

**Maine Citizen Trade Policy Commission Meeting  
September 16, 2011  
Minutes**

**Member attendance:** Connie Jones, John Palmer, Jay Wadleigh, Harry Ricker, Rep. Peggy Rotundo, Rep. Joyce Maker, Sen. Roger Sherman, Sen. John Patrick, Jay Wadleigh, Joseph Woodbury, Stephen Cole, Michael Herz, Michael Roland, Wade Merritt, Sen. Thomas Martin

The meeting was opened with introductions by members.

**10:10am Presentation from Sarah Bigney of Maine AFL-CIO  
“Trade Agreements 101”**

Ms. Bigney expressed her regrets to those who have heard this Trade Agreements 101 before. Ms. Bigney generally explained trade agreements by stating that they are long and contain hundreds of provisions that go beyond simple trade and the exchange of goods and services. Those additional provisions have a significant impact on state sovereignty. She noted that Maine was at the forefront of being informed about and addressing the issue of trade and the states by creating the Citizen Trade Policy Commission. Since then, other states have followed suit and established similar bodies.

Ms. Bigney talked briefly about the passage of NAFTA and how that became a model for future trade agreements including CAFTA which she described as controversial and narrowly passed in the wee hours of a Congressional Session.

She went on to discuss and describe the World Trade Organization (WTO) and its purpose which were included in here handouts. She talked about the establishment of the General Agreement on Tariffs and Trade (GATT) and how it was borne out of the WTO.

Ms. Bigney briefly described how the WTO negotiates trade agreements that then need to be ratified by each member nation. She briefly discussed certain agreements and how each have impacts on state sovereignty, including those related to agriculture, services, and intellectual property rights. Particular attention was given to an agreement on Technical Barriers to Trade (TBT) – the purpose of which to eliminate obstacles to trade including domestic laws at any level. The provisions of TBT pose the biggest problems to governments within the U.S., at any level with regard to sovereignty and policy making.

Ms. Bigney drew attention to the myriad acronyms outlined in a handout she provided to the Commission.

Ms. Bigney described the fast-track process used by Congress to implement the trade agreements and stated that it has diminished the role of democracy in these important negotiations. Furthermore, states play little if any role in the development of implementing legislation passed using this fast-track process. There has been a push to let this fast track process expire...it is currently not on the docket to be renewed. There could be another mechanism introduced that would allow for more Federal and State consultation.

Ms. Bigney described the Intergovernmental Political Advisory Committee IGPAC – advisory committee to the United States Trade Representative (USTR). (Rep. Treat a former CTPC member serves on this committee) IGPAC provides some voice for states although there is consensus that the level of input is minimal.

Ms. Bigney discussed investor state rights under NAFTA and CAFTA which allow a nation to sue another member nation if federal, state or local laws limit the future profits of that nation. According to Ms. Bigney, foreign nation countries have been awarded millions under this provision.

Under WTO suits are nation to nation but under other bilateral agreements a foreign company can sue another member nation or government. This is a source of discontent for State Legislatures.

There is a dispute mechanism when a ruling on a trade agreement violation by a member nation or governmental unit therein is unacceptable to a party, but this process is criticized because the tribunals operate behind closed doors to determine whether the law in question needs to be changed or not.

The crux of the issue with the way these trade agreements are implemented is the impact on domestic regulation. In fact, currently, there is a proposal under GATS that would restrict states ability to license regulate or govern the service sector (proposal would use baseline of the lowest level of regulation and governance). However, states have been pushing back and it appears this proposal may not be incorporated into the Doha round. (Doha round is the latest round of negotiations at the WTO. It began in 2001 and suffered collapse in 2008 – agricultural tariffs being a major sticking point.)

Rep. Rotundo asked Ms. Bigney to provided some specific examples or issues to help illustrate her information.

