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Senate Subcommittee on International Trade Policy and State Legislation
Senator Liz Figueroa, Chair

Do Trade Agreements Threaten California's Ability to Protect and Promote Public Health?

My name is Laura Metune. I am the Consultant to the California Senate Subcommittee on International Trade Policy and State Legislation. I am pleased to be here today to participate in this panel.

There is no doubt that trade is an integral part of our economy and brings significant benefits to our state. Of equal importance, however, is ensuring that trade rules do not undermine state laws. That's why over four years ago, out of growing concerns that international trade rules could seriously affect the ability of state and local lawmakers to enact policies in the public interest, then-Senator Tom Hayden took the lead in creating a committee to examine the appropriate role for states in trade policy. In 2001, when Senator Hayden reached his term limit, Senator Sheila Kuehl became the Chair of the committee. For the past two years, state Senator Liz Figueroa has taken the reins of this committee, and pushed this vital issue.

It should be no surprise that California has taken a leadership role in working to ensure that international trade rules do not interfere with the ability of California state and local lawmakers to regulate in the broader public interest. We have always been a national and global leader on issues of economic development, labor standards, human right protections, consumer protections and environmental sustainability. We see our high standards as proof that our traditional system of federalism works. We have had the room and authority to be innovative and experimental. This is why we are so concerned that these trade rules could impinge upon our ability to do so.

This debate is about sovereignty and democracy. As globalization gains momentum, and as trade institutions like NAFTA expand their power, it is important for state lawmakers to understand how these developments impact our governing ability. Trade rules are shifting the balance of political power – a shift away from state legislatures, away from national courts, and away from public proceedings by which voters could hold elected officials accountable.

The resulting trade policy is less accessible and accountable to the people of each nation and more accessible and responsive to multinational corporations that do not see themselves as citizens of any particular country. This is not an argument against trade; it is an argument in favor of assuring that the process of negotiating trade agreements does not undermine the traditional checks and balances of the U.S. Constitution.

We often hear discussions about trade policy framed in the terms of “free trade” vs. “protectionism” – that is not what this debate is about, it is instead about whether governments bound by international trade agreements will be forced to cede their sovereign power to regulate in the public interest.

These are questions for state lawmakers all over the country, not just California, because globalization is already having a major impact on democracy and governance. While many state

lawmakers may not even be aware of the threat, WTO and NAFTA rules are already in direct conflict with many state laws, including public and environmental health policies, economic development programs and consumer safety laws.

For example, laws at risk could include:

- food labeling laws including Proposition 65
- laws governing food safety inspection
- laws governing pesticide residue levels
- laws covering nurse to patient staffing ratios
- laws covering air pollution abatement
- laws governing acceptable levels of lead in products
- laws requiring that workers be informed when they are being exposed to toxic materials
- laws setting limits on the maximum allowable levels of toxins in packaging
- laws governing waste treatment
- community right to know disclosure laws
- Just to name a few...

NAFTA Chapter 11

January 1, 2005 marked the 11th anniversary of the NAFTA, a trade agreement between the U.S., Mexico and Canada that was expected to ease trade relations among signatory governments. But in California, the effects of NAFTA have had less to do with eliminating tariffs and quotas and are more about extending the reach of trade rules and the sanctions they can evoke.

This is because NAFTA, and the many current and pending trade agreements modeled on NAFTA, place enforceable restrictions on the capacity of local, state and national governments to obtain and retain laws to advance goals important to their constituencies.

These rules place state and local laws at the heart of trade agreements that have become less about trading goods like automobiles and apples across borders, and more about restricting the ability of governments to promote socially and environmentally responsible policies.

Of particular concern to California has been NAFTA's investment provisions, which give private foreign corporations unprecedented rights to challenge the authority of sovereign, signatory states – under NAFTA, corporations can submit claims for arbitration when they believe a governmental action has resulted in a future loss of profit.

A case in point is the initiation last year of a NAFTA investment claim by a Canadian gold mining corporation because of recently enacted California mining regulations. Glamis Gold claims that California's law requiring the backfilling of open pit mines is too onerous and expensive to comply with. In their claim, they demand \$50 million in compensation, the alleged profit they lose because of the California regulation.

This complaint is similar to another NAFTA claim against California's phase-out of MTBE, a gasoline additive and possible carcinogen found to be contaminating underground water supplies throughout the state. Using these same NAFTA investor rules, the Canadian corporation

Methanex, who produced one component of MTBE, claimed California's action was a confiscation of its property – its expected profit – and sued for \$1 billion.

