

The Honorable Robert Lighthizer
United States Trade Representative
Executive Office of the President
Washington, D.C. 20508

Dear Ambassador Lighthizer:

In accordance with section 105(b)(4) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, and section 135 (e)(1) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Intergovernmental Policy Advisory Committee on the Trade Agreement, reflecting consensus ((1) majority and minority; (2) majority and additional) advisory opinions on the proposed Agreement.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert C. Hamilton".

Robert C. Hamilton
Chair
Intergovernmental Policy
Advisory Committee

Trade Agreement between the U.S., Mexico and Potentially Canada

Report of the
Intergovernmental Policy Advisory Committee
September 27, 2018

Intergovernmental Policy Advisory Committee

Advisory Committee Report to the President, the Congress and the United States Trade Representative on the NAFTA 2.0 Agreement

I. Purpose of the Committee Report

Section 105(b)(4) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, and Section 135 (e)(1) of the Trade Act of 1974, as amended, require that advisory committees provide the President, the US Trade Representative, and Congress with reports not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principle negotiating objectives set forth in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015. The report of the appropriate sectoral or functional committee must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area.

Pursuant to these requirements, the Intergovernmental Policy Advisory Committee (IGPAC) hereby submits the following report.

II. Executive Summary of Committee Report

IGPAC members believe that the Trade Agreement between the United States and Mexico, if Canada is included in the agreement, meets most of the overall and principle negotiating objectives as set forth in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, and most members believe the Trade Agreement between the United States and Mexico promotes the overall economic interests of the United States, provided that Canada is included and the serious reservations about the issues outlined below are addressed. That being stated, not all members of IGPAC have expressed complete support for the Trade Agreement between the United States and Mexico.

More members would likely support the Trade Agreement between the United States and Mexico if some of the issues discussed below were addressed prior to sending the agreement to Congress for consideration. IGPAC members strongly believe that any revised NAFTA agreement must include the nations of Canada, Mexico and the United States, and the failure to incorporate all parties will negatively impact the competitiveness of all members of the agreement.

In addition, IGPAC members believe firmly that this FTA -- like all trade agreements -- should be drafted, implemented, and interpreted, to respect and give due consideration to existing state and local level regulatory, tax, and economic development policies, and to support the social, economic, and environmental values that those policies promote. Consistent with longstanding principles of federalism, statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect reasonable responses to the needs of their constituents, should not be overridden by provisions in trade agreements.

III. Brief Description of the Mandate of the Intergovernmental Policy Advisory Committee

Established by the United States Trade Representative (USTR), pursuant to Section 135(c)(2) of the Trade Act of 1974 (19C. 2155(c)(2), as amended, the Federal Advisory Committee Act (5 C. App. II) and Section 4(d) of Executive Order No. 11846 dated March 27, 1975, the Intergovernmental Policy Advisory Committee (IGPAC) is charged with providing overall policy advice on trade policy matters that have a significant relationship to the affairs of state and local governments within the jurisdiction of the United States.

IGPAC consists of nineteen members appointed from, and reasonably representative of, the various states and other non-federal governmental entities within the jurisdiction of the United States. These entities include, but are not limited to, the executive and legislative branches of state, county, and municipal governments. Members may hold elective or appointive office. The Chair of the Committee is appointed by the US Trade Representative, and members are appointed by, and serve at the discretion of, the US Trade Representative for a period not to exceed the duration of the IGPAC charter. The US Trade Representative, or the designee, shall convene meetings of the Committee.

IGPAC's objectives and scope of its activities are to:

- Advise, consult with, and make recommendations to the US Trade Representative and relevant Cabinet or sub-Cabinet members concerning trade matters referred to in 19 C. Section 2155(c)(3)(A).
- Draw on the expertise and knowledge of its members and on such data and information as is provided it by the Office of the US Trade Representative.
- Establish such additional subcommittees of its members as may be necessary, subject to the provisions of the Federal Advisory Committee Act and the approval of the US Trade Representative, or the designee.
- Report to the US Trade Representative, or the designee. The US Trade Representative or the designee will be responsible for prior approval of the agendas for all Committee meetings.