Ms. Bigney spoke of the TBT agreement and how it has been a significant issue for State Legislatures. She cited a letter from China to a Vermont Legislator and Maryland Assemblyman warning that China will sue if the laws being considered by their respective states were to be passed.

She spoke of a Canadian company that challenged a California law regarding MTBE restrictions. The Canadian company argued, citing chapter 11 of NAFTA, that their profits would be limited by this restriction. That suit failed.

Metalclad also sued under Chapter 11 of NAFTA for lost profits provisions because a state in Mexico banned a substance that was polluting water supply. Commission member Woodbury interjected – saying it was not under 11 that Metalclad succeeded but there was a different ruling under another provision. Ultimately, Mexico did reimburse Metalclad.

Another example cited was the Antigua gambling case. The state of Utah has a law prohibiting gambling. Most internet gambling is based in Antigua. Antigua is arguing that gambling is a service covered under GATS. The United States as a member nation argues that gambling was never meant to be in the agreement as a service. The U.S lost in a ruling on the case but has not paid because they are currently challenging. This ruling is significant because of the storage of liquid natural gas may also be deemed a service and regulation of LNG sites could be challenged.

Ms. Bigney cited two other successful challenges to US regulations under trade agreements. Upon a challenge from Mexico, the WTO ruled against the dolphin safe message on tuna sold in the US. The US Youth Smoking Act was also successfully challenged by Indonesia.

**10:38 am Phone –in presentation:  
Pending Free Trade Agreements Jim Catella – Sen. Snowe’s office**

Signed in 2006 and 2007

Colombia

Panama

South Korea

These agreements have not been officially signed by the President. Congress is currently working on the implementing legislation.

According to Mr. Catella, Sen. Snowe is concerned about the Korean agreement and that it will increase the trade deficit, although believes there are some good agricultural benefits to the agreement. She is concerned the risks are greater than the benefits in particular with regard to challenges faced by the states for policies and regulations deemed inconsistent with or in violation of the agreements.

Sen. Snow is also concerned about the Colombia agreement because of concern about violation of the human rights of Colombian workers. Santos in Colombia has stated that they are making improvements of human rights conditions and enforcement. Sen. Snowe is hesitant to support the agreement until it can be assessed how well these human-rights improvement efforts have worked.

Panama agreement – similar concerns with human rights but not to the degree of Colombia –Sen. Snowe is likely to support this agreement.

Mr. Catella noted that Sen. Snowe is concerned with currency manipulation by the Chinese government. She wants the US to pass legislation that allows investigation of China monetary practices – and another to require the President to certify that any country we enter into an agreement with has not been found to have manipulated currency in the past.

She also wants to reauthorize trade adjustment systems – to address loss of employment from outsourcing and loss of exports.

Mr. Catella mentioned pending legislation that would extend, through 2013, benefits to US service workers who lose jobs to outsourcing to countries with whom we have trade agreements. They may consider this as early as Monday or Tuesday of next week (9/19 or 9/20). Sen. Snowe would like this passed prior to signing off on trade agreements.

Likely the goal is to wrap up the pending trade agreements prior to Thanksgiving – so the legislation may be put through.

Additionally, Mr. Catella told the commission that Sen. Snowe is pressing the President to not have across the board duty cuts apply to shoe imports because of the negative impact on Maine shoe industry.

Mr. Catella noted that there is significant interest in the softwood lumber agreements (SLA) and briefed the commission on a July meeting held with USTR Ron Kirk. He cited that Canada has violated these agreements. The agreements are not the issue but the delay or lack of enforcement is having a detrimental impact on US/Maine. Snowe pressed that enforcement of violations needs to happen more quickly. Agreements are due for extension to 2015. Snowe still cautious and wants to ensure that we are using the enforcement tools in the SLA.

Senator Sherman inquired about the Korean agreement as it relates to beef. Catella noted that Korea has a high tariff on imported beef. However, this is not the biggest bone of contention. There are agricultural gains like blueberries - but the negative impact on manufacturing outweighs those benefits regarding the Korean agreement.

