

April 2, 2004

The Honorable Robert B. Zoellick  
United States Trade Representative  
Executive Office of the President  
Washington, D.C. 20508

Dear Ambassador Zoellick:

Pursuant to Section 2104 (e) of the Trade Act of 2002 and Section 135 (e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Intergovernmental Policy Advisory Committee on the US-Morocco Free Trade Agreement, reflecting majority, minority and additional advisory opinions on the proposed Agreement. IGPAC members have also taken this welcome opportunity to express some recommendations with respect to the overall process for federal/state/local trade policy consultation. Thank you for your consideration.

Sincerely,

Kay Alison Wilkie

Chair  
Intergovernmental Policy Advisory Committee

**The US-Morocco Free Trade Agreement (FTA)**

Report of the  
Intergovernmental Policy Advisory Committee

April 2, 2004

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**Intergovernmental Policy Advisory Committee**

**Advisory Committee Report to the President, the Congress and the United States Trade Representative on the US-Morocco Free Trade Agreement**

**I. Purpose of the Committee Report**

Section 2104 (e) of the Trade Act of 2002 requires that advisory committees provide the President, the Trade Representative, and Congress with reports required under Section 135 (e) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act of 2002.

The report of the appropriate sectoral or functional committee must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area.

Pursuant to these requirements, the Intergovernmental Policy Advisory Committee hereby submits the following report.

**II. Executive Summary of Committee Report**

America's economic growth and prosperity are best served by embracing strategies for more open and fair global markets, investing in innovative research and technologies that create the industries and jobs of the future, providing assistance to workers impacted by technology and trade trends, and engaging in, rather than isolating ourselves from, the challenges of international competition in this increasingly interconnected world. Thus, in principle, IGPAC members support the US-Morocco Free Trade Agreement's strategically essential goals of trade liberalization and reduction of regional barriers to trade and investment, and take this opportunity to also suggest some clarifications to certain provisions. The laudable US-Morocco Free Trade Agreement (FTA) objectives of economic growth, employment creation, sustainable development, geo-strategic market reforms and improvements to living standards and market

opportunities should be pursued in a manner consistent with constitutional and public policy obligations to state and local constituents. Consequently, this FTA should accord consideration for existing state and local level regulatory, tax, and subsidy policies, and the social, economic, and environmental values those policies promote.

Statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect locally appropriate responses to the needs of our residents, should not be overridden by provisions in trade agreements. These concerns were reflected by Congress' inclusion of the "no greater rights" language in Trade Promotion Authority legislation. The principle that the United States may request, but not require, states to alter their regulatory regimes in areas over which they hold constitutional authority should be maintained. Full and effective coordination and consultation should include requesting authority from the appropriate state or local authority before a state or local rule, regulation, or statute is listed in a trade agreement, offer or other binding commitment. IGPAC would prefer a process that relies upon affirmative, informed consent from affected state and local entities, rather than negative opt-out.

IGPAC members appreciate that the USTR involved this and other advisory committees in consultations during FTA negotiations. The compressed timeframe for negotiations did not permit IGPAC members sufficient opportunity to make perspectives known and to influence certain key provisions.

Recent developments in trade disputes impacting federal and state jurisdictions, such as the WTO interim ruling in support of the Antigua-Barbuda GATS challenge to US federal and state internet gambling restrictions, and the NAFTA Chapter 11 arbitration claim filed by Grand River Enterprises Six Nations Ltd. seeking compensation related to the tobacco Master Settlement Agreement, are troubling to IGPAC members. While aware that such challenges do not directly overturn state or federal laws, the demands on state agencies' resources for legal preparation and policy response remain significant.

With respect to the Morocco FTA, some IGPAC members have expressed concerns about, and in some cases, offered clarifications for, provisions regarding market access, investment and investor-state dispute settlement, and procurement. The IGPAC member representing North Carolina indicates that the state is opposed to this FTA on the grounds that it further accelerates the loss of textile jobs without additional protections for North Carolina's workers and communities.

As the US and Moroccan federal governments work toward implementation of this FTA, as well as collaborate on the creation of a broader Middle East Free Trade Area, IGPAC members would like to offer their support for remaining engaged with our federal and subcentral counterparts in the trade policy dialogue, and for collaborating on trade capacity building efforts and mutually beneficial trade development initiatives.

### **III. Brief Description of the Mandate of the Intergovernmental Policy Advisory Committee**

Established by the United States Trade Representative (USTR), pursuant to Section 135(c)(2) of the Trade Act of 1974 (19C. 2155(c)(2), as amended, the Federal Advisory Committee Act (5 C. App. II) and Section 4(d) of Executive Order No. 11846 dated March 27, 1975, the Intergovernmental Policy Advisory Committee (IGPAC) is charged with providing overall policy advice on trade policy matters that have a significant relationship to the affairs of state and local governments within the jurisdiction of the United States.

IGPAC consists of approximately 35 members appointed from, and reasonably representative of, the various states and other non-federal governmental entities within the jurisdiction of the United States. These entities include, but are not limited to, the executive and legislative branches of state, county, and municipal governments. Members may hold elective or appointive office. The Chair of the Committee shall be appointed by the US Trade Representative, and members shall be appointed by, and serve at the discretion of, the US Trade Representative for a period not to exceed the duration of the IGPAC charter. The US Trade Representative, or the designee, shall convene meetings of the Committee.

