Oregon Fair Trade Campaign
Testimony in Support of HJM 18

Monday, April 9, 2007

My name is Arthur Stamoulis. I live in Hillsboro, and am testifying on behalf of the Oregon Fair Trade Campaign, a nonprofit organization based in Portland. Thank you for the opportunity to voice our support for House Joint Memorial 18, a measure urging Congress to protect states' rights in international trade agreements.

Today's trade pacts cover far more than just tariffs and quotas. They bind both the federal government and sub-federal units of government to a wide range of provisions that constrain regulatory authority and thus threaten state sovereignty. To date, Congress has done a poor job of encouraging the federal-state consultation and cooperation necessary to ensure that states' rights are protected during trade negotiations and that the checks-and-balances inherent in the nation's federal system are upheld.

HJM 18 weighs in on this issue by respectfully requesting that the United States Trade Representative be required to obtain the prior informed consent of the Oregon Legislative Assembly before binding the state to trade agreement obligations that affect state authority.

How Trade Agreements Encroach Upon States' Rights

International trade policies encroach upon states' rights in three major areas: public procurement, trade in services, and foreign investor privileges.

Public Procurement
Procurement policies often have goals that extend beyond the simple purchasing of goods and services. It is not uncommon to find state and municipal procurement rules that aim to use public agencies' purchasing power to aid in local economic development or to help advance some other worthy goal.

The procurement provisions found in most international trade pacts include "non-discrimination" rules that forbid purchasing agencies from giving favorable treatment to domestic suppliers over foreign ones. These provisions prohibit many of the "local bidder" preferences and anti-offshoring measures designed to use public procurement as a tool for encouraging local economic development.

The procurement agreements found in most trade pacts also include technical specification rules that prohibit purchasing agencies from favoring one supplier over another based on how a good is made or how a service is provided. Thus, procurement policies banning the use of child labor or requiring certain environmentally-friendly manufacturing methods would be prohibited.

Finally, purchasing agencies are limited in the “supplier qualification” rules they can establish. Barring an individual foreign supplier or contractor based on its labor or environmental record is prohibited, as are blanket bans of all bidders operating in countries with human rights offenses (such as the anti-Apartheid procurement policies some states and municipalities enacted during the 1980s).

One of the first state laws challenged under the World Trade Organization was a Massachusetts law banning purchases from companies that did business with the dictatorship in Burma. The U.S. State Department then used the example of that WTO challenge to lobby against proposed Maryland legislation that would have banned purchases from companies operating in Nigeria. That case is illustrative. These trade provisions have not just been used to overturn existing state polices; they’re being used to limit the establishment of new policies.

Trade in Services
In the past, trade agreements primarily dealt with lifting barriers to goods traded across borders. Today’s trade agreements focus very heavily on trade in services.

Many international trade pacts, particularly the World Trade Organization’s General Agreement on Trade in Services (GATS), limit states’ ability to make decisions regarding the regulation and subsidization of nearly 100 different service sectors. This includes financial services, health insurance, transportation, gambling, media, telecommunications, public works and more. In 2005, the United States Trade Representative proposed expanding the GATS to include even more service sectors, including services from higher education to Liquid Natural Gas Terminals.

The GATS puts constraints on the regulation of services in a number of ways. First, the GATS prohibits quotas on the number of foreign-owned service providers allowed to enter this country. That sounds reasonable enough. Unfortunately, federal and state bans on certain services—such as various forms of gambling—have been determined by the WTO to be a “quota of one” and are thus WTO illegal. Regulations that limit the size, location and hours of service of service providers may also be considered violations under the GATS “market access” provisions.

Second, the GATS’ “non-discrimination” rules prohibit regulations that have—not the intent—but the effect of favoring domestic businesses over foreign businesses. This includes both foreign-owned service providers operating in the United States, and those operating overseas and selling services cross border. The number of laws and regulations that could fall victim to this simple-sounding trade provision is astounding. This includes regulations impacting advertising, medical services, fishing, mining, tax preparation, retail outlets—a hundred service sectors in all, with more proposed to be added. A searchable directory of service-oriented regulations vulnerable to a GATS challenge can be found at: http://www.citizen.org/trade/forms/gats_search.cfm

Finally, the GATS prohibits service monopolies and also requires that public subsidies and grants to any service provider be shared equally with foreign-owned companies. Amazingly, this includes not just subsidies to American-owned businesses, but taxpayer subsidization of public services. The subsidization of public health care, transportation, road repair, water and sewers, libraries and more are threatened by these excessively-broad trade agreement provisions.