State lawmakers are particularly wary of the proposals to expand these rules in the Central American Free Trade Agreement and the Free Trade Agreement of the Americas. Such expansions would extend these privileges to multinational corporations from every country in the western hemisphere, exposing California to lawsuits by any one of them.

The rules that allowed for this suit (NAFTA Chapter 11) were the first of their kind in a trade agreement, providing foreign corporations standing to directly sue sovereign governments when alleging unfair treatment. This goes far beyond what judicial opinions and legislative actions have allowed.

For those of us concerned about preserving democracy at the state and local level, seeing first hand the reach of trade and investment rules has been a grim wake-up call.

Legislators were happy to see that in the Trade Act of 2002, otherwise known as “Fast Track”, Congress directed that in future trade agreements foreign investors not be afforded greater rights than Americans.

The Trade Act language was general however, and did not explicitly list the necessary changes. At the time, some concerns raised that U.S. negotiators would bring Congress trade agreements that did not meet this reasonable test.

In fact, the proposed Central American Free Trade Agreement (CAFTA), which Congress is expected to vote on in May, fails to meet this congressional directive – meaning that under CAFTA rules foreign investors would be able to recover taxpayer funds from a CAFTA tribunal as damages in cases for which Americans could not recover under our court system.

Congress has the ability to stop the expansion of foreign investor protection provisions by rejecting CAFTA. Many California legislators are urging our Congressional delegation to vote “no” on CAFTA.

The Chilling Effect

Assemblymember Lloyd Levine has spent the few years working on a solution to the problem of how to rid the state of the over 9 million scrap tires filling California landfills. As you know, these tires can occasionally catch on fire and send toxic smoke in to neighboring communities.

Assemblymember Levine, who wrote his master's thesis on this issue, introduced AB 338 as an attempt to solve the problem. The bill required that those tires be used to pave California roads and highways. Small amounts of crumb rubber has been used in California for years, and Mr. Levine's bill would have required Caltrans to increase the amount of crumb rubber projects to 35 percent of total road projects. Rubberized asphalt last longer and makes for a quieter drive. But most importantly, it diverts the millions of scrap tires from landfills.

The bill was approved by the legislature easily, with some bipartisan support. Levine was surprised when he learned that Governor Schwarzenegger was vetoing the bill because the Administration was afraid the bill violated the rules of NAFTA.

You heard earlier the list of other laws that could violate a trade commitment...

The problem, according to the Governor's office, was that AB 338 required Caltrans to buy tires from U.S. scrap-rubber sources. This, of course, is logical considering that the problem Assemblymember Levine was trying to address was the tire piles here in California.

The Governor's office felt that the bill would have exposed California to suits from Canadian and Mexican companies who export scrap tires to the U.S. This was the first time that the Governor actually vetoed a bill because of a commitment made under a trade agreement.

This, however, was not the first time that opposition has argued against a bill on the grounds that it might violate a trade agreement. Legislators were told that attempts to regulate the amount of lead in candy, and to charge an air mitigation fee on electricity imports, would also violate terms of international trade agreements.

This is the "chilling effect" that many have worried about -- where policies to protect the public are not enacted because they are perceived to conflict with trade rules.

U.S. – Australia Free Trade Agreement / Prescription Drug Prices:

We are concerned that current and pending trade agreements could affect California's ability to protect and promote public health.

In February, Senators Figueroa and Kuehl sent a letter to the U.S. Trade Representative outlining their concerns with current and pending international trade agreement language. They expressed concern that the vague nature of the language would infringe upon California's authority to provide quality and affordable health care services to citizens.

Several components of U.S. obligations in the Australia-U.S. Free Trade Agreement and other draft trade agreements conflict with California health policy.

California legislators have attempted to limit patent abuses, increase access to affordable drugs, and implement cost containment strategies through bills dealing with:

- Imports and internet access to approved Canadian outlets that sell FDA-approved medicines.
- Access to generics consistent with the options that the Food and Drug Administration and members of Congress have already proposed.
- Preferred drug lists that favor cost-saving generics.