IGPAC's objectives and scope of its activities are to:

- Advise, consult with, and make recommendations to the US Trade Representative and relevant Cabinet or sub-Cabinet members concerning trade matters referred to in 19 C. Section 2155(c)(3)(A).
- Draw on the expertise and knowledge of its members and on such data and information as is provided it by the Office of the US Trade Representative.
- Establish such additional subcommittees of its members as may be necessary, subject to the provisions of the Federal Advisory Committee Act and the approval of the US Trade Representative, or the designee.
- Report to the Trade Representative, or the designee. The US Trade Representative or the designee will be responsible for prior approval of the agendas for all Committee meetings.

The United States Trade Representative, or the designee, will have responsibility for determinations, filings, and other administrative requirements of the Federal Advisory Committee Act. The Office of Intergovernmental Affairs and Public Liaison of the Office of the Trade Representative will coordinate and provide the necessary staff and clerical services for IGPAC. IGPAC Members serve without either compensation or reimbursement of expenses.

#### **IV. Negotiating Objectives and Priorities of the IGPAC**

Members of the IGPAC would like to express their gratitude to their USTR colleagues for their tremendously improved efforts to expand participation by state and local government representatives through the Intergovernmental Policy Advisory Committee on Trade (IGPAC) during the US-Morocco Free Trade Agreement (FTA) negotiations.

IGPAC members affirm that America's economic growth and prosperity are best served by:

- embracing strategies for more open and fair global markets;
- investing in innovative research and technologies to foster commercialization into the industries and jobs of the future;
- providing assistance to workers impacted by technology and trade trends, and
- engaging in, rather than isolating ourselves from, the challenges of international competition in this increasingly interconnected world.

Hence, as a general principle, IGPAC members support this agreement's trade liberalization objectives, with the recognition that those objectives must be carried out in a manner consistent with constitutional and public policy obligations owed by the federal government to state and local entities. Consequently, the FTA should accord consideration for existing state and local level regulatory, tax, and subsidy policies, and the social, economic, and environmental values those policies promote. Statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect locally appropriate responses to the needs of our residents, should not be overridden by provisions in trade agreements. These concerns were reflected by Congress' inclusion of the "no greater rights" language in Trade Promotion Authority legislation. The principle that the United States may request, but not require, states to alter their regulatory regimes in areas over which they hold constitutional authority should be maintained.

Full and effective coordination and consultation should include requesting authority from the appropriate state or local authority during the policy formulation and negotiation process, before a state or local rule, regulation, or statute is listed in a trade agreement, offer or other binding commitment. In general, IGPAC would prefer a process that relies upon affirmative consent from fully informed, involved and affected state and local entities, rather than for them to be required to opt out of proposed coverage.

#### **Background and Context**

State and local government entities are at the front lines of the international marketplace: both by assisting businesses to engage in global competition through trade development assistance; and by working to mitigate the impact of technological change and trade dislocations on communities, businesses and workers through varied adjustment, training and assistance programs. States have typically been innovators in international economic development work to foster increased export activity by small and mid-sized firms. Though businesses may turn first to private sector contacts for trade assistance, research shows that the transaction costs for providing trade development

assistance to small and medium-sized businesses generally outweigh the benefits for most private sector service providers. Hence, federal, state and local government trade assistance plays a key role in filling this need by providing information, technical assistance, referrals, alliance-building and facilitative guidance to smaller firms lacking the internal resources to develop export expertise on their own. Still, the specific export and job creation/retention benefits from informational, capacity-building trade development assistance services remain difficult to measure. Moreover, many state and local trade development efforts are constrained by limited resources and competition from other budgetary priorities.

State and local governments have generally supported multilateral, regional and bilateral efforts to expand market access, both for local businesses reaching out to global markets, and for international investors engaged in the local economy and creating employment. By strengthening rules-based international trade and investment systems, and making the investment process more transparent both in the US and abroad, the ability of all parties to expand trade is enhanced. As trade liberalization efforts progressed in recent decades, however, their coverage and scope have increasingly extended beyond the federal-level, increasing the impact on state and local-level laws, practices and regulations.

Following the approval of Trade Promotion Authority in August 2002, the USTR is to be commended for expanding the IGPAC, and for engaging in active consultations with states and others on a wide array of trade agreements under negotiation. Still, in recent years, concerns such as the following have emerged:

- Given the comparative newness of states' involvement in the content of international trade agreement negotiations, and in their implementation and dispute resolution, states often lack a clearly defined institutional structure with experienced staff dedicated to handling requests from trading partners, federal agencies and other interested parties, and for articulating the state's position on trade issues. Despite the absence of a clear structure for federal-state trade policy consultations, the dialogue has gradually intensified and the role of state policy-makers has increased, as has the involvement of other interested parties.
- Though the State Point of Contact system was meant to create a clear conduit for two-way communications, the structure has not met expectations for a variety of reasons. Most would agree that a broader and deeper range of contacts with diverse state entities, and particularly with those bearing regulatory and legislative authority, needs to be created and maintained by the USTR. Further, requests from the USTR for information and comments related to agreements being negotiated need to allow sufficient time for an informed and meaningful state/local response in order to influence the initial development and articulation of US positions.
- The analytical challenge faced by state and local governments is significant as well: international trade and investment data at the state level are insufficient; and reporting on the results of trade agreements at the state/local level is scant. There is no information by state on services or merchandise imports; no detailed data on services exports and decreasing

information on merchandise exports at the zip code level (given the discontinuation by the US Dept. of Commerce of the Exporter Location data series); and limited, delayed and highly aggregated international investment information. The challenges of assembling national, not to mention subcentral, information on procurement contracts and merchandise and services trade render reporting on specific trade agreement results quite problematic for the US and other countries. These data gaps make it difficult to conduct an informed analysis of the specific costs or benefits of trade liberalization for a given industry or location.

