Reported in Maine: Exports, Jobs, and Foreign Investment, August 2009, above.

[110] Robert E. Scott, Phony Accounting and U.S. Trade Law, Economic Policy Institute, EPI Issue Brief #184, October 23, 2002.

alone.[111] It must be noted that other economists estimate that trade and globalization are a net plus for the United States. Gary Clyde Hufbauer at the business-friendly Peterson Institute for International Economics says, " The Peterson Institute calculates that the U.S. economy is approximately $1 trillion richer each year owing to past globalization-the payoff from both technological innovation and policy liberalization-and could gain another $500 billion annually from future liberalization.…"[112] Referring to criticism of his work from economists at the Economic Policy Institute and elsewhere, Hufbauer replies, "Underlying the noisy attack from our critics is their fear that, if public officials believe in a substantial payoff from globalization, they will be too eager to negotiate new trade agreements."[113]

The real problem here may be the lack of hard export and import data at the state and community level. State trade officials argue that the lack of specific data sets related to exports (as well as on foreign investment into their state) obscures the important contribution that export-promotion and investment-attraction programs make to job creation and economic activity in their state, and inhibits their ability to help businesses identify and take advantage of new market opportunities around the world. They argue for the reintroduction of zip code-specific data to merchandise export, as well as major improvements in the provision of state-level export data on services. Similarly, they believe that states and regions will continue to have difficulty assessing their trade balances and relative global competitiveness unless the federal government makes significant progress in collecting state level merchandise and services *import* data.

These concerns were summarized by the Inter-Governmental Policy Advisory Committee (IGPAC), which provides input from state and local governments to the Office of the United States Trade Representative regarding the negotiation and implementation of free trade agreements, in its 2007 report on the pending US-Panama Trade Promotion Agreement:

> IGPAC also stresses the importance of expanding American trade promotion capacity and improving the collection and dissemination of trade data….IGPAC members applaud the recent actions undertaken by the Department of Commerce to improve the quality of state and local-level trade information by reintroducing zip code specificity to merchandise export data. However, as the U.S. economy is increasingly driven by services, it is vital that state-level services export data collection be improved….While IGPAC recognizes the challenges inherent in

[111] Robert E. Scott, The China Trade Toll: Widespread Wage Suppression, 2 Million Jobs Lost in the U.S., Economic Policy Institute, EPI Briefing Paper#219, July 30, 2008, p. 7.

[112] Gary Clyde Hufbauer, Answering the Critics: why Large American gains from Globalization Are Plausible, Peterson Institute for International Economics, May 2008, available at http://www.iie.com/publications/papers/print.cfm?researchid=929&doc=pub.

[113] Hufbauer, above.

collecting such data, Canadian data track product exports and imports by province, country, and U.S. states, offering an impressive example.[114]

Beyond the general debate on the effect of international trade and investment agreements on the Maine economy and jobs picture, there are specific concerns about how these agreements affect Maine.

The effect of trade agreements and globalization on the Maine business climate and working conditions. International trade and investment agreements, particularly in combination with other factors contributing to globalization such as technological improvements in transportation and communication, contribute to a hyper-competitive business climate and the perception of insecure working conditions for employees. In a globalized economy, businesses, and manufacturers in particular, may feel compelled to respond quickly to competitors who are seeking an advantage by relocating or outsourcing to jurisdictions with a low-tax and de-regulated "business-friendly climate." Concurrently, many countries and regional governments including some American states may believe that low business taxes, deregulation, reductions (or non-enforcement) of labor, social welfare, or tort law protections are necessary to attract investment and to nurture a culture of entrepreneurship. [115] In combination, these factors may leave workers in Maine and elsewhere feeling insecure and vulnerable. Job tenure may be increasingly unpredictable as manufacturers respond to plant relocation incentives offered by governments or simply the lure of a low tax, de-regulated, non-union, and "business-friendly" environment. There is evidence to show increased income inequality in this era of market-liberalizing trade agreements and globalization, although analysts disagree about whether this is driven by increased labor market competition, cutbacks in government services, and economic de-regulation fostered by international trade and investment agreements or whether it is primarily a result of rapid technological change.[116]

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[114] "US-Panama Trade Promotion Agreement, Report of the InterGovernmental Policy Advisory Committee", 24 April 2007.