Sen. Patrick inquired if Sen. Snowe had a concern about Panama becoming a tax haven. Mr. Catella stated that this had been an area of concern. A major concern had been lack of transparency in their tax policy and bank secrecy provision similar to the Cayman Islands. That concern has been somewhat mitigated because they have agreed to be more transparent so an assessment can be made by the US if indeed Panama is a tax haven. He went on to note that we actually enjoy a trade surplus with Panama because our exports go into their markets at reduced rates.

Sen. Patrick added that generally with regard to these pending agreements it is vital that in addition to human rights concerns we need to ensure protection of the environment and the rights of workers.– in addition to human rights...we want to see protection of environmental and workers' rights assurances

### **11:00am Phone-in presentation**

#### **Nora Todd – Rep. Michaud's office**

Ms. Todd informed the commission that she is a Legislative Director in Rep. Michaud's office. She handles the House trade working group (4 members of Congress that advocate for fair trade). This group is very busy discussing the 3 pending free trade agreements with Colombia, Panama and S. Korea.

She noted that President Obama wanted to improve them before reaching floors of Congress

The three pending agreements should hit the floors of Congress in October. Rep. Michaud is opposed to all 3 because of their NAFTA style template.

A Trade Adjustment Assistance bill which provides benefits to workers negatively impacted by job losses to countries with whom we have trade agreements may be up for consideration next week. The 2009 changes to the program expired this year – an extension is pending. The 2009 changes allowed workers in service industry to qualify and also dealt with health benefits. Rep. Michaud is pushing for a 5 year extension of a more streamlined and improved TAA program. The Senate bill is a 2 year extension excluding public sector workers (problem for Michaud). The White House wants that TAA to happen before the FTA happens. We should know more next week.

When TAA passes – we expect the FTAs to go through. These FTAs were all negotiated under fast track...there will be no amendments because of this process. By early Nov. we could expect to see action on a TAA bill as well as the pending FTAs.

Sen. Sherman inquired about the typical length of extension. Ms. Todd explained that TAA has not been controversial in the past. Short extensions were bipartisan so there was no threat of expiration unlike with this current TAA. If there is no extension the TAA may revert back to the 2002 system – and will stay that way for a long time.

FTAs have been signed – implementing legislation is what is considered by Congress – it's a stamp of approval of the agreement negotiated by the White House.

Sen. Patrick expressed concern about transparency of Panamanian banking system and potential for tax haven status. Ms. Todd noted that there have been efforts by the White House to increase that transparency but it is not yet clear if it is enough.

Mr. Ricker referring to a comment made about including public center employees in the assistance program asked – what is the impact on public sector jobs so that they must be included in the TAA?

Ms. Todd responded that the general issue is off-shoring of jobs – Michaud is also concerned that TAA are being narrowed at the same time that more FTAs are being adopted.

### **11:20 Rep. Rotundo CTPC overview**

Opened comments by citing how responsive the delegation has been – and commission comments have clearly made it into the debates on these agreements.

Rep. Rotundo presented a summary of the representation on the commission and noted that all of the votes of the commission have been unanimous. There was a misconception that the CTPC was an anti-trade commission but to the contrary, the commission has pushed the federal government to push exports of Maine goods.

A major issue for the commission is that these agreements are negotiated without input from the states (with the exception of IGPAC). The agreements go far beyond the issues of trade and tariffs which is why it is so vital for State input.

Jurisdiction is an issue – the foreign tribunal is directed to rule on disputes in a way that maximizes free trade. These disputes are not handled in a Maine court even if we are the respondent to a claim.

The list of concerns for Maine with these agreements is great. The areas of concern include, prescription drugs, LNG terminals, tobacco advertising and gambling. These topics are those that Maine has a vital role in developing policies for...that policy-making can be infringed upon by these trade agreements and the standing provided in those agreements that allow foreign nations or corporations who feel harmed to come after us.