- Legal experts in all branches of government at the state and local level are examining the evolving impact of deepening trade liberalization on federalism, as interpretations of trade agreements during trade disputes brought by investors, trading partners and others impact the historically established state-federal division of power and responsibility (e.g. Chapter 11 of NAFTA). Recent developments in trade disputes impacting federal and state jurisdictions, such as the WTO interim ruling in support of the Antigua-Barbuda GATS challenge to US federal and state internet gambling restrictions, and the NAFTA Chapter 11 arbitration claim filed by Grand River Enterprises Six Nations Ltd. seeking compensation related to the tobacco Master Settlement Agreement, are troubling to IGPAC members. While aware that such challenges do not directly overturn state or federal laws, the demands on state agencies' resources for legal preparation and policy response remain significant.

Today as throughout history, the benefits of trade liberalization and its short, medium and long-term costs and benefits are being debated by academics, government leaders and the general public. Our increasing and intensifying globalization is occurring ever more rapidly, with factors of production more mobile and international interconnections more profound than ever before. Resulting advances in technology and productivity are having a major impact on employment trends in a variety of sectors and professions. Given the disparate trade flow impacts, those communities, businesses and workers gaining from greater international market access tend to be less visible, while those challenged by global competition tend to suffer disproportionately, evoking understandable public concern and calls for greater government intervention. Some industrial and agricultural sectors facing import competition may effectively organize for protection or special treatment, while other sectors may suffer more comparatively given their lack of connections and clout to gain preferential treatment. Additional factors often placing US smaller businesses at a competitive disadvantage are the substantial budgets and sophisticated export assistance infrastructure of our major trading partners -- at regional, federal and sub-central levels. Though American awareness of the importance of effective trade development efforts has grown, greater attention to these matters will be crucial in upcoming years.

#### Recommendations:

Given this climate, it has never been more essential for international trade agreements, and the federal, state and local trade policy discussions surrounding these agreements, to be effective at opening markets and expanding the benefits of trade for US firms and workers. Bolstering the global competitiveness of the country's growth engine, small and mid-sized firms and their



workforces, is at stake. Collaborative state/federal efforts for deepening international trade policy dialogue and fostering creative trade development strategies can help address this need.

IGPAC recommends that the Trade Promotion Coordinating Committee (TPCC), the Trade Policy Review Group (TPRG) and the Trade Policy Staff Committee (TPSC) be expanded or reconfigured to include state and local government representation (e.g. interested IGPAC members, designated State Points of Contact for the USTR, other relevant agency officials) and private sector representation. Issues for the attention and action on the part of a newly expanded trade promotion and trade policy consultative process might include:

- Establishing and fully funding a formal, regularly scheduled mechanism for US federal-state trade policy consultations in light of the increasing state role in trade policy formulation, negotiation and dispute resolution. Consultations would address trade and investment agreement negotiations that may impact state laws and practices, and would continue into implementation and dispute settlement phases. To be most effective and inclusive, this consultative mechanism would:
  - need a structure with sufficient budgetary support and resources to develop essential institutional capacity;
  - build upon the annual National Forum on Trade Policy (started by North Carolina in December 2003 and being supported by Centers for International Business Education and Research around the nation); and
  - be informed by best practices of trading partners, such as the Canadian federal-provincial model for trade consultations (C-Trade).

The creation of a consultative federal-state trade policy infrastructure could serve to bridge trade policy gaps between federal agency understanding of varied state processes and states' understanding of the scope of federal requests -- and between federal agency needs and expectations, and states' capacity to respond in a timely and effective fashion.

- Increasing awareness by state officials of the recent and on-going efforts on the part of USTR and other TPCC federal agencies to proactively discuss trade issues with national associations of state officials exercising regulatory functions (e.g. National Association of Attorneys General, National Association of Insurance Commissioners, National Association of State Procurement Officials, etc.). Particularly with respect to GATS, national associations of state regulators such as the National Association of Regulatory Utility Commissioners should play an important role in USTR consultations with states, given the vast scope of these negotiations, the number of agencies and sub-sectors involved, and complexity and range of services regulations. It would be helpful for the federal-state trade policy consultation process to foster links between the national associations' experts in trade law and state trade contacts, and among federal negotiators and federal/state/local agency contacts with expertise in the given issue area.
- Establishing a clear priority for federal support of high technology manufactured goods and services exports. This would build on a foundation of increased federal funding for research and development in emerging sectors such as biotechnology, nanotechnology, photonics,

advanced materials, and other innovative technologies. US support for the infrastructure of advanced R&D and for the commercialization of new technologies has never been more crucial to our nation's economic survival in this century's globally competitive context. Such support, along with an educational system preparing the technology workers of the future, would spur the US economy to generate high paying, high value-added employment. Some US trading partners, Singapore, for example, have multi-year plans to strategically target industrial development, devoting significant resources to accelerate their comparative advantages. In confronting the challenges of this century, the US has as much to learn from our global trading partners as they do from us.

