

**Environmental Quality Council
Energy Policy Subcommittee
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Trade Agreements and State Sovereignty

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Summary

There are four main points I would like to make today:

1. As the world's largest exporter, importer and foreign investor, the United States has much to gain from trade agreements that assure open markets and a level playing field. And agreements work two ways – Montana is using an international agreement to try to protect water quality in the Flathead River basin. The WTO has opened China's market to Montana wheat.
2. While many thoughtful questions have been raised about the impact of trade agreements on state regulatory sovereignty, my reading of GATS and NAFTA suggest that states have important flexibility in key areas. However, where concerns are valid, we should work to correct the agreements and assure that similar problems are avoided in the future.
3. Trade negotiations offer a great deal of flexibility to address concerns of states, including a means to protect state laws or regulations that otherwise might conflict with commitments made by the United States.
4. A formal process exists by which States can participate in the trade negotiation process. The State of Montana should avail itself of the opportunities that exist to make its views and concerns known to U.S. trade negotiators.

My Background

I worked nearly 20 years with the U.S. Government as a trade policy professional, participating in international trade negotiations and the related Congressional approval process; and drafting trade legislation and overseeing its implementation by the Executive Branch. I ended my public service career as the second-ranking official (and the highest American) at an international organization in Paris, France:

- Organization for Economic Cooperation and Development (OECD),
Deputy Secretary General
- U.S. Dept. of State, Deputy Assistant Secretary for Trade Policy and Programs
- U.S. House of Representatives, Ways and Means Subcommittee on Trade,
Professional Staff Member
- U.S. Treasury Department and U.S. Trade Representative's Office, staff member

I currently am a Senior Fellow with the Montana World Affairs Council; a non-partisan, non-profit organization with approximately 85 affiliates nationally. The Council's purpose is to educate citizens and students about international issues of importance to the United States. I also teach "American Trade Policy and Politics" at The University of Montana. My husband, Richard Erb, and I own and operate a farm in Moiese Valley.

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*Note: WTO is the World Trade Organization, based in Geneva, Switzerland
GATS is the WTO's General Agreement on Trade in Services
NAFTA is the North American Free Trade Agreement
USTR is the Office of the U.S. Trade Representative, Executive Office of the President*

The United States Benefits from Trade Agreements

The United States is the world's largest exporter, importer and foreign investor and has taken the lead in crafting many of the rules that govern international trade and investment today. No agreement is perfect, just as no piece of legislation is perfect. But agreements' imperfections need to be kept in perspective and should not obscure the larger benefits that flow from them.

Agreements also work two ways. For example, the state of Montana is using an international agreement – the U.S.-Canadian Boundary Waters treaty – to seek delay and assessment of a coal mining/methane project north of Glacier National Park, for fear it will pollute Flathead River and Lake. Similarly, the WTO agreement has been used to prevent China from continuing to use spurious food safety concerns to block the sale of Montana wheat in China.

GATS, NAFTA and State Sovereignty

Nondiscrimination. The central principle of international trade agreements today is nondiscrimination. This simply means that we commit to treat foreign traders and investors like we treat our own. Under the WTO and NAFTA, governments are free to set high environmental, health and safety standards – indeed, the United States has among the world's highest standards – but those standards should not set the bar higher for foreign producers than they do for American producers. The vast preponderance of federal, state and local laws meet this test.

A large percentage of WTO cases involve discriminatory laws and regulations, some of them relating to the environment. Critics often misrepresent the nature of those cases and allege incorrectly that it is the environmental regulation itself that is the target. Cases we have lost involving federal or state laws most often stem from the discriminatory nature of our laws, not from their subject matter.

However, questions have been raised about the impact of trade agreements on state sovereignty in a number of areas, including in the areas of energy and electricity. I will not presume to provide definitive answers here to admittedly complex questions; but my reading of GATS and NAFTA suggest that these agreements give states important flexibility in key areas. For example:

Monopolies and exclusive service providers: both GATS and NAFTA explicitly recognize and accept these forms of service provider.

State subsidies limited to in-state investors: NAFTA states explicitly that subsidies or other government benefits to investors may be limited to investors within the government's territory. Nor does the WTO prohibit such in-state limitations.

Regulating in the public interest: Nothing in NAFTA or the WTO prevents governments from regulating in the public interest. Thousands of U.S. environmental, health and safety, and other public interest regulations are in force and have never been challenged – nor are they likely to be. Cases that have been brought in these areas almost always stem from factors other than the public interest aspect of the law (e.g., discrimination).

