

The Legislature, The Governor & International Trade Agreements: An Analysis of Washington Law

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Introduction

With the creation of the World Trade Organization (WTO) and the development of global markets, international trade agreements have begun to impact states and their economies. For the first time, states (or “sub-central governments”) are included in agreements covering procurements by government entities. This development has caused many to question what institution holds the power to commit the state government to a trade agreement—the federal government, the state’s governor, or the state legislature? The federal government uses “Fast Track” trade promotion authority to negotiate and enact trade agreements, but what do states use?

This paper provides the background on the WTO as well as bilateral and regional trade agreements that have been garnering much of the Legislature’s attention. The focus of the paper then turns to the question: what institution—the Office of the Governor or the Legislature—has the power to enter trade agreements on the behalf of Washington’s citizens? This is not an easy answer, requiring an analysis of federal law, the Washington Constitution and Washington statutes, only to conclude that there is no clear delegation of this power. The implications of this conclusion are also discussed.

Washington is not the only state struggling with this issue. This paper provides information regarding what other states are doing to resolve their own ambiguities. Finally, legislative options are outlined should the Committee continue to have concerns regarding Washington’s involvement in international trade agreements.

Trade Agreements Background

Current Trade Agreement Procedures and Status

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.¹ In 2002, Congress authorized the most recent fast track trade promotion process.²

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.³ Chosen by the governor of each state, the SPOC designee disseminates information received from the USTR to state and local agencies.⁴ 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.⁵

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

¹ See Appendix A for a Fast Track Flow Chart.

² The Bipartisan Trade Promotion Authority Act of 2002, P.L. 107-210.

³ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2004 TRADE POLICY AGENDA AND 2003 ANNUAL REPORT (2004).

⁴ *Id.*

⁵ *Id.*

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.⁶ 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.⁷ 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.⁸ 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.

Rectifications or Modifications to the GPA

Under Article XXIV of the GPA, a process has been established for the rectification or modification of a member state’s commitments to the GPA, including a withdrawal. Rectifications or modifications to Appendix I (the government entities’ commitments and exceptions) along with “information regarding the likely consequences [of the proposed changes] for the mutually agreed coverage provided by the GPA” must be communicated to the WTO Committee on Government Procurement (“Committee”).⁹ If the changes are purely formal or minor in nature, they are effective within 30 days, provided there are no

⁶ The members also include: Canada, the European Union, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands-Aruba, Norway, Singapore, and Switzerland.

⁷ World Trade Organization (WTO) Agreement on Government Procurement (GPA) Art. I.

⁸ WTO GPA Art. III.

⁹ WTO GPA, Art. XXIV(6)(a).

objections by the other member states.¹⁰ If a change is not purely formal or minor or if there is an objection, a Committee meeting will be held “promptly” to consider the proposal and “any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage” provided prior to such notification.¹¹ If no agreement is reached, the matter may be handled through the challenge procedures under Article XX.¹²

However, “[w]here a [member state] wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has effectively been eliminated”, the member state must notify the Committee.¹³ Following a meeting of the Committee that occurs at least 30 days after notification, the modification shall become effective the day after the Committee adjourns unless an objection to the withdrawal has been made. If an objection occurs, the procedures on consultations and dispute resolution kick in.¹⁴

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.”¹⁵ 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 7 days.¹⁶ Consultations with the allegedly offending state or states must take place.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ WTO GPA, Art. XXIV (6)(b).

¹⁴ *Id.*

¹⁵ 19 USCS § 3512(b)(2) (1999).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 19 USCS § 3512(b)(2) (1999).

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.²¹ 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.²² Despite committing the executive branch agencies, Washington did reserve some procurement from GPA coverage, including fuel, paper products, boats, ships and vessels.²³

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.²⁴ 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.²⁵

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.²⁶

²¹ As the result of the DR-CAFTA controversy, several states have considered or made some movement to withdraw from the GPA.

²² WTO GPA Annex 2.

²³ Pre-existing restrictions were also reserved. WTO GPA Annex 2.

²⁴ See Chapter 43.19 RCW (Goods and Services); Chapter 43.105 RCW (Information Processing Equipment and Services); Chapter 39.80 RCW (Highway Design); Chapter 47.28 RCW (Highway Construction); Chapter 43.78 RCW (Printing); Chapter 39.29 RCW (Client Services); and Chapter 39.80 RCW (Public Works).