- Assessing the comparative costs and benefits to the federal budget and US economy, particularly in terms of employment creation/retention and trade value, of the allocation of resources and trade protections to agricultural commodities, technology research and development, industrial goods, manufactured products, and services sectors.
- Collecting and disseminating better national, state, regional and zip-code level data on merchandise and services exports and imports, and on international investment flows, deploying mapping technologies and other tools to better inform analysis and planning. Such data would make it possible to benchmark state/federal trade performance against other major trading partners and regions with successful trade development agencies (e.g. Canada, European Union, Japan) by conducting regular evaluations of measured performance, program outcomes, and customer satisfaction at the sub-central level. Having TPCC conduct empirical analysis and report on the trade development capacity and resources of selected trading partners would be an essential aspect of this benchmarking process.
- Encouraging TPCC federal agencies to: deepen the state/federal trade development partnership; prioritize support by overseas posts for state-led trade initiatives in global markets; increase cooperation in domestic trade development program delivery; and integrate further Eximbank trade finance and delegated authority activities with those of states and the private sector, improving small firms' awareness of and access to trade financing. Successful collaboration by federal agencies with state, local, public and private sector economic development partners should be acknowledged and rewarded.
- Substantially transforming, expanding and fully funding the Trade Adjustment Assistance program, perhaps renamed as the "Technology" or "Workforce Adjustment Assistance" program (TAA or WAA). A transformed workforce adjustment and retraining program could more effectively prepare our nation's future workforce for confronting and mastering this century's employment challenges. In the past just as in the present, the complex interactions of economic and industrial factors are more often the cause of employment dislocations than trade-related import competition alone. Many manufacturing and services industries are transitioning through wrenching adaptations to technological change, automation advances and productivity gains, in an intensely competitive global context. The significant job losses occurring in some sectors result from broad trends transcending time and borders. A reconstituted Technology or Workforce Adjustment Assistance effort,

beyond aggressively implementing existing TAA provisions (e.g. wage insurance, job-search and relocation aid, health insurance), needs to create initiatives for continuous training, skill enhancement and other assistance (e.g. fully portable health and pension benefits, asset-value insurance, tax incentives for companies' increased on-the-job training), offering a comprehensive safety net to cushion the adaptation of impacted workers and their communities. Such efforts, in addition to appropriately redistributing a small portion of the national gains from technology and trade to dislocated workers and communities, might foster more domestic understanding of, and support for, investments in education, research, technology, and an agenda of trade liberalization in the future. Moreover, in light of the rapidly changing characteristics of employment being relocated or displaced, the reconstructed program should serve the needs of our nation's wide and diverse workforce, assisting manufacturing workers at varied skill levels as well as workers in services industries. Specifically, the US government should allocate full funding for Technology and Workforce Adjustment Assistance for both blue and white collar workers, including information technology and other professionals whose jobs are being lost due to outsourcing or technological change.

- Emulating our nation's effective responses to natural disasters, in order to mobilize resources for economic disasters, TPCC and related entities should collaborate on the creation of an *Economic* Federal Emergency Management Agency. Such an agency would concentrate varied resources and programs to assist communities coping with sudden and severe workforce contractions following plant shut-downs.

In addition to the recommendations above for expanding state/local and private sector connections to the TPCC, TRPG and TPSC, IGPAC members suggest that the USTR:

- Intensify the focus of its consultative process on reaching out to State Points of Contact, advisory committees and other interested parties for their input as trade policy is being formulated and as trade agreement negotiations are being initiated – rather than after their conclusion. Given the economic distress and employment dislocations created in certain industries and communities due to trade liberalization, the USTR outreach process needs to include active participation by federal and state-level labor agencies and labor unions.
- Utilize the existing corporate, government, and academic relationships of the US states abroad as a bridge to foster cooperation and understanding in preparation for future trade policy, trade capacity building, program development and trade agreement initiatives and meetings, such as WTO Ministerials. Some illustrations of these collaborative ties in action would include: discussion of trade development best practices between state economic development officials and overseas counterparts; educational and technology exchanges and linkages among academic, corporate and government leaders; and, technical assistance and training offered by state courts system experts to enhance the efficiency, transparency and effectiveness of courts in other jurisdictions. These types of subcentral working relationships may provide linkages of benefit to Moroccan leaders working toward a more productive world trade system. Many states have formal and informal international connections that could advance our shared objectives for trade development and capacity building.

## **V. Advisory Committee Opinion on the US-Morocco FTA**

### **General Observations:**

The US-Morocco Free Trade Agreement is supported in principle by most IGPAC members, as the agreement advances strategically critical and comprehensive trade development and market reform objectives in a manner generally beneficial to our national, regional and local economies. Certain provisions related to investment and procurement warrant clarification, as detailed below. The IGPAC member representing North Carolina indicates that the state is opposed to this FTA on the grounds that it further accelerates the loss of textile jobs without additional protections for North Carolina's workers and communities.

