

Maine Citizen Trade Policy Commission



Senator Margaret Rotundo, Co-Chair

Representative John Patrick, Co-Chair

June 6, 2008

Christopher Melly, Director, Services Trade Negotiations
Daniel Watson, Director, Services Trade Negotiations
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Dear Mr. Melly and Mr. Watson:

We are writing to you on behalf of the Maine Citizens Trade Policy Commission. The Commission is a public body created by an act of the Maine Legislature to examine both the economic opportunities for the State of Maine provided by the expanding number of trade agreements to which the U.S. is party, and also the possible impacts of new trade disciplines on U.S. federalism, particularly as they pertain to Maine's ability to regulate in the public interest. With this in mind, the Commission has taken a particular interest in the on-going negotiations pertaining to the General Agreement on Trade in Services (GATS). We are writing to you today to update our June 16, 2006 letter regarding GATS negotiation to address recent developments by the Working Party on Domestic Regulations (WPDR) regarding proposed disciplines for U.S. commitments under GATS.

1. Negotiations on "domestic regulation" in the WTO's Working Party on Domestic Regulation. The WPDR has been asked to develop binding rules for implementation of GATS Article VI.4, to ensure that regulations are "not more burdensome than necessary to ensure the quality of the service." We have previously expressed our concerns that the creation of a test of "burdensomeness" or "necessity" could shift the standard for regulation away from the constitutionally-protected "rational basis test" to one which is far more restrictive of state authority. We have also have communicated our concern that limiting regulations to those necessary to "ensure the quality of the service" would preclude a whole range of non-discriminatory policies that seek to protect broader public interest in relation to the provision of that service. We are pleased to see that the text of the WPDR Chair's fourth draft does not contain the "necessity test" language. We greatly appreciate you efforts to remove that language from the latest draft of proposed disciplines. However, as cited above, GATS Article VI.4 still contains the "necessity test" language and we are concerned that unless the text of the proposed disciplines contains language that essentially "turns off" the existing "necessity test" language in

GATS it may still be the overall purpose of the disciplines.

We are extremely concerned about the deletion of deference to sub-federal policy objectives as legitimate exercises of the “right to regulate.” The Chair’s second draft included both national and subnational objectives within the right to regulate, but the third and fourth drafts reverted to only national objectives. This deletion could restrict the ability of states to adopt standards that may be different than those advanced at the federal level. The restriction of this ability is entirely unacceptable and strikes at the heart of U.S. federalism. On this and subsequent points, we support the recommendations and analysis submitted to you by the Intergovernmental Policy Advisory Committee (IGPAC).

With these concerns in mind, we urge USTR to:

- Continue to reject any proposal brought before the WPDR for consideration that would include a “necessity test,” and include text that would ensure that existing language in GATS Article VI.4 would not be interpreted to be the overall purpose of the proposed disciplines. This will confirm the prerogative of legislative bodies to make the final determination of what measures are “necessary” or “relevant”.
- Preserve fully the rights of states to regulate all aspects of a service, by seeking the broadest possible definition of what regulatory measures relate to the “quality of the service,” including the external impact of a service on people, commerce or the environment.
- Reject references to “national policy objectives,” or insert the following language: **“National policy objectives include objectives identified at national or sub-national levels.”**
- Continue to safeguard state oversight of professional licensing procedures and use of education/qualification requirements. We sincerely appreciate USTR’s efforts in removing some of the problematic language from the WPDR Chair’s third draft regarding professional licensing protocol.

2. Impacts of new GATS sectoral commitments on the ability of Maine to regulate the siting and construction of a Liquid Natural Gas (LNG) facility. As you know, there are several entities seeking a license from the Federal Energy Regulatory Commission (FERC) to develop on- or off-shore LNG facilities in the State of Maine. At least one of those entities includes foreign ownership. In the 2005 Energy Policy Act, Congress gave FERC authority to license LNG facility siting, while explicitly preserving state authority to review applications to site coastal facilities. The FERC describes this on its website as having preserved a “virtual veto” power for states. At the same time, however, foreign LNG suppliers have already complained (explicitly in the case of California) that the dual federal-state LNG regulatory oversight system is overly burdensome.

With this in mind, we wish to therefore remind USTR that:

- Maine has requested a carve-out from any new GATS sectoral disciplines, including those pertaining to bulk storage of fuels and pipeline transportation of fuels—both of

which would be part of any coastal LNG facility.

- States worked actively with their Congressional delegations to preserve state regulatory authority on LNG siting decisions in the 2005 Energy Policy Act, and would therefore take a dim view of any “end-around” of state authority through commitments on GATS—including new rules on domestic regulation that impose tests regarding whether particular regulations are “relevant to the supply of the services,” a discipline that remains in the Chair’s fourth draft. As you know, LNG terminals raise concerns that go well beyond the quality of natural gas services. States are concerned about coastal zone management issues that include security, environmental, commercial, scenic, historic, and recreational impact of facility siting and operations.
- We understand that while the commitment on storage facilities is still pending, USTR has officially offered this sector as part of a proposed Internet gambling case settlement with the nation of Antigua. We note that this settlement is not just about trade with Antigua; the new commitments will extend to all WTO nations. While Antigua wants gambling access, the settlement focuses on other sectors of interest to the European Commission, Japan and Canada. We understand that consultations have also included Australia, which has significant LNG interests in the U.S. market. We have serious reservations about this offer because it appears to be tantamount to an “end-around” of state authority to regulate the siting of storage facilities.

3. USTR’s continued failure to address concerns raised in previous letters from the Maine Citizens Trade Policy Commission. The lack of meaningful consultation regarding proposed new GATS commitments led us to conclude that it would be most prudent for Maine to seek a carve-out from new GATS commitments until such time as the Commission—which includes representatives from both houses of the Maine Legislature and a number of executive branch agencies, plus the Maine State Point of Contact with USTR—has had an opportunity to study the potential impacts of such new commitments on Maine’s regulatory authority. For example, in addition to storage, the proposed settlement of the Internet gambling case involves research and development, a sector in which states have extensive tax incentives and regulations that affect service suppliers. Given the lack of consultation with states on USTR’s decision to include bulk storage of fuels and research and development in the Internet gambling settlement, we believe our request for a carve-out from new GATS commitments is more urgent than ever and we re-assert that request here.

The members of the Maine Citizens Trade Policy Commission request that USTR negotiating staff brief members of the Commission regarding current negotiations in the WPDR particularly USTR’s position on the WPDR Chair’s fourth draft of proposed disciplines, USTR’s settlement offer of disciplines that encompass bulk fuel storage facilities in the Antigua gambling case, and any other issues pertaining to GATS “domestic regulation” rules or new sectoral commitments.

We appreciate the opportunity to raise these concerns with you and look forward to your earliest possible reply. If you would prefer to reply by telephone, we are happy to arrange a conference call. With very best wishes.

Sincerely,



Senator Margaret Rotundo
Co-Chair



Representative John Patrick
Co-Chair

cc: Tiffany M. Moore, Assistant USTR, Intergovernmental Affairs and Public Liaison
Patrick Kilbride, Director of Intergovernmental Affairs and Public Liaison
Maine's Congressional Delegation
Coastal States Organization
Kay Wilkie, Chair, Intergovernmental Policy Advisory Committee
William Pound, Director, National Conference of State Legislatures