[115] James Gwartney, Robert Lawson, Economic Freedom of the World: 2009 Annual Report, Cato Institute, 2009, available at, http;//www.cato.org/pubs/efw/index.html.(Cato ranks Singapore, New Zealand, Switzerland, and Chile as the most economically free; not coincidentally perhaps, these four countries are among the strongest supporters of international trade and investment agreements that restrict the policy space of government; The Obama administration is now contemplating a Trans-Pacific Partnership Free Trade Agreement that would include Singapore, New Zealand and Chile (the U.S. free trade agreements with Singapore and Chile are the current model for new U.S. free trade agreements.); Arthur B. Laffer, Stephen Moore, Jonathan Williams, Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index, 2nd edition, American Legislative Exchange Council, 2009, available at, http://www.alec.org/am/pdf/tax/09RSPS/26969_REPORT_full.pdf. (ALEC ranks the top five states as Utah, Colorado, Arizona, Virginia, and South Dakota; ALEC ranks Maine 47th).

[116] Mark Barenberg, Sustaining Workers Bargaining Power in an Age of Globalization, Economic Policy Institute, EPI Briefing Paper #246, October 9, 2009, pp.3-4;Florence Jammotte, Sabir Lall, Chris Papageorgiou, Petia Topalova, Technology Widening Rich Poor Gap, International Monetary Fund, October 10, 2007, available at http;//www.imf.org/external/pubs/ft/survey/so/2007/RES1010A.html.

The effects of globalization and trade agreements on the business climate and working conditions are illustrated by recent developments in Maine.

Maine paper mills have been particularly hard hit by Chinese trade competition. A typical story comes from Rumford, Maine, a town of 6,472 people in Oxford County and the birthplace of Edmund Muskie, where the first paper mill began operation in 1882. On January 16, 2008, New Page Corporation, headquartered in Ohio, announced that they were shutting down paper machine #11 and laying off at least 60 workers at Rumford (as well as 440 paper workers in Wisconsin and 160 workers in Ohio who also worked in coated free sheet paper production units). James Tyrone, Vice-President of Sales for New Page, testified before Congress in 2007 that Chinese state planning officials targeted its coated paper industry for rapid development in the 1990s, providing low-cost loans through government banks, direct grants, and tax breaks based on export performance. The Peoples Republic in 2003 also forgave a $600 million loan to Asia Pulp and Paper, China's largest paper company. As a result, China's market share in the U.S. coated free sheet paper market has increased 75 percent annually over the period 2003-2007. [117]

In January of 2009, New Page Corporation announced that 100 hourly employees and 30 salaried employees at the Rumford Mill would be permanently laid off.[118] This bad news was offset somewhat in November 2009, when the U.S. International Trade Commission voted to proceed with a full investigation of coated paper imports from China and Indonesia.[119]

The layoffs at the Rumford mill illustrate how Maine's industrial base is eroding in an era of globalization. Manufacturers News Inc. (MNI) reports that Maine lost 1,135 industrial jobs in 2008, down slightly from 2,000 industrial jobs lost in 2007. MNI says that the leather and paper manufacturing sectors were hardest hit.[120]

The loss of manufacturing jobs in Maine is related to U.S. trade policy, especially with respect to China, according to the Economic Policy Institute. As noted above, EPI estimates that from 2001 to 2006 Maine suffered a net loss of 8,800 jobs (amounting to a 1.4 percent share of total state employment in 2001) due to growing trade deficits with China, alone. Maine workers could not compete, EPI says, because China directly subsidizes export industries, pegs its currency

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[117] Forum on Democracy & Trade, Maine, available at www.forumdemocracy.net/article.php/id;statement of James C. Tyrone, New Page Corporation, Subcommittee on Trade, U.S. House Committee on Ways and Means, February 15, 2007, available at http://waysandmeans.house.gov/hearings.asp?formmode=views&id=5413.