This agreement with Morocco, a long-standing ally of the US, would foster trade ties and deepen economic integration throughout Northern Africa, Europe and the Middle East. Since 1995, the United States and the Kingdom of Morocco have endeavored to promote closer economic ties, freer trade, and a stronger investment climate under a Trade and Investment Framework Agreement. Morocco is the first African nation to have entered into a Free Trade Agreement with the US, and plays an essential part in the Administration's strategy to create a Middle East Free Trade Area by 2013. IGPAC members understand that bipartisan efforts in Congress, such as the Middle East Trade and Engagement Act, indicate active federal support for economic reform and trade liberalization in the greater Middle East. Expanding global market access and broadening economic opportunity throughout this region are essential tools to address the potential socio-economic impact of demographic trends and to counteract the risk of terrorism.

Building upon prior FTAs with Israel and Jordan, the US-Morocco FTA should substantially improve the business environment and advance civil society development objectives, while increasing trade capacity and investment opportunities between the US and this critically important world region. The elimination of over 95 percent of tariffs on consumer and industrial product exports to Morocco at inception is most welcome, as are other market opening provisions for a wide range of technology, services and agriculture products. US economic interests, entrepreneurs and employees would benefit from improved market access for goods, services, agricultural products, and from better access to government procurement opportunities. Improvements in market access, notably for some key agricultural and industrial sectors, will help US exporters compete more effectively against European Union and Canadian firms. Provisions to promote workers rights, labor standards and environmental protections, and to advance regional development through trade capacity building, technical assistance and the integration of civil society, are appreciated and essential. IGPAC members note that the US, the Kingdom of Morocco and the broader geo-strategic region are poised to benefit, both from greater access between markets, and from greater regional integration amongst smaller and larger nations in Europe, Northern Africa and the Middle East.

While supportive of innovative regional and bilateral trade liberalization agreements, IGPAC members remain hopeful that USTR leadership, in re-energizing the WTO Doha Round, will successfully advance multilateral efforts. Given limited trade policy time and resources at the

state and local level, we are especially mindful of the considerable staff time involved in the analysis of trade agreements – whatever their scope and economic impact. Obviously, comprehensive multilateral agreements encompassing all WTO member countries would offer comparatively significant trade development benefits for the investment of federal and subcentral staff time and resources involved. With demonstrable trade gains on a large scale from multilateral trade accords, the case for constituent support can be persuasively made at the subcentral level. It may prove more difficult for state and local officials to communicate the relative importance and potential benefits of free trade agreements with smaller, individual countries or regions.

Members of IGPAC support expanding trade and market access, while simultaneously maintaining a commitment to ensuring that trade laws, enforcement efforts and the dispute settlement process respect the authority of states and local governments to regulate and interpret land-use, labor, health, safety, welfare, and environmental measures. Some of the core principles that could facilitate international trade and investment agreements, and dispute resolution processes, without sacrificing constitutional standards, include:

- Inclusion of the phrase “no greater procedural or substantive rights” in trade agreements, notably with respect to international investment provisions. Such language would ensure that international businesses do not receive preferential treatment when compared to domestic businesses, and would reference the US Constitution as the benchmark with respect to competing language in international agreements. As evidenced by disputes arising from the NAFTA Chapter 11 *Methanex* and *Loewen* cases, generalized expropriation language has allowed some foreign investors to file frivolous takings claims that challenge laws traditionally in the purview of state and local governments. Where agreements are reached with countries such as Morocco, inclusion of a wholly separate litigation process, applicable only to foreign commerce and investment, would seem understandable, as the Kingdom’s legal and regulatory systems may lack the certainty and clarity desired by the international business community. Still, the construction of any investor-state provisions should be approached with extreme caution and after extensive consultation with state and local governments, in order to avoid unintended consequences akin to NAFTA Chapter 11.
- Legal standards that are “rationally related to a legitimate governmental interest,” and that are consistent with the US Constitution and applicable case law, by ensuring state and local governments are not held to a higher standard in defending legitimate governmental interests with respect to international trade than domestic commerce. International agreements that include standards such as “least trade restrictive” or “least burdensome” for defining the permissible scope of governmental regulation are inconsistent with constitutional standards for evaluating legislation, and may affect a state or municipality’s ability to implement effective economic development programs and zoning laws.
- Transparency in claim and dispute resolution processes. Where it may still be appropriate to include investor dispute resolution procedures, greater attention must be paid to making these more accessible to both the public and any affected governmental entity. The United States

and relevant international tribunals need to provide prompt notification to state and local governments when their regulation or law is being challenged, seek their input and assistance at all stages of the process, and allow impacted state and local governments to participate fully in the hearing and deliberation process. Affected state and local governments should be empowered to file *amicus* briefs in matters before the tribunal and be able to work with the federal government in defense of their laws and regulations. Attention should also be given to making the proceedings open to the public. Recent developments in trade disputes impacting federal and state jurisdictions, such as the WTO interim ruling in support of the Antigua-Barbuda GATS challenge to US federal and state internet gambling restrictions, and the NAFTA Chapter 11 arbitration claim filed by Grand River Enterprises Six Nations Ltd. seeking compensation related to the tobacco Master Settlement Agreement, are troubling to IGPAC members. While aware that such challenges do not directly overturn state or federal laws, the demands on state agencies' resources for legal preparation and policy response remain significant. Finally, further consideration should be given to the structural problems inherent in regulating important aspects of international trade through a process that uses *ad hoc* judges and eschews reliance on precedent. In view of the need of businesses for stability and predictability and, in light of the substantial impact that decisions may have, there is an imperative need to ensure that the decisions and decision-makers are viewed as having substantial institutional credibility.