²⁵ The GPA does not apply to preferences or restrictions that are part of a program to promote the development of distressed areas and businesses owned by minorities, disabled veterans and women; thus, Washington may implement a procurement program designed with these goals in mind. WTO GPA Appendix 2.

²⁶ President Bush signed the Australia Free Trade Agreement into law on August 3, 2004. The Moroccan Free Trade Agreement was signed into law on August 17, 2004. The effective date for both is January 1, 2005.

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, 2004.²⁷ 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.²⁸

²⁷ As of the date of this memo, President Bush has not sent DR-CAFTA to Congress for approval.

²⁸ Letter from Gary Locke, Governor of Washington, to Robert Zoellick, the United States Trade Representative (USTR) (September 30, 2003) (on file with the Governor's Office). *See also* Letter from Gary Locke, Governor of Washington, to Robert Zoellick, USTR (June 17, 2004), clarifying Washington's commitments to the government procurement chapters of the DR- CAFTA, SACU, FTAA, Moroccan and Australian trade agreements.

An Analysis of Washington State Law

Question Asked

Does the Governor have the power to commit Washington to international trade agreements?

Short Answer

There is no explicit grant of such power to the Governor in either the Washington Constitution or the Revised Code of Washington. Indeed, a court could find that such an agreement impedes the legislative authority of the Legislature and the citizens granted by the Washington Constitution.

Introduction

The purpose of this section is to establish which branch of state government has the power to commit Washington to trade agreements and to make trade policy. It is also intended to provide a framework for future discussion regarding the relationship between the Legislature and the Governor on trade matters. In order to provide a manageable analysis, there is an underlying assumption that a court would not consider the trade agreement a “treaty” as Congress chose the purely legislative approach of Fast Track. Therefore, this section does not contain an analysis of Article II, Section 2 or Article I, Section 10 of the U.S. Constitution.²⁹

Background

State & Federal Tension

The U.S. has a federal government of enumerated powers: “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”³⁰ Thus, the states retained a great deal of their sovereignty upon the formation of the United States of America:

“The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the state.”³¹

²⁹ As discussed later in this memorandum, instead of using the treaty ratification process established by the U.S. Constitution, Congress has authorized and approved trade agreements through the process known as “Fast Track”.

³⁰ U.S. CONST., amd. 10.

³¹ Madison, James, *The Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961), as quoted in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

The U.S. Constitution vests Congress with the federal government’s legislative powers.³² Although the states retained a great deal of their sovereignty, Congress may impose its will upon the states. Pursuant to the Supremacy Clause of the U.S. Constitution,³³ Congress may, in exercising its legislative power, supersede and preempt a state law. A state law is preempted in two circumstances: first, when Congress intends federal law to occupy the field; and second, even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.³⁴ If the challenged state law “stands as an obstacle to the accomplishment and execution of the full purposes and objects of Congress”, and where it is impossible for a private party to comply with both laws, the Court will find preemption applies.³⁵

In addition, Congress may legislate in an area traditionally regulated by the states, overriding state laws; however, if “Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention unmistakably clear in the language of the statute.”³⁶ The Supreme Court resolved a conflict between a Missouri constitutional amendment and the federal Age Discrimination in Employment Act of 1967 in favor of Missouri, holding that the citizens exercised their “prerogative as citizens of a sovereign State” in creating a mandatory retirement age for the judiciary.³⁷ The decision cited the lack of evidence of congressional intent to override a state’s sovereignty in establishing the qualifications for state public officials.³⁸

Under the Foreign Commerce Clause of the U.S. Constitution, Congress shall have the power to “regulate Commerce with foreign Nations, and among the Several States and with the Indian Tribes.”³⁹ In adopting the Fast Track legislation, Congress has delegated some of its power, albeit with defined limitations, to the President. However, Congress did not articulate a clear intent to legislate in an area traditionally held by the states—government procurement.⁴⁰ Indeed, the Congress specifically evidenced the intent to not preempt state law in the case of the Uruguay Round Agreements.⁴¹ As mentioned above, the failure to articulate such intent can be fatal to a federal attempt to override state law.

However, a state’s attempt to legislate in an area in which Congress also intends to legislate in will be resolved in Congress’ favor. Such was the case when Massachusetts tried to restrict its agencies from purchasing goods or services from companies doing business with Burma.⁴² Shortly after Massachusetts adopted its Burma Law, Congress

³² U.S. CONST., Art. I, §1.