That said, we also must recognize that just as when legislators legislate, trade agreements sometimes may be interpreted in ways that the drafters did not intend or anticipate; and the interaction between differing provisions may leave some uncertainty as to which takes precedence. This is why it is crucial that the right expertise be available to negotiators, so as much clarity as possible can be achieved as trade agreements are being negotiated. Moreover, when problems in the interpretation of agreements are identified, we need to work to correct them and to try to prevent similar problems from occurring in the future. My understanding is that concerns about NAFTA's investment chapter have stimulated active discussion within U.S. Government agencies responsible for trade on how to address these concerns.

Trade Negotiations and Protection of States' Interests

I have worked on the inside of trade negotiations. Negotiators do their very best to be aware of all issues of concern to interested U.S. parties and to accommodate them as much as possible. When there are conflicting interests, negotiators must try to balance those interests. What are the ways that states' interests taken into account and protected when agreements are negotiated?

Voluntary participation. State participation in many important aspects of international trade negotiations is voluntary. In negotiations on services and government procurement, for example, states must *offer* to include specific services and government procurement practices as part of a trade agreement. If they choose not to do so, those services or procurement practices are not considered part of any commitment made by the United States to its trading partners.

Grandfathering and Reservations. If a state does not wish to change an otherwise inconsistent law or regulation, or if it does not choose to open its government procurement practices to foreign participation, then those laws, regulations or practices can be "grandfathered" – carved out of any general U.S. commitment in those areas. In such cases, USTR lodges a formal "reservation" (or exemption) to the agreement, thereby protecting the state practices from challenge by our trading partners. Current U.S. reservations to NAFTA and WTO agreements contain a long list of otherwise noncompliant state practices. Future changes to those laws and practices that do not alter the fundamental status quo also are protected from challenge.

Only states can change state laws. If a U.S. trading partner *does* challenge a state practice that is part of a U.S. legal commitment in the WTO or NAFTA, USTR works vigorously to defend the law or practice in question – involving the state closely in every phase of the case. If the United States loses the case, only the state can change the law in question. If the state chooses not to do so, the United States may have to liberalize trade in another sector or face trade retaliation from the affected trading partners. (In the case of NAFTA, investment cases require that reasonable compensation be paid to the investor winning the case.) The same rules apply to federal laws and practices.

Consultation. USTR consults with states and local governments, both formally and informally through a number of avenues, both to inform states of the status of negotiations and to be aware of states' concerns. ***This consultation process does require, however, that states play an active role as well,*** which brings me to my last observations.

Consultation Process

Two formal avenues exist for state and local governments to convey their views and concerns to U.S. trade negotiators. These are USTR's:

- Intergovernmental Policy Advisory Committee on Trade (IGPAC), and
- State Points of Contact (SPOC).

The State of Montana is not active in either venue – a situation I strongly encourage our elected officials to remedy. In a world of increased international trade and investment, it is essential that Montana have a voice in trade negotiations affecting the state's interests.

Intergovernmental Policy Advisory Committee on Trade (IGPAC). This 41-member body includes representatives from a broad cross-section of state and local governments. Some states, cities and counties are represented individually – for example, Idaho Gov. Dirk Kempthorne is listed as Idaho's representative. In addition, broader associations represent sub-federal interests:

- National Council of State Legislatures
- National Association of Attorneys General
- National League of Cities
- Council of State Governments

Members of IGPAC are cleared advisors to USTR, are given access to classified negotiating documents, and are looked to for advice on issues under negotiation that may impact sub-federal interests. This advisory body has been reinvigorated and strengthened over the past year and will play an important role in ongoing trade negotiations.

State Points of Contact (SPOC). This is an important vehicle through which USTR communicates directly with states via a designated official, usually in the governor's office or the state commerce department. SPOCs are cleared advisors to U.S. negotiators and have access to classified negotiating documents. USTR uses these contacts on a routine basis to inform states of trade matters of interest to them, and to solicit state views on matters under negotiation. The SPOC receives documents from USTR and is responsible for disseminating them to appropriate regulators and officials. In turn, the SPOC sends to USTR any state comments, questions or concerns raised by the negotiating documents.

At one time, Montana had an official designated as the state's SPOC, but for unknown reasons, the state has allowed this designation to lapse. I strongly encourage our state's elected officials to assure that a state representative is named, so that Montana will have a voice at the table during international trade negotiations that affect its interests.