- Improvement by USTR of the consultation process by implementing the recommendations for consultations outlined above, and by adopting the standard set out in Federalism Executive Order 13132, Section 6, (which requires federal agencies to consult with state and local officials and representatives of their respective national organizations *before* issuing proposed rules or submitting legislative proposals to the Congress) would help the USTR gauge the concerns of state and local governments in a timely fashion.
- No presumption of federal authority over state and local law, when dealing with matters of unclear constitutional authority. This would bolster due consideration for the principles of federalism, and the negotiating position of the US would be clarified if federal functions were clearly separated from those of state and local governments.
- Monitoring and enforcement by USTR and relevant federal agencies, to ensure Morocco's compliance with commitments made under the FTA with respect to market access, labor standards, environmental protections and other provisions. Updated information on on-going US monitoring and enforcement efforts should be made readily and publicly available.

### Market Access

To the extent that state and local laws, regulations and other measures are involved, IGPAC requests that, in concert with the consultation provisions between FTA parties, regular channels of communication and consultation between federal and subcentral governments be established as needed (note report recommendations in section IV) with respect to provisions of this Agreement, notably on agriculture and sanitary and phytosanitary measures (Chapter 3),

technical barriers to trade (Chapter 7), government procurement per detailed notes below (Chapter 9 and Annexes), investment and investor-state dispute settlement per notes below (Chapter 10 and Annexes), cross border trade in services (Chapter 11), financial services (Chapter 12 and Annexes), telecommunications (Chapter 13 and Annexes), e-commerce (Chapter 14), intellectual property (Chapter 15), labor (Chapter 16), environment (Chapter 17), transparency (Chapter 18), and dispute settlement (Chapter 20).

### Government Procurement

IGPAC members generally support the goal of improving transparency and increasing fair market access in government procedures and regulatory decisions that are related to procurement, while preserving the independent authority of state and local governments to adopt legislation, standards and procedures consistent with their experience and interests. IGPAC members understand that sub-central, i.e. state, government procurement is covered by this Agreement as specified in Annex 9-A-2 and other Annex notes to Chapter 9, and that local government procurement is neither covered in the FTA nor in the World Trade Organization (WTO) Government Procurement Agreement (GPA). Regarding the coverage of state procurement in FTA, certain provisions in Chapter 9 related to the procurement process call for clarification, as detailed below.

IGPAC members appreciate that the USTR has agreed with our recommendation and is inviting the National Association of State Procurement Officials (NASPO: a member organization consisting of the state purchasing directors for the centralized procurement organizations in each state) to designate a representative to join IGPAC. Given the technical complexity and procedural sensitivity of the procurement process, state-level procurement expertise offers guidance on specific terms and conditions, implementation feasibility and background on potential conflicts with existing law. Many NASPO members are familiar with the World Trade Organization (WTO) Government Procurement Agreement (GPA), whose subcentral procurement provisions are similar to those in the FTA. To the extent that the USTR seeks to obtain the voluntary participation and informed consent of additional state government entities in international procurement agreements, the involvement of state procurement officials is critical. Moreover, with respect to the implementation phase of this or any other trade agreement covering procurement at the subcentral level, IGPAC members would recommend that the USTR and other federal agencies make a concerted effort to communicate to impacted state entities in all branches of government the content of relevant provisions in order to advance understanding, effective administration and compliance.

Regarding procurement provisions in Chapter 9 of the FTA, IGPAC members support the basic intent of expanding market access through increasingly fair and open bidding processes. IGPAC members would also note that coverage of state procurement in the FTA only pertains to those subcentral entities that have affirmatively offered to include their procurement in the FTA and other FTAs. Some state governments that are not covered by the WTO GPA may be unable or unwilling to comply with certain specific requirements, given potential conflict with state rules, regulations, laws and the exigencies of a particular procurement. In reflecting issues that may

arise for states, especially those states not presently covered by the WTO GPA, IGPAC members advance the following recommendations based on review of FTA Chapter 9:

- Article 9.5 (Time Limits for the Tendering Process – requiring public notice of not less than 40 days, or not less than 10 days under some conditions): This FTA agreement provision should be clarified with respect to alternative time limits. Some states' bids are published for shorter time frames, for example from 2 to 4 weeks (less than the 40 calendar days specified in the FTA text, and not meeting conditions listed as necessary to reach the reduced 10 day time frame, i.e. the absence of qualification requirements or publication of an annual notice of intended procurements). In some urgent cases, states may need bids back in 2 to 5 days -- a time frame that may be inconsistent with the 10 day minimum in the text. Also note that e-procurement tools have allowed many states to accelerate the tendering process, while improving efficiency and international market access to the procurement opportunity.
- Article 9.6 (Tender Documentation – requiring that all criteria for contract awards be published in the tender): The provisions in article 9.6.1 should be clarified as to the definition of tendering documentation. There is agreement that all information used to evaluate bids should be documented prior to the receipt of bids to ensure a fair evaluation process. However, various state laws do not always require that all of the detail, especially in very complex RFP procurements, needs to be included in the tendering document. Some state laws provide for a general description of the evaluation process in the tendering document and an evaluation packet, which may be a separate document from the tendering document. Some state laws may have similar requirements, for example: "A best value determination must be based on the evaluation criteria detailed in the solicitation document. If criteria other than price are used, the solicitation document must state the relative importance of price and other factors." Although similar in concept, the proposed FTA language appears to hold states to a higher standard by requiring "all cost factors" and "weights" in the tendering document. NASPO and IGPAC recommend clarification of this article to more clearly define the scope of tender documentation, focusing on the intent of fair and open competition without constraining the specific mechanics used to accomplish that intent.
- Article 9.10 (Awarding of Contracts – requiring tender submissions in writing): It is recommended that section 9.10.1 be clarified, since this requirement appears contrary to e-procurement activity on the part of some states and would also appear to contradict FTA's definition of "in writing" in article 9.16 definitions.
- Article 9.14 (Non-Disclosure of Information – regarding the non-disclosure of certain confidential information): This article needs clarification, in light of the fact that many states have Freedom of Information Legislation (FOIL) requirements that may be consistent with the intent but not the letter of the FTA text. For example, some states provide that the only business-related data that can be protected from disclosure as non-public must meet the legal standard of "trade secret" -- a stricter test than the definition here.