However, trade negotiations continue to promote the contrary by strengthening the resolve of patent holders and restraining the free market:

- With regards to importing drugs, provisions of the Australia and other draft trade agreements implement private import controls, which sustain the monopoly of highly priced prescription drug costs.
- With regards to access to generic drugs, provisions of the Australia and other draft free trade agreements contain stanch limitations on government authority to allow the makers of generic drugs to challenge invalid patents and utilize data from prior clinical trials. California is a leader in biotechnology and recognizes the importance of patent-rights. However, current trade rules that delay the production of generic drugs beyond a patent's reasonable, allotted expiration are shortsighted and impede access to affordable drugs for elderly, poor, and terminally ill patients.
- With regard to preferred drug lists, these agreements undercut the ability of states to consider cost effectiveness as a factor when deciding to grant preferred status to a drug. Preferred drug lists promote the most cost-effective and therapeutically advantageous products, and discourage more expensive alternatives that are found to have no real benefit in regard to patient care. A loss in bargaining power on behalf of the State will increase costs, and limit the overall effectiveness of California cost reducing programs.

Senators Figueroa and Kuehl have requested the United States Trade Representative clarify these commitments, and discontinue the use of language that will limit the ability of the State to protect public health.

GATS Negotiations and State Health Policy:

In addition to our concerns over prescription drug prices, we have just started to examine the ways that negotiations under the WTO's General Agreement on Trade in Services (GATS) might constrain state policy making options – We are concerned over the implications for single payer universal health care proposals, pay or play insurance mandates, bulk prescription drug purchasing, and regulations governing telemedicine quality, just to name a few. We are continuing to research this issue, and are looking at holding a legislative hearing specific to this GATS and health care later this year.

SB 348 (Figueroa) – Strengthening The Role of The Legislature:

While states like California are finding themselves bound to many aspects of these agreements, such as the rules covering prescription drug negotiating power, there is currently no mechanism in state or federal law to systematically notify and consult with legislators prior to binding states to these agreements.

Currently, the only provision of international trade agreements where the USTR has provided the state with the option of participating is the procurement provision of international trade agreements.

Government procurement rules contained in trade agreements can limit the ability of the state to enact economic development policies such as buy California laws, “green” procurement policies such as requirements for recycled content in goods or a percentage of energy from renewable sources, and policies targeting companies’ human rights or labor conduct such as laws that ban the purchase of goods made with sweatshop or child labor.

To determining whether a state wants to be bound by the terms of a specific government procurement chapter of an international trade agreement, the USTR sends letters to the governor of each state. If the governor agrees to bind the state to the specific government procurement agreement, the USTR then includes the state or state agency as a bound party in the appendix to the specific trade agreement.

This process provides for no legislative oversight or opportunities for public input. The U.S. Trade Representative has even refused to copy the Legislature on trade related correspondence that is sent to the Governor.

Without a mechanism that requires the informed consent from California legislators prior to being committed to these agreements, California’s ability to enact laws in the public interest will continue to be put at risk.

Senator Figueroa has introduced legislation aimed at remedying this situation.

The Legislature and the Governor have historically worked together to adopt and implement state procurement standards and policies. And the decision to consent to the coverage of California under the procurement chapters should also be considered by the Legislature and the Governor, with the opportunity for public input.

Just as the U.S. Congress oversees the executive branch’s negotiations of agreements, state legislatures should have a say over whether or not proposed changes to state law and legislative authority are in the state’s interest.

Senator Figueroa’s SB 348 establishes that any trade agreement provision, where California is provided with the option to be a covered entity, must be deliberated in a public forum, through the legislative process, and considered by the legislature as a whole. SB 348 will restore democratic control over these important issues.

State and Local Governments Involvement in Trade Negotiations:

State and local governments must continue to weigh in on trade related matters.

Our challenge is to develop the capacity to respond to both the threats and the opportunities that come from layering global trade rules that regulate governments on top of a federalist system that has traditionally respected cities and state rights to regulate in the broader public interest.

While California has played a leadership role in bringing attention to these issues, the concerns we raise are shared by legislators all over the country and represent a growing awareness among state policy makers that they have an important role to play in the globalization debate.

When our committee in California was created over four years ago, it was the only state committee of its kind. Today, legislatures in 14 states have established legislative, executive or public commissions to examine the role of the state in international trade agreements. State and local government associations are now playing an oversight role in the making of international trade agreements as well.

We have had some successes – in large part due to lobbying from state and local governments, the U.S. Trade Representative’s office took action to revitalize the Intergovernmental Policy Advisory Committee. Unfortunately, however, the U.S.T.R. has not yet incorporated many of the advisory committee’s suggestions on protecting state and local lawmaking authority into pending trade agreements.

That’s why it is important for states and other organizations to continue shining a light on the exclusive nature of these agreements. We must demand more transparency and access to negotiating texts and dispute resolution procedures.

Thank you.