³³ U.S. CONST., Art. VI, cl. 2.

³⁴ *Id.*

³⁵ *Id.* at 372-73.

³⁶ *Gregory* at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

³⁷ *Gregory* at 473.

³⁸ *Id.* at 460.

³⁹ U.S. CONST., Art. I, §8, cl. 3.

⁴⁰ See Bipartisan Trade Promotion Authority Act of 2002, P.L. 107-210.

⁴¹ See 19 USCS §3512(b)(2) (1999).

⁴² Mass. Gen. Laws §§ 7:22G-7:22 M, 40 F 1/2 (1997).

acted by imposing sanction directly on Burma, authorizing the President to impose additional sanctions conditioned on the presence of certain circumstances, and directed the President to develop a comprehensive and multilateral strategy to affect certain goals in Burma.⁴³ Massachusetts argued that Congress failed to expressly preempt the state's Burma Law; however, the Court rejected that argument.⁴⁴ Citing the specificity of Congress's legislation and invoking the Supremacy Clause, the Court concluded that the Massachusetts law was preempted by federal law and its application was unconstitutional.⁴⁵

In this case, the states, including Washington, still appear to hold sovereignty over decisions regarding government procurement policy as Congress did not clearly evidence an intent to preempt a state-level decision. Indeed, in the case the WTO Government Procurement Agreement, the United State Trade Representative solicited each state's participation. In addition, the implementing legislation for the Uruguay Round specifically notes the federal deference to state laws. The decision to opt in or out of this agreement (or any agreement) was exercised by Washington's Governor; however, in order to determine whether or not the governor was correct, one must examine Washington law.

State Trade Powers

Washington's Constitution

Under the Washington constitution, the Governor has certain enumerated duties and powers. Among the powers and the duties, the Governor is charged with ensuring that the laws of the state are "faithfully executed and may require state officers to provide information about a subject within their jurisdiction."⁴⁶ The Washington constitution also establishes the governor's veto power,⁴⁷ his or her role as commander-in-chief,⁴⁸ his or her pardoning powers,⁴⁹ and his or her ability to convene an extraordinary legislative session⁵⁰.

The legislative authority of the state is vested in the Washington Legislature's two bodies; however, the citizens reserved both initiative and referendum powers.⁵¹

⁴³ Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, §570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, § 101(c), 110 Stat. 3009-121 to 3009-172).

⁴⁴ *Crosby, et al., v Nat'l Trade Council*, 530 U.S. 363, 386-87 (2000).

⁴⁵ *Id.* at 388.

⁴⁶ WASH. CONST., art. III, § 5.

⁴⁷ WASH. CONST., art III, § 12.

⁴⁸ WASH. CONST., art III, § 8.

⁴⁹ WASH. CONST., art III, § 9.

⁵⁰ WASH. CONST., art III, § 7.

⁵¹ WASH. CONST., art II, § 1; WASH. CONST., amd. 7.

“The people in framing the constitution committed to the legislature the whole law-making power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception.”⁵²

Although vested with the legislative authority of the state, the Washington Legislature may delegate its legislative powers under certain circumstances. The Washington Supreme Court has stated:

“The delegation of legislative power is justified and constitutional, and the requirements of the standards doctrine are satisfied, when it can be shown (1) that the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.”⁵³

The Washington Supreme Court applied this test upholding the delegation of legislative powers to the Department of Motor Vehicles to establish a schedule of maximum fees to be charged by employment agencies⁵⁴ and the delegation to the Washington State Department of Transportation to identify toll bridges and set toll rates.⁵⁵ However in *United Chiropractors of Washington v. State*⁵⁶, the lack of procedural safeguards surrounding the appointment procedures for the State Board of Chiropractors led the Washington Supreme Court to find the delegation of legislative powers to private parties violated due process and invalidated the statutes as unconstitutional.

The Legislature may also delegate administrative power.⁵⁷ In order for such a delegation to be constitutional, the Legislature must define reasonable administrative standards.⁵⁸ In *Keeting v. P.U.D. no. 1 of Clallam County*, the Washington Supreme Court developed a rule for evaluating the administrative standards for reasonableness: “the Legislature must define: (a) what is to be done, (b) the instrumentality which is to accomplish it, and (c) the scope of the instrumentality’s authority in so doing”.⁵⁹

Using this test, the Washington Supreme Court has upheld the 1959 Budget and Accounting Act’s transfer of certain duties from the Office of the State Auditor⁶⁰ and the right of the Toll Bridge Authority to determine when and where to construct a publicly

⁵² *State v. Fair*, 35 Wash. 127 (1904) (citing *People v. Draper*, 15 N.Y. 532, 543).