IGPAC members comprehend that the text negotiated by federal parties for the FTA, the WTO GPA and other international agreements covering subcentral procurement may not include detailed language on the terms and conditions duly specified by each state entity. Still, state governments reserve the right to condition their agreement to accept the proposed procurement language based not only on the terms of the final agreement and implementing legislation, but also upon the inclusion of terms and conditions such as the following in their acceptance letters:

- Agreements to be included may be withdrawn upon a subsequent decision by the appropriate legislative and executive offices;
- State procurement written and on-line publications will be recognized as meeting relevant requirements;
- Federal officials will provide necessary resources and assistance to impacted agencies for procurement trade agreement implementation and compliance;
- Amendment of inconsistent state or local laws to conform with the obligations being undertaken depends upon approvals by the relevant legislative, administrative and executive bodies;
- In the event that a contract award is disputed by a foreign bidder, the procurement process will not be impeded or delayed, thereby preserving public interest and safety;
- In the event of a dispute settlement adverse to the US due to the actions of a state or local entity, such entity will not be held liable to compensate the US for any costs or sanctions imposed under the dispute settlement;
- Any substantial changes to the types of commitments covering state and local procurement contained in this agreement, future agreements, and the WTO Government Procurement Agreement will not be deemed as being within the scope of agreements currently provided to the USTR without providing such entities an opportunity for full review and a new decision on inclusion;
- Existing state and local exceptions to coverage will be maintained, including but not limited to:
  - all existing or future preferences and practices benefiting small, minority and women-owned businesses;
  - procurement contract awards made to state or local companies due to tie-bids;
  - procurement of transit cars, buses and related equipment, steel, coal, autos, and printing services, and
  - requirements designed to encourage economic development for the purpose of alleviating economic distress and to promote environmental quality.

Currently, public awareness of the implications of “outsourcing” or “offshoring” has been heightened as some US employment shifts overseas and across borders – while popular awareness of the benefits of international investment and foreign affiliate employment to the US economy seems less evident. A wide array of proposals under review by state and local elected officials could potentially limit international procurement market access. Given this context, IGPAC members suggest that the USTR, the US Department of Commerce Export Assistance Centers, and other relevant federal agencies, provide technical assistance to actively encourage US firms to access newly opened procurement markets under this agreement.

## Services

State and local governments generally support objectives to liberalize trade in services industries as a means of increasing market access for US firms and for reaching trade development objectives. IGPAC members equally assert that the independent exercise of state and local legislative and regulatory power is critical to protecting citizens' interests and safeguarding the federal system. IGPAC would suggest that involving the National Association of Regulatory Utility Commissioners (NARUC) as a member of IGPAC and as part of the trade policy consultation process could significantly enhance substantive comment on services provisions from the state and local regulatory perspective, as NARUC members include governmental agencies engaged in the regulation of telecommunications, energy, and water utilities and carriers in the US, Puerto Rico and the Virgin Islands.

The USTR has diligently endeavored to identify various state statutes and local measures that may not conform to certain provisions in this agreement, excluding them from coverage by listing them in annexes of non-conforming measures. It should not be presumed, however, that these annexes are comprehensive, nor that future legislative and regulatory decisions must be consistent with commitments made in this agreement.

In this regard, the general “blanket” exemption for “existing” and subsequent state and local measures that do not increase the degree of non-conformity could leave open a myriad of potential disputes about future changes. At a minimum, this matter highlights the critical need for the USTR to educate and consult with state and local entities so that they remain aware of the constraints that may be imposed upon future legislative actions. If future measures are not covered by current exceptions for existing laws, it would be necessary to fit them within other exceptions, many of which are far narrower and risk being subject to problematic standards, such as being “no more burdensome than necessary.” The unintended consequence might be to freeze state and local legislation in ways that prevent it from adapting adequately to changing facts and circumstances. The difficulties that developed under energy deregulation in the Western states, and the discussions about whether to reconsider any aspects of current law in the area are indicative of such potential problems. This is particularly true where the interpretation of many of these terms and concepts continues to evolve and is subject to dispute within the WTO framework. IGPAC members urge the USTR to act expeditiously to work with the global community on forging a common view on these issues, so that state and local governments can make more informed assessments of their positions on future agreements.