[118] Eileen N. Adams, "Rumford Mill Cuts Jobs," Kennebec Journal/ Morning Sentinel, January 28, 2009, available at http://morningsentinel.mainetoday.com/news/local/5877766.html.

[119] "Trade Commission Votes to Proceed with Investigation of Coated Paper Imports," Printing Impressions, November 6, 2009, available at, http://www.piworld.com/article/trade-commission-votes-proceed-investigation-coated-paper-imports-pi-news/1.

[120] News clipping, available at http://news.maintoday.com/updates/038829.html.

artificially low (an effective subsidy of 40 percent), and denies basic labor rights to its industrial workers, resulting in a 47 percent to 85 percent suppression of Chinese wage levels. [121]

Options for the Commission to Engage on Trade Policy in 2010 and 2011.

Preservation of State Sovereignty and Authority to Regulate in the Public Interest

Reform Measures Related To Federal Preemption & Unfunded Mandates

Maine may want to reiterate its call to Congress and the President for additional protections against federal preemption and unfunded federal mandates resulting from trade and investment disputes. For example, Congress could enact legislation to forbid U.S. federal agencies from taking any of the following actions on grounds that a state, tribal, or local government measure (or its application) is inconsistent with an international agreement or treaty or award: (1) initiate legal action to preempt or invalidate a sub-national law or its enforcement or application; or (2) directly or indirectly shift costs to a state or local government in response to an international tribunal decision that the United States must pay compensation to a foreign investor.

Reform of International Services Agreements

Maine may want to reiterate its call for Congress and the President to limit the coverage of state and local measures in international services agreements. For example:

All international services agreements entered into by the United States could include provisions that: (1) preserve the right of federal, state, and local governments to provide and regulate services in the public interest on a non-discriminatory basis; and (2) provide that nothing in any services agreement shall bar measures rolling back service privatization or require the privatization of public services, even when such services are provided on a commercial basis and/or are already partially privatized;

The United States by legislation or executive directive could adopt a policy that:

(1) It will never accept a GATS agreement on domestic regulation that requires domestic regulations to meet a "necessity test" even if drafted in language addressing a "disguised barrier to trade," to be "pre-established, based on objective criteria, or relevant;" and

(2) The domestic regulation portion of the proposed agreement providing for a principle of deference to legitimate national policy objectives shall explicitly state that national policy objectives include objectives identified at both national and sub-national levels.

Reform of International Investment Agreements and Treaties

[121] Scott, Phony Accounting…, above.

Maine may want to consider the pros and cons of reiterating its call for Congress and the President to limit the coverage of state and local measures in international services agreements, in the following respects among others:

Minimum standard of treatment – Narrow the minimum standard treatment to the elements of customary international law as explained in the U.S. brief in *Glamis*, in which the State Department argued for a reading of MST confined to three elements: (1) compensation for expropriation, (2) "internal security," and (3) "denial of justice" where domestic courts or agencies (not legislatures) treat foreign investors in a way that is "notoriously unjust" or "egregious" such as a denial of procedural due process.[122] Further, the expectation of a stable or unchanging legal environment is not to be understood as part of customary international law.[123]

Indirect expropriation – Narrow indirect expropriation so that it does not apply to nondiscriminatory regulations as explained in the *Methanex* award. In other words, establish that the adoption or application by any national or sub-national government of any bona fide and non-discriminatory measure intended to serve a public purpose shall not constitute a violation of an expropriation article of an investment agreement or treaty.[124]

Protected investments – Narrow the definition of investment to include only the kinds of property that are protected by the takings clause of the U.S. Constitution. Exclude from the definition of investment the expectation of gain or profit, the assumption of risk, and intangible property interests other than intellectual property. Acknowledge that property interests are limited by background principles of domestic property, water, and nuisance law.

Exhaustion of remedies – Follow international law and require investors to exhaust domestic remedies before using investor-state arbitration. This recognizes that international investor-to-state arbitration is to be used as a last resort and should not be invoked routinely as a means of circumventing the domestic administrative and judicial processes. This also allows domestic courts and administrative bodies to resolve disputed facts and disputed points of domestic law prior to review by international arbitrators.