⁵³ *Barry & Barry Inc. v. Dept. of Motor Vehicles*, 81 Wn.2d 155 (1972).

⁵⁴ *Id.*

⁵⁵ *State ex rel. v. WA State Dept. of Transp.*, 142 Wn.2d 328 (2000).

⁵⁶ 90 Wn.2d 1 (1978).

⁵⁷ WASH. CONST., amd. 7; *Keeting v. P.U.D. no. 1 of Clallam County*, 49 Wn.2d 761 (1957);

⁵⁸ *Keeting* at 767.

⁵⁹ *Id.*

⁶⁰ *Yelle v. Bishop, et al.*, 55 Wn.2d 286 (1959).

financed Narrows Bridge.⁶¹ But, the Court invalidated the Washington Agricultural Adjustment Act of 1935's application to melon and tomato crops, which required artificial price fixing, finding the act "vague and indefinite in prescribing the standard by which the objects of the act are to be effectuated."⁶² "[R]egulations made by executive officers are valid only as subordinate to a legislative policy sufficiently defined by statute, and when found to be within the framework of such policy."⁶³

Statutes

Powers & Duties

Chapter 43.06 RCW outlines specific powers and duties delegated to the Governor by the Legislature. The Governor is endowed with the duty to supervise the conduct of all executive and ministerial offices.⁶⁴ The Legislature also designated the Governor as "the sole official organ of communication between the government of this state and the government of any other state, territory, or of the United States."⁶⁵ The Legislature has also authorized the Governor to execute certain state compacts with federally recognized Indian tribes⁶⁶ and to join the interstate oil compact commission.⁶⁷ However, the Legislature has not explicitly granted the power to the Governor to make commitments to trade agreements.

The Department of Community, Trade and Economic Development (DCTED) was created by the Legislature to "diversify the state's economy and export goods and services."⁶⁸ The DCTED has the responsibility to expand the state's stature as a trading partner and assist businesses in developing overseas markets.⁶⁹ The director of DCTED is appointed by the Governor and is confirmed by the Senate.⁷⁰ Thus, DCTED is a cabinet-agency with oversight by the Governor focused on trade.

Trade Related Laws

In 1994, Governor Lowry created the position of Special Trade Representative as part of his International Trade Initiative. The Special Trade Representative was directed to act as the state's liaison with foreign governments on trade matters and issues, work with state agencies involved in international trade, and work with the Council on International Trade. The position was funded jointly through the Washington State Department of Agriculture (WSDA) and DCTED.

⁶¹ *State ex. rel Washington Toll Bridge Authority v. Yelle*, 195 Wash. 636 (1938).

⁶² *Uhden v. Greenough, et al*, 181 Wash. 412, 425 (1935).

⁶³ *Uhden* at 988-89 (citing *Panama Refining Co. v Ryan*, 293 U.S. 388).

⁶⁴ RCW 43.06.010(1) (2004).

⁶⁵ RCW 43.06.010(4) (2004).

⁶⁶ RCW 43.06.010(14) (2004).

⁶⁷ RCW 43.06.015 (2004).

⁶⁸ RCW 43.330.005 (2004).

⁶⁹ RCW 43.330.060 (2004).

⁷⁰ RCW 43.330.0430 (2004).

In 1995, the Legislature created the State Trade Representative (STR) in statute. In the bill that passed the Legislature, the STR was designated as the “executive and administrative head of the office of the Washington state trade representative.”⁷¹ However, Governor Lowry vetoed the section of the bill containing this language. In his veto letter, the governor stated: “[t]he state trade representative should not operate as a separate agency but should serve as an arm of the Governor’s office....”⁷² The Legislature made no attempt to overrule the veto, and the STR continues to serve out of the Governor’s office.