Rep. Rotundo noted that Sen. Patrick (while in the House) helped pass the bill which formed this commission (co-sponsor). He added that it took a year for the CTPC to educate itself on trade and the impacts on state sovereignty. The Maine CTPC is recognized as a model across the country. He noted that he has learned the value of trade in a world economy and gained a more global view.

He has also learned how important it is to ensure competitiveness where the competition has little regard for human rights or the environment.

#### DISCUSSION OF DATES AND TIMES OF HEARINGS:

NEXT MEETING NOVEMBER 3<sup>RD</sup> – CALAIS  
1PM COMMISSION MEETING  
6PM EVENING PUBLIC HEARING

#### **12:00 BREAK**

#### **12:43 pm Phone-in presentation**

**Bob Stumberg – Harrison Institute of Public Law and Georgetown University**

Summary briefing on 2009 CTPC Assessment ( Mr. Stumberg consulted on the assessment with Forum on Trade and Democracy who was contracted to conduct it)

Mr. Stumberg provided what he called a roadmap of trade agreements and discussed how lawyers think of them. He put the agreements into 3 families:

- WTO – 20 agreements, 153 nations – trade disputes between nations but not between private investor and nation state;
- FTA – 17 nations (they overlap with WTO agreements) cover disputes between nations but they include investor arbitration;

- BITs – Bilateral investment treaties (39 US treaties). These are similar to a particular chapter in a WTO agreement. These treaties serve a single function and there is no arbitration between nation states but rather a forum for investor arbitration.

Mr. Stumberg spoke to the commission regarding a potential new trade agreement being proposed for consideration – the Trans Pacific Partnership. This is a large trade agreement being proposed that would be bigger than the EU if successful.

Mr. Stumberg provided a list of trade agreements that have impacts on state sovereignty (see chart in slides).

He provided a short description of the Trans Pacific Partnership Agreement (TPPA) meeting in Chicago last week regarding impacts of these agreements impacting governing at the state level. There is a big network for states to communicate their interests and needs to the trade world.

Mr. Stumberg spoke of Rep. Sharon Treat's presentation in Chicago and her membership on IGPAC and her direct contacts with trade negotiators.

Sharon Treat joined the conversation to mention that members of IGPAC don't get the time to consider the agreements under the intended timeline – there is often only 4 days to familiarize with the topic and make comment and since the information can't be shared it's challenging to consult with others in order to make comment.

She also has concerns about what happens to those comments and whether or not they go into the void. She did have the luck to be in Washington to follow-up on her last submission –but that won't always be a process.

She uses the CTPC assessment that Mr. Stumberg consulted on to make those comments – and since it's a public document she can refer to it when she makes her comments. Documents that she is available to view as a member of IGPAC are prohibited from being discussed publicly.

Mr. Stumberg stressed that it is important to have each state represented on IGPAC – you need to have a voice and be persistent to have an impact.

Mr. Stumberg referred to his presentation and Slide 6 regarding how trade rules are used. He stated that a loss in a trade dispute can result in serious consequences.. Trade sanctions are almost always 100% punitive tariffs. In a loss to Indonesia with regard to cigarette sales, they are not likely to impose sanction on cigarettes but rather intellectual property or something else that inflicts pain. Thus, the subject punishment does not necessarily correlate with the trade offense.

Mr. Stumberg provided the commission with examples of trade rules that effect state governments.

Pharmaceutical trade rules require that reimbursement policies must be based on competitive market derived prices – contrary to state policies to control escalating prescription costs. This

rule group can impact Maine's programs to reduce the cost of prescription drugs and could potentially impact the Affordable Care Act. The Australia and Korea FTAs did carve out an exception of Medicaid. However, Medicare Part B was not excepted – where prices are set by statute and Section 340B of Fed. Public Health Act was not excepted. These are big budget issues for states.