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[122] Counter-Memorial of Respondent United States of America, in Glamis Gold v. USA (September 19, 2006) 221.

[123] Counter-Memorial… at 226, 232.

[124] The Intergovernmental Policy Advisory Committee, which is the formal state and local government advisory body to the U.S. Trade Representative, has recommended codifying the rule in *Methanex v. United States, "*The recent ruling in the *Methanex* dispute established an important precedent for safeguarding important principlesof federalism and state sovereignty of concern to this Committee. However, since such tribunal judgments are not formally precedential, IGPAC members recommend that the case's finding that 'as a matter of general internationallaw, a non-discriminatory regulation for a public purpose, which is enacted with due process and which affects…a foreign investor or investment is not deemed expropriatory and compensable....' be codified as a formal Interpretive Note in NAFTA and other existing FTAs, and that corrected language be added to this TPA and future trade agreements."The US-Peru Trade Promotion Agreement: Report of the Intergovernmental Policy Advisory Committee," February 1, 2006, *available at,* http://www.citizen.org/documents/IGPAC_Peru_Report.pdf.

Waiver of right to file an international investment claim – Clarify that no international investment tribunal may find a contract provision in which a foreign investor waives its right to pursue an international investment claim to be unenforceable.

Developing the Maine Economy by Promoting Exports and by Preserving and Expanding the Number of Jobs, Particularly in the Manufacturing Sector

Reform of Border-Adjusted Value Added Taxes

Explore trade policy reform options for neutralizing the trade distorting effects of border-adjusted value-added taxes implemented by U.S. trading partners. As noted above, the United States lost the *Foreign Sales Corporation (FSC) case* in WTO litigation, putting the U.S.A. at a competitive disadvantage to the large number of countries that rebate Value Added Taxes (VATs) for their exports (in effect providing an export subsidy), while imposing VAT levies on imports from the United States (a de facto tariff). While the WTO ruled that the U.S. export tax benefit for FSCs was illegal under the Agreement on Subsidies and Countervailing Measures (SCM), the VAT export rebate is not illegal because U.S. trade negotiators in the 1950s agreed to European demands that the VAT should not be treated as a subsidy under the General Agreement on Tariffs and Trade. Legislation, H.R. 2927 sponsored by Representative William Pascrell of New Jersey and co-sponsored by Representative Michael Michaud of Maine, is pending in Congress that would address the VAT (indirect tax) export rebate problem.[125]

Reform of Policy to Assist Small and Medium Sized Exporters

Maine may want to consider the pros and cons of supporting a proposed small business export enhancement bill. U.S. Senator Olympia Snowe of Maine has introduced legislation to encourage exports by small and medium sized businesses. According to the U. S. Senate Small Business Committee: "S.2862 would strengthen and improve support for American entrepreneurs seeking opportunities to expand their business, create new jobs and compete in the international market. The bill would also:

[125] The Congressional Research Service summarizes the provisions of the bill as follows: "Border Tax Equity Act of 2009 - Requires the United States Trade Representative (USTR) to submit to Congress a report certifying whether or not U.S. objectives to revise World Trade Organization (WTO) rules on border tax treatment of goods and services from countries with indirect tax systems have been met in WTO negotiations. Amends the Internal Revenue Code to: (1) impose a tax on imports of goods and services from any country with an indirect tax system and deposits taxes so collected into a special account; and (2) upon request of a U.S. exporter, grant a rebate to such exporter from such account of indirect taxes paid. Imposes such requirements if the USTR fails to certify to Congress that U.S. objectives have been met."

"Establish an SBA Associate Administrator for International Trade to carry out the Agency's international trade programs and formulate its trade and export policy;

Bolster the number of SBA export finance specialists assigned to Export Assistance Centers;

Raise, from $2 million to $5 million, the maximum amount of an International Trade Loan or Export Working Capital Program loan;

Establish in statute an Export Express program and expand the maximum loan size from $250,000 to $500,000; and

Create a State Trade and Export Promotion Grant Program to increase the number of small businesses that export and increase the value of the exports by small businesses."