In 2003, the Legislature expanded and clarified the STR’s duties.⁷³ The new duties include working with DCTED, WSDA, and other appropriate state agencies to review and analyze proposed international trade agreements and the potential impact on Washington businesses.⁷⁴ The responsibility of acting as liaison to the Legislature on matters relating to trade policy oversight was added.⁷⁵ The STR is also directed to provide input to the USTR reflecting Washington’s concerns in the development of international trade, commodity and direct investment policies.⁷⁶ In addition, the STR is required to provide an annual report on his or her activities to the Governor and appropriate committees of the Legislature.^{77 78}

Also in 2003, the Legislature passed Substitute House Bill 1059, creating the Joint Legislative Oversight Committee on Trade Policy (Oversight Committee).⁷⁹ Created to monitor the impact of trade agreements on Washington law as well as provide a mechanism for legislators and citizens to voice their opinions and concerns about the potential impact of trade agreements, the Oversight Committee is composed of four Representatives, four Senators and three ex-officio members.⁸⁰ The STR is one of the ex-officio members of the Oversight Committee.⁸¹ Among its many powers and duties, the Oversight Committee is charged with maintaining “active communication with the OSTR, USTR’s office, Washington’s congressional delegation, the National Conference of State Legislatures (NCSL), and any other bodies the committee deems appropriate....”⁸²

⁷¹ 1995 Wash. Laws 350 (3).

⁷² Governor Lowry Veto Letter to SHB 1123, 1995 Wash. Laws 350.

⁷³ See SHB 1173, 2003 Wash Laws 346.

⁷⁴ RCW 43.332.010 (2)(a) (2004).

⁷⁵ RCW 43.332.010 (2)(c) (2004).

⁷⁶ RCW 43.332.010(2)(b) (2004).

⁷⁷ RCW 43.332.030 (2004).

⁷⁸ This duty, and the subsection containing it, was the subject of a partial veto by the Governor. The Legislature challenged this partial veto, along with several others. A stipulated judgment reinstated the vetoed subsection. See *Wash. State Legislature v. Governor*, No. 03-2-01988-4 (Super. Ct. Oct. 28, 2003).

⁷⁹ 2003 Wash. Laws 404; Chapter 44.55 RCW (2004).

⁸⁰ RCW 44.55.010; RCW 44.55.020 (2004).

⁸¹ RCW 44.55.020 (2004).

⁸² RCW 44.55.040(2) (2004).

Analysis

It is well-established in Washington law that public officers are limited to exercising only such powers as conferred to them by statute or constitution.⁸³ If a public officer exercises a power he or she does not possess, the government is not bound by such an unauthorized act.⁸⁴ As previously discussed, there is no explicit power given to the Governor, either by the constitution or by statute, to commit the state to international trade agreements. In fact, the Legislature only gave the Governor the ability to enter into compacts on behalf of the state in certain circumstances—with federally recognized Indian Tribes⁸⁵ and the Interstate Oil Compact Commission.⁸⁶ The absence of a similar explicit grant of authority could be considered a telling example of the Legislature’s intent to retain trade policy oversight.

Implied Power

The argument could be made that the Legislature implicitly delegated this authority through the creation of the OSTR and the later expansion of the STR’s duties. Indeed, it could be argued that the Legislature by failing to challenge Governor Lowry’s veto eliminating the creation of a separate STR office acquiesced in the Governor’s taking the trade policymaking power to the Governor’s office. Moreover, the Legislature not only later made the STR the “state’s official representative to foreign governments on trade matters,” it also directed the STR to “conduct other activities the governor deems necessary to promote international trade and investment within the state.”⁸⁷ This could be construed as confirming the delegation of trade policymaking powers.

In applying the *Keeting* test, this purported delegation of power may fail, as a court may find that the scope of the power to “conduct other activities...deem[ed] necessary to promote international trade . . .” is not well-defined.⁸⁸ The contrary can also be argued: that the Legislature retained its trade policy oversight by creating the Oversight Committee. This would be the retention of legislative power and would not be subject to the *Keeting* test.

The OSTR statutes lay out a series of duties; however, there lacks a certain specificity on how the duties are to be performed. The lack of specificity could be a sign that the Legislature intended to not delegate the power to enter into trade agreements. The argument could also be made that the ability to enter into trade agreements can be implied as reasonably necessary to promote international trade and investment. In an early case, the Washington Supreme Court explained implied powers as follows:

⁸³ *Young v. State*, 19 Wash. 634 (1898).

⁸⁴ *Id.*

⁸⁵ The ability of the governor to enter into such state compacts is also dependent on the federal Indian Gaming Regulatory Act, 25 U.S.C. Sec. 2701 et seq.

