The U.S.-Chile & U.S.-Singapore Free Trade Agreements

IGPAC Member Report

Submitted by The Council of State Governments

February 28, 2003

The Council of State Governments (CSG) appreciates the opportunity to comment on the Chile and Singapore Free Trade Agreements through the Intergovernmental Policy Advisory Committee (IGPAC). We applaud the U.S. Trade Representative for including state and local associations in IGPAC deliberations.

The comments contained in this submission are consistent with the views expressed by CSG members in past discussions on trade issues. However, CSG's original voting member of the IGPAC, former Texas Secretary of State Henry Cuellar, has resigned from office. As CSG currently lacks a voting member on the committee, the specific observations contained in this report solely represent the views of CSG's IGPAC staff liaison.

CSG has been informed that the U.S. Trade Representative will soon be reconstituting the Intergovernmental Policy Advisory Committee to include new members and additional staff liaisons. CSG strongly supports this effort and believes that it is essential for ensuring that future trade agreements have the benefit of submissions from the full IGPAC membership.

CSG's Observations on the Chile and Singapore Free Trade Agreements

Support for Expanding Trade & Investment – State governments are strong supporters of expanding international trade and investment. The 50 states spend approximately $100 million each year on trade and investment promotion and maintain a network of over 240 overseas offices. Given this commitment to international commerce, states have a clear interest in increasing market access for state businesses. However, this support is tempered by a deep commitment to protecting the independent powers and responsibilities of states within the federal system.

- **Non-conforming Measures** – Both agreements endeavor to open new markets for U.S. businesses by liberalizing trade in services, including banking and insurance. States support efforts to increase market access for U.S. service firms. However, the independent exercise of legislative and regulatory power is essential for safeguarding the interests of state citizens and preserving the freedom of action inherent in the federal system. While the U.S.T.R. has clearly worked hard to identify individual state laws that may not conform to the provisions of these agreements and to exclude these statutes from coverage by listing them in annexes of non-conforming measures, these annexes should not be assumed to be comprehensive. In addition, the agreements presume that all future laws and regulatory decisions adopted by states must be consistent with the commitments contained in the agreements. CSG strongly believes in protecting the independent legislative and regulatory powers of states so long as they are exercised in conformity with U.S. constitutional principles. Consequently, CSG would like to encourage the U.S.T.R. to work more closely with state governments and state associations to ensure that these powers are protected in all trade agreements.

Transparency – Both agreements require "competent authorities", potentially including state governments, to abide by detailed requirements for ensuring the transparency of procurement procedures and regulatory decisions. While states support the need for transparency in these important fields, it is important that states preserve their independent authority to adopt standards and procedures consistent with their own experiences and interests.

Dispute Settlement – CSG is also concerned that the dispute settlement procedures of both agreements may provide an avenue for private action by an aggrieved party, which exceeds the legal remedies currently available to parties within their jurisdictions. Such dispute settlement options would afford international investors rights and protections over and above those provided to U.S. businesses.

This report was prepared by Chris Whatley, Director of International Programs for the Council of State Governments and staff liaison to the Intergovernmental Policy Advisory Committee.

Ambassador Robert Zoellick
The Office of the U.S. Trade Representative
1724 F Street, Northwest
Washington, D.C. 20006

Re: Comments on the Proposed Singapore Free Trade Agreement
(Federal Register, August 14, 2002, Volume 67, Number 157)

Dear Ambassador Zoellick:

State and local governments enthusiastically support trade investments because they generate jobs and economic growth in our local communities. Our organizations' ardent support for free trade is balanced by our commitment to fair trade laws that respect the authority of states and municipalities to enact and enforce land-use, health, safety, welfare, and environmental measures.

Organizations representing state and local governments, like a majority of the American people, support trade liberalization and generally support new trade and investment agreements, such as the Singapore Free Trade Agreement, provided that the language in such agreements is consistent with American values and constitutional principles. In particular, state and local governments insist that international trade and investment agreements, including the Singapore FTA, must not infringe upon our American federal system and must not afford foreign investors greater rights than those afforded to American investors and property owners, vis-a-vis state laws, local ordinances and regulations, protected under our constitution. This latter standard is, of course, parallel to the "no greater rights" language incorporated into the recently-enacted Trade Promotion Authority bill on a 98 to 0 vote of the U.S. Senate.

State and local officials are gravely concerned about the prospect that the Singapore FTA may include an investor-to-state dispute resolution mechanism. The investment chapter of NAFTA provides for a private right of action for foreign investors to seek damages from the United States. It is also being used to seek compensation for the exercise of such traditional state government powers as the protection of the drinking water supply and the invocation of state sovereign immunity to protect taxpayer interests.

State and local governments believe that NAFTA's investment chapter is a threat to "our federalism," and that no provision remotely similar to it should be included in future agreements, including the Singapore FTA.

U.S. negotiators, in our view, will have to meet a very high burden to show that any investor-to-state system will not grant foreign investors greater rights than those afforded to U.S. businesses and property owners under the U.S. Constitution. As stated by Senator Baucus in explaining the purpose of the no greater substantive rights language, "the rights of U.S. investors under U.S. law define the ceiling. Negotiators must not enter into agreements that grant foreign investors rights that breach that ceiling."

Will, for example, the mere diminution of the value of an investment as a result of government regulation give rise to a claim for compensation under the Singapore FTA, in circumstances where no such claim could arise under the U.S. Constitution? Similarly, would dispute resolution panels under a Singapore FTA consider a claim for compensation that would not be "ripe," under U.S. constitutional standards, as for example when American state law remedies have not been sought and exhausted?

