
**Economic Development,
Agriculture & Trade Committee**

HB 1857

Brief Description: Requiring legislative ratification of international trade agreements.

Sponsors: Representatives Conway, Hudgins, Wood, McCoy, Chase, Hasegawa and Santos.

Brief Summary of Bill

- Clarifies that the Legislature must authorize the commitment of Washington to any future trade agreements.

Hearing Date: 3/1/05

Staff: Tracey Taylor (786-7196).

Background:

Fast Track

Fast track trade promotion authority is the process the federal government is using to create new trade agreements. Through authorizing legislation, Congress grants the President the broad authority to negotiate trade agreements that meet the congressionally established objectives. The president must notify Congress prior to entering into negotiations on a new trade agreement or prior to signing an agreement. The text of the agreement must then be promptly sent to Congress with a statement confirming that the agreement meets the objectives set by Congress. In order for the agreement to be effective, implementing legislation must be sent to Congress as well. There is no opportunity for Congress to amend the agreement's terms when it considers enacting the implementing legislation. In 2002, Congress authorized the most recent fast track trade promotion process.

The United State Trade Representative (USTR), a member of the President's Cabinet, handles the negotiations on behalf of the President. The USTR, the President's chief advisor on trade policy, also consults with other government agencies, private sector advisory committees, and various congressional committees on trade policy matters. The USTR is also responsible for contacting the various states regarding participation in trade agreements. The USTR has established a State Single Point of Contact (SPOC) system for day-to-day consultations with the states. Chosen by the governor of each state, the SPOC designee disseminates information received from the USTR to state and local agencies. The SPOC also assists in communicating trade specific information and advice from the state to the USTR. In addition to the SPOC, the USTR's Office of

Intergovernmental Affairs and Public Liaison (IAPL) is the designated "Coordinator for State Matters" and is charged with informing states on an on-going basis of trade-related matters.

The World Trade Organization (WTO)

Created in 1995, the World Trade Organization (WTO) is the successor to the General Agreement on Tariffs and Trade (GATT) established after World War II. The WTO is a multilateral trade system with 147 nation-state members. The WTO is charged with administering trade agreements, providing a forum for trade negotiations, settling trade disputes and other related tasks. Decisions are made primarily on a consensus basis. The top level decision-making body is the Ministerial Conference, which usually meets on a biennial basis.

The WTO agreements cover goods, services and intellectual property. The first round of agreements, commonly referred to as the Uruguay Round, established the basic principles, dispute settlement process and trade policy transparency reviews for all three agreements. Additional details and schedules of country commitment were established for goods and services (GATT and the General Agreement on Trade in Services (GATS) respectively), but not intellectual property (the Agreement on Trade-Related Intellectual Property Rights (TRIPS)). The Doha Round of negotiations began in November 2001, but no agreement has been reached yet.

WTO Government Procurement Agreement

The current WTO Agreement on Government Procurement ("GPA") was negotiated during the Uruguay Round and went into effect January 1, 1996. The agreement has 28 members, including the United States, Canada, the European Union, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands-Aruba, Norway, Singapore, and Switzerland. There are two parts to the GPA. First, there are general rules and obligations of the member states. Second, the GPA contains schedules of the entities in each member state covered by the GPA and a list of excluded goods and services.

At issue are the member states' laws, regulations, procedures and practices regarding covered public procurement. The GPA requires federal, state and other covered entities to treat goods and services providers from member states equal to the domestic goods and services providers in the pre-bid and bid process for all transactions above the monetary threshold. The current threshold for all goods and services, except construction services, is \$477,000. The threshold for construction services is \$6,725,000. Thus, if a state agency that is covered by the GPA is purchasing \$500,000 worth of pencils, it must have a bid process that treats a bidder from Norway (a GPA member) and a "hometown" bidder equally

Relationship of the Agreements to State Law

Pursuant to the U.S. Uruguay Round implementing legislation, the general rule is that "no state law, or application of such a state law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid." Thus, a duly enacted state law, past, present and future, will be given its full effect and meaning.

If a consultation is requested by a WTO member regarding whether a state law is consistent with any of the Uruguay Agreements, including the GPA, the USTR is required to contact that state's governor or designee as well as the state's attorney general within seven days. Consultations with

the allegedly offending state or states must take place. Involvement of the state in the case development and presentation as well as any response to a dispute settlement panel or Appellate Body is required by federal law; however, only the U.S. government, not the state, has standing at the WTO. Only in the event that a WTO dispute settlement panel or the Appellate Body find the state law inconsistent with the Agreements can the U.S. government bring an action against State with the offending law to force a change. In such a case, the process for the action is laid out in statute and the burden of proof is on the U.S. government.

What does this mean for Washington?

Annex 2 to the GPA is a schedule of sub-national or state commitments to the GPA. There are 37 states that have made a commitment to participate in the GPA in some fashion. Washington, one of the 37 states, committed the state executive branch agencies, "including General Administration, Department of Transportation and state universities" to the terms and conditions of the GPA. Despite committing the executive branch agencies, Washington did reserve some procurement from GPA coverage, including fuel, paper products, boats, ships and vessels.

The GPA's general rules and obligations require an open, competitive bid process for covered procurement. This is not alien to Washington's agencies, as the state's current statutory and regulatory procurement process is a competitive open bid process. However, should the state government decide to adopt more protectionist policies, such as a preference for in-state companies, it would likely be in violation of the GPA and could be subject to an action under the conditions previously discussed.

Other Trade Agreements

The United States, in addition to participating in the WTO Doha Round of negotiations, is in various stages of negotiations and implementation for a number of bilateral and regional trade agreements. In fall 2003, as the result of the negotiations of several of the agreements, the USTR sought commitments from the states to extend the GPA terms and conditions to these new agreements. This year, the U.S. has completed free trade agreements with nine countries: Australia, Bahrain, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Morocco and Nicaragua. Two of these free trade agreements were approved by Congress—Australia and Morocco.

Twenty-one states, including Washington, are currently committed to the newest agreement, the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA), which was signed August 5, 2004. However, DR-CAFTA has been the subject of much political discussion, especially at the state level, which may have delayed its approval until the new session of Congress begins in January 2005. Washington is also committed to participate in the completed agreements with Morocco and Australia as well as the possible South African Customs Union (SACU) and the Free Trade Area of the Americas (FTAA) agreements.

Washington Law

The power to enter trade agreements is not clearly delegated in the Washington Constitution to the Governor or the Legislature. However, the power to make laws is clearly within the Legislature's purview. Thus, if a trade agreement is considered law, not merely advisory, the Legislature must be involved either by enacting the law or delegating the power to the Governor or an agency. But, such delegation must be done within the parameters established by the case law. Whether or

not, this was adequately done could rest with the Washington State Supreme Court if challenged. Various arguments could be made based on implied powers, but none contain an unambiguous delegation of power. Thus, Washington law is unclear on this issue.

Summary of Bill:

In order for Washington to commit to being party to a trade agreement, the legislature must pass enabling legislation. The legislation must establish the parties to the agreement, the agencies included, and the extent of the state's participation. Such enabling legislation may be prospective, setting out the terms and authorizing the Governor to communicate the terms to the USTR. The Governor may also condition the state's assent to a trade agreement upon ratification of the terms by the state legislature; however, the ratification must occur by the end of the first regular legislative session following the signing of the agreement by the U.S. and the other nations.

This act only applies to any international trade agreements signed after the effective date of the act.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill contains an emergency clause and takes effect immediately.