⁸⁶ See RCW 43.06.010(12) (2004) and RCW 43.06.015 (2004).

⁸⁷ RCW 43.332.010(2)(e) (2004).

⁸⁸ *Keeting*, 49 Wn2d at 767.

“If a person or board is charged by law with a specific duty, and the means by which the duty is to be accomplished are not specially provided for, the person or board is so charged has the implied power to use such means as are reasonably necessary to the successful performance of the required duty,...[b]ut where a person or board is charged by law with a specific duty, and the means for its performance are appointed by law, there is no room for implied powers, and the means appointed must be followed, however, inadequate may be the result.”⁸⁹

The Governor as the Executive

Under the Washington constitution, the Governor is the “sole organ of communication” to the federal government. The USTR has the power to determine who in Washington will be contacted regarding a trade inquiry; however, this does not mean that the USTR can select who has the power to commit the state to a trade agreement. As there has been no clear attempt by Congress to encroach on a state’s sovereign right to determine how the power is allocated between the executive branch and the legislative branch, it will be up to the Washington courts to determine whether or not the Governor, as the sole organ of communication, has such a power.

In addition, the Washington Constitution allocates oversight of the state officers and their implementation of laws to the governor. Could this executive oversight be sufficient to confer the trade agreement authority into the hands of the Governor? It is unlikely that this alone would be sufficient. The Legislature is still the law-making body, creating the policy parameters upon which the executive branch is constrained. As discussed earlier, the delegation of administrative powers by the Legislature must be accompanied by reasonably defined standards.

Some may argue that the Governor’s letters committing Washington to the various trade agreements were done using his authority to issue executive orders. Indeed, as the executive, the Governor has the power to issue executive orders. However, to be fully effective, and not merely advisory, he or she must cite the statute or statutes providing the basis for the executive order.⁹⁰ Often, the statutes providing a basis actually outline the circumstances under which an executive order may be issued.⁹¹ Without the ability to cite an underlying statute, it could be argued that the Governor’s letter to the USTR was not operative but merely a commitment to encourage compliance.

Trade Agreement as Legislative Action

As mentioned earlier, except for those powers retained by the people of Washington, the whole law-making power of the state is vested in the Legislature. However, a common criticism of recent trade agreements is the agreements are in effect an improper attempt to

⁸⁹ *State ex rel. Hartley v. Clausen*, 150 Wash. 20 (1928).

⁹⁰ Wash. AGO 1991 No. 21.

⁹¹ See RCW 43.06.010(12) (2004); RCW 39.86.160 (2004); RCW 43.06.115 (2004).

enact laws without the safeguards of the legislative process. In the case of the GPA, critics argue that although Washington law may currently be in compliance, future actions by the Legislature to enact more “protectionist” policies are precluded or severely hampered by the threat of a WTO member requesting a consultation on an allegedly offending state law. In *State v. Fair*, the Court stated “[w]hile the constitution empowers the governor to call extra sessions of the legislature, and defines his duty respecting the same, it does not authorize him to restrict or prohibit legislative action by proclamation or otherwise.”⁹² It would appear that a court may not look kindly at the Governor’s attempt to restrict the Legislature’s future actions through a letter to the USTR.

Conclusion

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.

In this case, the various arguments outlined above could be made, but none contain an unambiguous delegation of power. Depending on whether or not a valid delegation of power occurred, an argument may be made that Washington’s accession to such trade agreements as the GPA is invalid. “A law is invalid when the authority delegated leaves the regulatory or enforcement agency with unguided and unrestricted discretion in the assigned field.”⁹³ This question is also for the courts to decide.

⁹² 35 Wash. 127, 133 (1904).

⁹³ *Peterson v. Hagen*, 56 Wn.2d 48 (1960).