And, as another example, would a reviewing tribunal under the Singapore FTA examine a law or regulation of an American state based only on the impact of the law and regulation upon a segment of the property rather than follow the practice under the U.S. Constitution of considering the impact on the property as a whole?

As a final and most important example of the difficulty of reconciling any international investor-to-state mechanism with U.S. constitutional standards, will the definition of "investment" under a Singapore FTA be as narrowly defined as the concept of "property" under the takings clause of the Fifth Amendment of the U.S. Constitution? Will this concept of property still be defined with primary reference to state constitutions and state legislative acts?

State and local governments believe that the world can have free trade while America at the same time preserves its federal constitution. We believe in mending, not ending our international trade and investment agreements. Thus, state and local governments urge U.S. negotiators to learn from the mistakes made in crafting NAFTA's investment chapter as they draft a new Singapore FTA and similar agreements.

Sincerely,

William T. Pound
Executive Director
National Conference of State Legislatures

Don Borut
Executive Director
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National Association of Towns and Townships

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The Honorable Tom Daschle
The Honorable Trent Lott
The Honorable Dennis Hastert
The Honorable Richard A. Gephardt
The Honorable Dick Armey
The Honorable Bill Thomas
The Honorable Charles B. Rangel
The Honorable Max Baucus
The Honorable Charles E. Grassley

To strengthen and promote cities as centers of opportunity, leadership, and governance.

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February 28, 2003

The Honorable Robert B. Zoellick
United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Dear Ambassador Zoellick:

On behalf of the 138,000 local elected officials represented by the National League of Cities (NLC), I am reporting on the Chile and Singapore Free Trade Agreements pursuant to Section 2104 of the Trade Act of 2002 and Section 135(3) of the Trade Act of 1974, as amended.

NLC enthusiastically supports trade investments because they generate jobs and economic growth in our local communities. Our ardent support for free trade is balanced by our commitment to fair trade laws that respect the authority of states and municipalities to regulate land-use, health, safety, welfare, and environment measures. To that end, NLC adopted policy that urge the United States to advocate for trade rules that contain legal standards consistent with the U.S. Constitution and applicable case law. Simply put, we do not believe that it is necessary to create different legal standards for foreign investors to attract their investments in our communities. After reviewing the aforementioned trade agreements, we wish to communicate the following comments.

Non-conforming measure

NLC applauds the efforts of USTR to increase market access for U.S. businesses. Specifically, NLC appreciates USTR's effort to accommodate the interests of local government by exempting key state laws and existing local measures from conforming to the agreement. (Articles 8.4 through 8.7 of the Chile Agreement and Article 10.8 of the Singapore Agreement.) Nevertheless, we remain concerned that the exemptions provided in the annexes are not exhaustive of the trade in services areas of concern to state and local governments. Thus, areas of laws not yet identified may become subject to the trade agreement, and thus to future dispute resolutions.

Also, while the treaty provides an exception to provisions 8.4 through 8.7 relating to national treatment, most favored nation treatment, market access and local presence, it assumes that future measures adopted by state and local governments in these areas are not permitted. As we have stated in our previous communications with USTR, NLC is concerned about the far-reaching impact of provisions on trade in services because so many essential services are traditionally regulated by cities and states or directly provided by local governments. Essential services such as health, environmental services and energy are often provided commercially or in competition with public agencies. Procurement of services to provide waste management, water and electricity are often designed for purposes of resale to ratepayers. NLC would appreciate additional clarification of the scope of these exclusions so that we may ascertain the full scope of the exemptions under the treaty.

Finally, the treaty also calls for the development of mutually agreeable standards for professional services with regard to education, experience, examination, scope of practice, and local knowledge, among others. The standards are then to be submitted to a "Joint Committee" for review where each party is then expected to "encourage its respective competent authorities to implement the standards." NLC supports flexible language that *encourages*, rather than mandates local governments to adopt professional standards.

The "No More Burdensome Than Necessary" Test and Expropriation

NLC is concerned that the treaty would inadvertently impact the traditional deference of courts to measures that protect broad public interests. Specifically, both agreements would require state and local measures to be "no more burdensome than necessary" to assure the quality of a service. (Article 8.3 of the Chile Agreement and Article 11.09 of the Singapore Agreement) Before the United States even considers implementing such a departure from traditional deference to measures that satisfy a rational basis test, NLC requests an analysis of the potential impact of the least-burdensome standard on domestic law. The "no more burdensome than necessary" language in the treaty departs from a constitutionally set benchmark and provides a loophole that allows U.S. laws to be gradually diminished by competing language in international agreements.

NLC is also concerned that Article 10.11 of the Singapore Agreement, which establishes its own standard for what constitutes an expropriation claim, may induce some foreign investors to file frivolous takings claims that challenges laws that are traditionally in the purview of state and local governments. During the debate surrounding the trade promotion authority legislation in the last Congress, NLC raised the concern that the legislation failed to incorporate language that protected the sovereignty of state and local governments and ensure that foreign investors are granted "no greater rights" than U.S. citizens possess under the United States Constitution.

Procurement Exemptions

NLC wholly supports the exemption provided in Annex VIII of Article XX.12 of the Chile agreement. The exemption respects the authority of local governments to continue procurement practices that encourage small and minority businesses, or promote the development of distressed areas and businesses owned by minorities, disabled veterans, and women."

In closing, NLC appreciates the opportunity to comment on the Chile and Singapore Free Trade Agreements through its participation on the Intergovernmental Policy Advisory Committee. Along with our member jurisdictions, NLC is prepared to discuss our concerns with the staff of the USTR and other federal agencies. The comments contained herein are consistent with policy adopted by NLC.

Sincerely,

Donald J. Dorut
Executive Director