GATS: list of many services from alcohol, gambling, financial service and waste management. GATS rules provided there can be no quantitative limits that impact “market access” and that there can be no discrimination against nations. GATS also lists 70 proposed disciplines for domestic regulations. The bulk of laws that could be impacted by GATS disciplines are not discriminatory and do not set quantitative limits. Interpretation of these disciplines may be problematic (see slides 12 and 13 for illustration using LNG and tobacco examples).

Rules regarding foreign investor rights:

- Expropriation
- Fair and Equitable Treatment
- Most Favorable treatment

Mr. Stumberg cited an example regarding the treatment of tobacco in FTAs. He stated that trade agreements protect tobacco with the benefits enjoyed by all sectors. This would have implications where other industries could use trade agreements to avoid regulation as well.

In slides 17 and 18 of his presentation, Mr. Stumberg stated that US trade negotiators have exceeded their authority, using tobacco as an example.

Commission member Michael Herz inquired about the process for complaints of trade agreement violations and the tribunals for arbitration – not just the outcomes of these trade agreements. Mr. Stumberg explained that the tribunals are usually composed of 3 people nominated as follows:

- 1 by plaintiff
- 1 by defending country
- 1 by secretariat of tribunal/ “neutral arbitrator”

He also noted that a member of this tribunal could be an arbitrator on Tuesday but a litigant on one side or another on Wednesday. It's a serious problem. There is a strong argument to be made for investment courts with impartial to deal with these trade disputes.

Mr. Stumberg then noted that at dispute tribunals at WTO there are more seasoned diplomats – but still come with their own biases depending on where they come, for example whether they come from a more centralized or a federalist style of government.

**1:30 pm**

**Non-agenda item – Rep. Sharon Treat – discussion of IGPAC role and the Trans Pacific forum in Chicago**

Commission invited former commission member, Rep. Sharon Treat to talk about her position with IGPAC and how the CTPC plays a role in that position. Rep. Treat discussed challenges of attending these forums like the Trans Pacific forum in Chicago and her concern about how much impact one can have in this forum. She noted that speaking/attending as an elected official is a position that gives her comments and those from the CTPC more weight.

In advance of the Chicago forum, she spent 2 hours with USTR who went over the comments on the pending trade agreement because of strict confidentiality rules. She is now a member of IGPAC and is an official who can look at the text of agreements.

The fact that this commission is actively and proactively looking at the things that are particularly important to this state is very valuable for Rep. Treat to be prepared to offer comment and represent the CTPC's positions on trade agreements – she has been able to use the CTPC assessments to participate as a member of IGPAC. CTPC materials have provided her with information that she can share in contrast to the information received through IGPAC which is confidential.

There are many areas where we don't have the appropriate expertise – that is a problem beyond CTPC but also at USTR – and it is beneficial to be aware of those areas where we do not have expertise.

Rep. Treat, in a discussion about the lack of transparency of these negotiations, responded to an inquiry by commission member John Palmer who asked if it is true that foreign governments wouldn't negotiate unless there was this protection of privacy. Rep. Treat responded that it is not necessarily true that the foreign nations insist on the privacy but more so the US. Commission member Palmer when on to ask that shouldn't transparency be one of the goals of this commission? Rep. Treat cited a Resolution sponsored by Rep. Maker to make these negotiations transparent. The Resolution also proposed to remove us from under the jurisdiction of the arbitration panels but rather have those disputes handled in a US forum to be resolved here if the US is a respondent to the complaint.

## **2:00 pm Commission Discussion**

The commission was asked to consider potential topics for the next meeting which will be held November 3<sup>rd</sup> in Calais.

CTPC co-chair, Rep. Maker asked members to review the assessment of 2009 and consider the things presented today to come up with topics.

John Palmer – requested an updated email distribution list that incorporates the new members of the commission.

## **Commission Meeting Adjourned 2:08**