Currency Manipulation Reform

Maine may want to consider the pros and cons of supporting a currency manipulation reform bill similar to the one reported to the floor by the U.S. Senate Finance Committee in 2007. S. 1607, the Currency Exchange Rate Oversight Act of 2007, would have required the U.S. Treasury Department to identify two categories of currency: (1) "fundamentally misaligned currencies" based on observed objective criteria, and (2) "fundamentally misaligned currency for priority action" caused by the intentional actions of government. Treasury would have been required to initiate consultations with all countries found to have misaligned currencies. For "priority" currencies, Treasury would have been required to seek advice from the International Monetary Fund (IMF) and strategically-placed trading partners.

According to a Senate Finance Committee press release issued at the time of S. 1607 was favorably reported on a 20 to 1 vote: "The legislation imposes a number of immediate consequences for countries designated for "priority action," including accounting for currency undervaluation in determining whether a country should graduate from non-market economy status for purposes of U.S. antidumping rules. If a country fails to take appropriate action within three months, Treasury must take currency undervaluation into account when making antidumping calculations for products exported from the designated country. Other consequences include suspension of U.S. government procurement from the designated country, requests for special consultation by the IMF, and suspension of financing and insurance from the Overseas Private Investment Corporation and multilateral development banks for projects in the designated country. If the designated county fails to take appropriate action to address its misaligned currency within one year, the legislation requires the U.S. Trade Representative to begin WTO dispute settlement proceedings regarding the currency problem. It also requires the Treasury Secretary to consult with the Federal Reserve Board and other central banks on taking remedial intervention. The President may waive the bill's consequences if those actions pose a threat to national security or U.S. economic interests. The bill also increases congressional input by giving members of Congress the ability to override the Presidential waiver, and by creating a new body –

appointed by the President and the leaders of relevant congressional committees – with which Treasury must consult as it identifies misaligned currencies."

State-Federal Consultation on Trade Policy

Maine may want to reiterate its call to Congress and the President for greater state-federal consultation on trade and federalism issues, including the following options.

The Positive List Approach

Any new legislation establishing negotiating objectives for the Office of the United States Trade Representative might instruct USTR to utilize wherever possible the "positive list" approach for making services, procurement, and investment commitments in international agreements that apply to states. This approach would allow states to know more precisely the areas in which they need to consult with the federal government. The "negative list" approach, currently used in most agreements except for procurement, commits the United States to implement trade disciplines on all covered sectors unless policy areas or state laws are specifically exempted in the annexes of the agreement.

A Center on Trade and Federalism

Improving federal consultation with states on trade will require more resources and in particular greater capacity to produce unbiased legal and economic analysis on trade and federalism issues. To remedy this, Congress could fund a Center on Trade and Federalism, based in a university or a non-profit, that would be tasked with:

Conducting legal policy analysis on potential intrusions on state sovereignty resulting from international trade and investment agreements, with a particular focus on services, investment, and procurement agreements;

Conducting economic policy analysis on import, export, and investment flows at the community level, and their effect on local job creation or loss;

Improving trade and investment data collection and dissemination (in collaboration with congressionally-mandated collection by the U.S. Department of Commerce of export and import data for both goods and services at the community level);

Increasing export promotion collaborations among states; and

Analyzing the effectiveness of trade adjustment assistance programs.

The Decision Process for Initiating Trade Negotiations

Just as important as questions about the provisions of new trade and investment agreements are questions about who we select as negotiating partners. Maine may therefore want to consider the pros and cons of federal trade policy reforms, such as:

Establishing readiness criteria for the President to use in determining whether a country is an appropriate one with which to enter into an agreement, and whether a country is able to meet its obligations under a trade agreement.

Establish a process for Congress to verify that the President has complied with the readiness criteria.

Establish standards for more frequent consultations with all relevant congressional committees in the course of negotiations.

Establish negotiating objectives that are truly binding.

Establish a process for frequent and broadly based consultations with state and local governments throughout the course of negotiations.

Establish a process by which both houses of Congress vote to approve an agreement before the President signs it.