Not Just a Washington Issue

Other States

California

In July 2004, pursuant to an inquiry by State Senator Liz Figueroa, the Legislative Counsel of California authored an opinion on “whether the Governor [of California] may consent, without legislative participation or consent, to bind the executive branch agencies of the State of California to federal trade agreements...”⁹⁴ The memorandum also addressed the effect of a federal trade agreement has on the Legislature’s authority to pass laws in conflict with the trade agreement.⁹⁵

In the case of California, Legislative Counsel concluded that the California Governor has the general authority to bind the executive branch agencies of California so long as he or she does not contravene either statute or a regulation by executive order.⁹⁶ Specifically citing the California Governor’s supreme executive powers under the California Constitution and the requirement that the California Governor sees that all laws are faithfully executed, the memorandum concluded the California Governor could issue an executive order committing California to the various trade agreements.⁹⁷

On the second question, Legislative Counsel opined that the Legislature may enact state laws that conflict with the provisions of specific trade agreements, as they would not be necessarily invalidated.⁹⁸

Nebraska

In August 2004, at the request of Nebraska State Senator Chris Beutler, the Attorney General of Nebraska issued an opinion on the authority of the Governor to “conform certain Nebraska government procurement procedures” to the GPA.⁹⁹ In 2003, like Governor Locke, Nebraska Governor Mike Johanns unilaterally committed Nebraska to extending its commitments to the GPA to the trade agreements being negotiated.

Nebraska Attorney General, Jon Bruning, noted that there is no Nebraska statute or any state case law that “specifically provides that the Governor has authority to subject certain government procurement in Nebraska to trade agreements similar to the GPA.”¹⁰⁰ Despite this lack of express authority, Attorney General Bruning did opine that the governor possessed the authority to commit the state to trade agreements. Citing that the

⁹⁴ Memorandum from the Legislative Counsel of California to the Honorable Liz Figueroa (July 22, 2004) at 1.

⁹⁵ *Id.* at 1.

⁹⁶ *Id.* at 14.

⁹⁷ *Id.*

⁹⁸ Memo at 17.

⁹⁹ “Authority of Governor to Conform Certain Neb. Gov’t Procurement Procedures,” 2004 Neb. Att’y Gen. 04021 (August 2, 2004).

¹⁰⁰ *Id.* at 11.

agreement committed a state agency under the Nebraska Governor’s direction and control to “perform tasks with it was already authorized to do in a manner consistent with its statutory authority”, the Nebraska Attorney General found that the Nebraska Governor had the power to commit the state to the GPA “even absent some specific directive to join the GPA.”¹⁰¹ The Nebraska Attorney General also relied on the fact that the Nebraska Governor did not actually sign the agreement, noting that such an act would “raise questions concerning improper exercise of legislative authority.”¹⁰²

It is noteworthy that the opinion relies entirely on the fact that the agreement does not conflict with any existing statute. This reliance ignores the true issue of authority, since with the authority to commit the state to a trade agreement goes hand-in-hand with the power to *not* commit a state to the agreement. This is a much more difficult constitutional analysis.

New Hampshire

In September 2004, New Hampshire legislators delivered a letter to New Hampshire Attorney General Kelly Ayotte requesting an opinion on New Hampshire Governor Craig Benson’s authority to bind the state to trade agreements on government procurement.

Maine

Like Washington, Maine has created an oversight body to monitor trade agreements.¹⁰³ Maine’s Citizen Trade Policy Commission (Maine Commission) has 17 voting members including legislators, the attorney general and members of specific constituencies.¹⁰⁴ The Maine Commission is charged with making policy recommendations designed to “protect Maine’s jobs, business environment and laws from any impact of trade agreements.”¹⁰⁵ In its current form, the Maine Commission does not have authority to commit New Hampshire to trade agreements; it merely reviews and makes recommendations.

¹⁰¹ *Id.* at 19.

¹⁰² *Id.*

¹⁰³ 2003 Me. Laws 699.

¹⁰⁴ The Commission membership is: (1) three senators from at least two political parties, appointed by the President of the Senate; (2) three representatives for at least two political parties, appointed by the Speaker of the House; (3) the attorney general; (4) a small business person appointed by the Governor; (5) a small farmer appointed by the Governor; (6) a representative from a nonprofit organization that promotes fair trade policies, appointed by the Governor; (7) a representative of a Maine-based corporation that is active in international trade, appointed by the Governor; (8) a health care professional appointed by the President of the Senate; (9) a representative of a Maine-based manufacturing business with 25 or more employees, appointed by the President of the Senate; (10) a representative of an economic development organization, appointed by the President of the Senate; (11) a person who is active with organized labor, appointed by the Speaker of the House; (12) a member of a nonprofit human rights organization, appointed by the Speaker of the House; and (13) a member of a nonprofit environmental organization, appointed by the Speaker of the House. There are also five ex-officio, nonvoting members representing five departments. 2003 Me. Laws 699.