A solid example of how extreme these types of provisions can be is already on the books. The United Parcel Service (UPS) has used, not the GATS, but NAFTA, to challenge what it calls the Canadian postal service's limited monopoly over letter carrying. The company is seeking $160 million in compensation—a case that has withstood several hearings and is still underway.

Foreign Investor Protections
The North American Free Trade Agreement, the Central America Free Trade Agreement and several bilateral trade agreements also include chapters that grant foreign investors special protections for their investments within the United States. These provisions give individual foreign companies the right to seek monetary compensation for complying with laws and regulations they believe hurt their profit-making ability—even if the policies in question are applied equally to foreign and domestic companies.

These privately-initiated challenges to federal, state and municipal law are heard outside of the U.S. judicial system within private tribunals. States whose laws are challenged do not have automatic standing within these tribunals; only federal governments are recognized. As such, the federal government is at times put in the position of defending state laws with which it disagrees.

Under NAFTA alone, 46 cases seeking billions of dollars in damages have been filed, challenging a host of environmental protections, food safety regulations, public procurement rules, taxpayer-subsidized public services and even state court decisions.

To date, none of Oregon's laws have been challenged using these investor provisions, and the federal government has successfully fought off four cases already—but over $35 million in funds have already been paid out to private companies using NAFTA's foreign investor chapter and billions of dollars worth of cases are still pending.

To cite just one example, Canadian cattlemen are seeking more than $300 million in damages for a U.S. Food & Drug Administration decision to ban imports of certain cattle and beef products from Canada after Canadian cattle were struck with Mad Cow Disease.

How Trade Policymaking Procedures Affect States' Rights

The trade agreement provisions referenced above were all negotiated and approved by the United States Congress under a policymaking procedure known as Fast Track. Fast Track exempts international trade policies from the scrutiny of ordinary Congressional committee review, amendment and debate procedures. As such, the ability to remedy grievances within individual trade agreement provisions is severely limited by Fast Track.

The current Congressional grant of Fast Track trade promotion authority expires on June 30th of this year. It can only be renewed with Congressional approval. Given that this Congress will soon be re-examining trade policymaking procedures makes now the perfect time for the state to weigh in on the need for better state-federal consultation and cooperation in the trade policy arena.

At a minimum, Congress should re-write its trade policymaking rules to include an explicit mechanism for ensuring the prior informed consent of state legislatures before states are bound to the non-tariff terms of any trade agreement that affects state regulatory authority. This is exactly what HJM 18 asks Congress to do.

Oregon's Tradition of Defending States' Rights in Trade

The encroachment upon state sovereignty by international trade agreements is not an issue that has gone unnoticed in this state. Oregon's elected officials have a long tradition of defending against the international preemption of state laws and regulations. In 2001, during the last Congressional debate on trade policymaking procedures, the seventy-first Legislative Assembly of the State of Oregon passed Senate Joint Memorial #2-2 outlining many of the issues raised above and calling on Congress to investigate the impact of trade policies on state and local regulatory authority.

In May 2004, Governor Kulongoski took the extremely important step of asking the United States Trade Representative (USTR) to exclude Oregon from the procurement provisions of any future trade agreement. The USTR bound Oregon to the procurement rules of the Central America Free Trade Agreement despite this request, but the state has since been excluded from the procurement provisions of subsequent trade pacts.

In a 2005 letter expressing concern over the GATS' potential impact on state gambling law, Oregon's Attorney General joined 28 others in calling on the USTR to "maintain the principle that the federal government may request, but not require, states to alter their regulatory regimes in areas over which the states hold constitutional authority."

In March 2006, the Governor went a step further in explicitly requesting that the USTR exclude Oregon from future GATS agreements being negotiated within the World Trade Organization. He cited concerns about maintaining state authority to make decisions regarding health care subsidization, land use restrictions and gambling requirements. Over a year later, it remains to be seen whether the USTR will honor the Governor's request; to the best of my knowledge, it is not specifically bound by law to do so. It, of course, also remains to be seen whether future governors will maintain Governor Kulongoski's very sensible position towards the GATS.

Unfortunately, none of the positive steps taken by the Governor, Attorney General or Legislative Assembly to date protect the state from the potential extra-judicial challenges to state law enabled by international trade agreements; only an act of Congress can offer such protection.

In a very timely and sensible manner, HJM 18 requests that our representatives in Congress take proactive steps to protect state sovereignty from international preemption. The Oregon Fair Trade Campaign urges your support of this measure. Thank you again for the opportunity to testify. I am happy to answer any questions you may have.

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Director