## Investment

Where agreements are reached with countries such as Morocco, with less fully developed legal systems, inclusion of a wholly separate litigation process, applicable only to foreign commerce and investment, may be viewed as necessary at the moment for creating the secure, predictable legal conditions in such countries that are conducive to attracting and retaining international investment. IGPAC members' objections to investor-state provisions stem from concerns that

investors from nations with well-developed legal systems have abused such FTA provisions to challenge the authority of state and local governments. In particular, the *Methanex* and *Loewen* cases stemming from NAFTA Chapter 11 have reinforced concerns that the provision will be abused by investors who simply hope to circumvent established legislative and judicial procedures. Given the still evolving context of investor-state disputes as cited earlier, IGPAC members maintain significant concerns about Chapter 10-Section B provisions on investor-state dispute settlement claim submission and arbitration. IGPAC members do welcome those Chapter 10-Section B provisions in the FTA that bring about greater transparency, inclusion of non-disputing party and *amicus curiae* submissions, and consideration of whether claims or objections may be frivolous. IGPAC also appreciates that the agreement does not include an appellate mechanism in the investor-state provisions. It is hoped that efforts to strengthen and reform the administration of justice in Morocco and the Middle Eastern region may ameliorate legitimate concerns in the future about these legal systems.

While appreciating the importance of flexibility in provisions related to national treatment (Article 10.3.3), such provisions could be clarified to more clearly preclude misunderstandings and unintended consequences related to investment and subcentral jurisdiction. Conceivably, a foreign investor could use this provision to argue for the treatment provided by one US state for its investment in another US state. Though clearly not intended to be used in this manner, such language may leave open that potential interpretation and misuse. IGPAC members would welcome the opportunity to discuss clarifications and suggested language for various investor-state provisions in the FTA and future trade agreements.

#### Comment on Advisory Committee Process:

IGPAC members sincerely appreciate the dedication of USTR Intergovernmental staff in providing extensive information and assistance as we prepared this report. However, IGPAC members found the 30 day period allotted for review of each of the FTA documents (the US-Australia FTA, the CAFTA, the Morocco FTA, and the Dominican Republic FTA) and creation of reports to be insufficient, given the complexity of the agreements, the time needed for consultation amongst many members entirely new to the Committee, the delay in making documents publicly available which hampered our discussions with other interested parties, and the coordination of members' schedules -- especially complex since some members are elected officials with legislatures in session. IGPAC members emphasize that the creation of an institutional infrastructure, to foster on-going federal-state-local trade policy consultations before, during and after final trade agreement language is made available, would provide for a far more comprehensive, inclusive and valuable IGPAC review process. In view of the compressed schedule and the need to consult with a large number of constituent members, the representatives of the National Association of Attorneys General (NAAG) do not take a formal position on this Agreement at this time. In light of the commitment of the USTR and Congress to receiving input from IGPAC and other advisory committees, lengthening this time frame and deepening the resources devoted to the entire process, as detailed in earlier recommendations (section IV of this report), would be most welcome.

**VI. Membership of Intergovernmental Policy Advisory Committee (IGPAC)**  
**Roster as of April 2004**

<u>Name</u>	<u>Affiliation</u>
Rep. Sheryl Allen	Utah House of Representatives
Jill Arthur	City of Santa Ana, California
Representative Daniel E. Bosley	Commonwealth of Massachusetts
Peter Bragdon	Office of the Governor/ Oregon
James A. Brooks	National League of Cities
Teresa Brown	Arkansas Attorney General's Office
Brian R. Caldwell	Office of Consumer Counsel/ Northern Mariana Islands
Liz Cleveland	Mississippi Development Authority
Carol Colombo	State of Arizona
Karen Cordry	National Association of Attorneys General
Peter S. Cunningham	North Carolina Department of Commerce
Rep. Johnny Ford	Alabama House of Representatives
Robert Hamilton	Office of the Governor/ State of Washington
Kathy M. Hill	Iowa Department of Economic Development
Judge Rebecca Jackson	Jefferson County Judge/Executive/ Louisville, Kentucky
Chief Justice Judith S. Kaye	New York Court of Appeals
Governor Dirk Kempthorne	State of Idaho
Brian Krolicki	Treasurer, State of Nevada
Peter Owens Lehman, Esq.	South Carolina State Ports Authority
Rep. Peter Lewiss	Rhode Island House of Representatives
Tony Lorusso	Minnesota Trade Office
Cassandra Matthews	National Association of Counties
Robert R. Matthias	City of Virginia Beach, Virginia
James Mazzarella	State of New York, Office of Federal Affairs
Ron McMurray	State of Idaho
Jeremy Meadows	National Conference of State Legislatures
Mayor Meyera E. Oberndorf	City of Virginia Beach, Virginia
Senator Jose Ortiz-Daliot	Commonwealth of Puerto Rico
Veronique Pluvoise-Fenton	National League of Cities
Representative Clay Pope	State of Oklahoma
Mayor Miguel A. Pulido	City of Santa Ana, California
Lynne Ross	National Association of Attorneys General
MardiLyn Saathoff	Office of the Governor/ Oregon
Milton Segarra	Commonwealth of Puerto Rico
Ms. Hannah Shostack	Office of Legislative Services, New Jersey Legislature
Mr. Richard Van Duizend	National Center for State Courts
Governor Tom Vilsack	State of Iowa
Mary Beth Warner	Kentucky Cabinet for Economic Development
Christopher Whatley	Council of State Governments
Kay Alison Wilkie	New York State Department of Economic Development