¹⁰⁵ *Id.*

IGPAC

The Intergovernmental Policy Advisory Committee (IGPAC)¹⁰⁶ recently submitted a memorandum to the USTR outlining recommendations to improve federal-state policy coordination. The main recommendation made by IGPAC was the creation of a Federal-State International Trade Policy Commission (Fed-State Commission).¹⁰⁷ Membership would be drawn from federal and state officials responsible for trade policy.¹⁰⁸ The goal of the Fed-State Commission would be to:

- Foster consultation among officials from various levels of government on trade and investment concerns;
- Be a resource for objective nonpartisan trade policy and trade law analysis; and
- Author reports and make recommendations about trade policy for consideration by the federal, state and local governments.¹⁰⁹

This process is similar to the federal-provincial-territorial consultations on trade that Canada employs.

¹⁰⁶ IGPAC members include representatives from the National Association of State Procurement Officials, National League of Cities, National Associations of Attorneys General, National Association of Counties, National Center for State Courts, Council of State Governments and National Conference of State Legislatures as well as state/local elected and appointed officials from several states, counties and territories. Washington's IGPAC representative is Robert Hamilton, the Governor's Advisor on Trade Policy and the state's Point of Contact for the USTR.

¹⁰⁷ INTERGOVERNMENTAL POLICY ADVISORY COMMITTEE, RECOMMENDATIONS FOR IMPROVING FEDERAL-STATE TRADE POLICY COORDINATION (August 5, 2004).

¹⁰⁸ *Id.* at 7.

¹⁰⁹ *Id.*

Washington's Legislative Options

Option 1: Fast Track “Light”

A similar process to the federal “Fast Track” could be employed by the Washington Legislature. The Legislature could set out the parameters under which the Governor could commit the state to certain trade agreements. The legislation would be enacted for a set period of time—perhaps two to five years—during which time the Governor could confidently assure the USTR of Washington’s terms as they would be set out the original legislation. Unlike the federal version of Fast Track, implementing legislation after the agreement is signed would not be appropriate. The adoption of the Fast Track legislation would provide an opportunity for Washington’s citizens to be heard and its trade policy to be discussed.

If this type of legislation is considered, the following decisions must be made:

1. To what terms would the Governor be permitted to commit?
 - a. Which agencies?
 - b. What type of procurement?
 - c. Dollar amounts?
 - d. Exceptions?
2. Are there specific agreements (FTAA for example) that should be included?
3. How long should the authorization last?
4. What accountability provisions should be required? Reports?
5. Should the agreements previously entered into be addressed?

Option 2: Legislature Only

The Legislature could specify that Washington may only be committed to trade agreements by legislative act. This would require separate legislation for each trade agreement; however, a bill could set out this policy in statute as well as the implementing legislation for any trade agreements the Legislature wants to commit to this session. The difficulty of this option is Washington has a part-time Legislature and trade agreements require a quick and often unscheduled response.

If the Legislature considers this option, the following issues must be addressed:

1. Whether or not to grandfather in the previous trade agreements, including the GPA;
2. The impact on Washington’s economy by not being a trade agreement partner; and
3. The ability of the Legislature to consider the agreements and respond in a timely manner.

Option 3: State Trade Representative

The current Office of the State Trade Representative could be expanded and truly operate as its own office. Currently staffed under the Governor's Office, the Legislature could make the STR an appointee subject to Senate approval, thereby giving the Legislature addition input into the office. In addition, the office size (currently one professional) could be expanded by at least one trade policy professional to assist in responding to USTR inquiries and increasing Washington's voice in the trade negotiations.

Option 4: Joint Legislative Oversight Committee on Trade Policy

The Legislature could allow the JLOCTP to assert its control over the subject area. It is clear that there is a varied knowledge level about trade agreements among the Legislature at large; however, the JLOCTP could develop the institutional experts needed to focus on the issues. The current committee structure could be adjusted to ensure that the committee is made of members of particular standing committees to provide continuity from session to interim on the topics. This would require legislation or appointment changes by Leadership.

Option 5: IGPAC Recommendations

A joint resolution could be introduced urging the President, Congress, the USTR, the Washington Congressional delegation and the other appropriate federal officials to create the Commission as recommended by IGPAC. This option would allow for a discussion of the trade issues and the need for increased state participation.