The US Trade Representative, or the designee, will have responsibility for determinations, filings, and other administrative requirements of the Federal Advisory Committee Act. The Office of Intergovernmental Affairs and Public Liaison of the Office of the Trade Representative will coordinate and provide the necessary staff and clerical services for IGPAC. IGPAC Members serve without either compensation or reimbursement of expenses.

IV. Negotiating Objectives and Priorities of the IGPAC

State and local governments play a vital role in advancing America's global competitiveness. IGPAC members affirm that our nation's economic interests are best served by embracing trade and economic development policy strategies that:

- (1) Are developed in a nonpartisan manner in close consultations with relevant stakeholders;
- (2) Yield significant, measurable economic gains for the country, increase the competitiveness of American industries, and promote full employment while broadly raising living standards;
- (3) Create more open, transparent, and reciprocal market access;
- (4) Commit resources to global market research and trade development assistance for small and mid-sized US businesses, in order that they can take advantage of new and growing market opportunities, and increase exports;
- (5) Provide comprehensive assistance to workers negatively impacted by technology and changing trade and investment flows;
- (6) Invest in innovative research and technologies to foster commercialization and job creation in the globally competitive industries and jobs of the future;
- (7) Safeguard essential federalism principles;
- (8) Respect and promote basic American values;
- (9) Protect other US objectives including consumer interests, national security and the protection of health, environmental and safety laws and regulations;
- (10) Promote labor rights and the rights of children in keeping with ILO core labor standards;
- (11) Provide foreign investors with no greater substantive and procedural rights than those enjoyed by US citizens and businesses; and
- (12) Ensure that environmental and trade policies are mutually supportive.

Although the Trade Agreement between the United States and Mexico meets a number of these strategic goals, IGPAC believes that the agreement could be significantly improved if the changes discussed below were incorporated in the agreement prior to Congressional consideration.

Recommendations for Improving Federal-State Trade Policy Consultations

IGPAC appreciates USTR's efforts launched in 2003 to broaden participation in trade policy formulation by state and local government representatives through the expansion of IGPAC. In order for IGPAC to perform its duty it is absolutely critical that the committee consist of keenly interested cleared advisors that represent a wide variety of states and expertise in state and local interests potentially impacted by international trade agreements.

In addition, IGPAC strongly urges changes to the advisory committee process to allow members much more timely access to the working text. Moreover, IGPAC seeks improvements in the collection and dissemination of international trade data. In particular, as the US economy is increasingly driven by the services sector, it is vital that state-level services export data collection be improved. Similarly, states and regions cannot assess their trade balances and relative global competitiveness unless the federal government makes significant progress in collecting state-level merchandise and services import data.

In the past, USTR briefed IGPAC on trade policy developments on the first Monday of every month and scheduled subject-specific briefings during the course of the negotiation of trade agreements, but these practices had been discontinued until the Administration's recent notification of its plan to enter into a revised NAFTA, at least with respect to Mexico. Particularly with the fast pace of the Trade Agreement between the United States and Mexico negotiations, there were limited opportunities for IGPAC to provide USTR with timely information about state and local concerns during the course of the negotiations. IGPAC respectfully requests that regular briefings be scheduled at least once every quarter by phone in order for members to stay more fully abreast of trade policy developments, and more frequent subject-specific briefings as the need arises during the course of future trade negotiations. IGPAC would also appreciate receiving redacted summaries of trade policy negotiations that can be reviewed by non-cleared members and other state and local officials.

IGPAC members believe that the Trade Agreement between the United States and Mexico meets most of the overall and principle negotiating objectives as set forth in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 and most members believe the Trade Agreement between the United States and Mexico promotes the overall economic interests of the United States, provided that Canada is included in the final agreement and the serious reservations about the issues outlined below are addressed. However there is not uniform support for all the provisions in the Trade Agreement between the United States and Mexico. A fuller evaluation of the economic impacts of the agreement is hampered by the absence of the US International Trade Commission's (USITC) economic analysis of the Trade Agreement between the United States and Mexico. Moreover, the Administration notified Congress of its intent to enter into a revised NAFTA agreement with Mexico, and possibly Canada, prior to finalizing the language of the agreement. This timing makes it extremely difficult for advisory committees to finalize their reports in keeping with statutory deadlines.

IGPAC members strongly believe a revised NAFTA agreement must include the nations of Canada, Mexico and the United States, and the failure to incorporate all parties will negatively impact the competitiveness of all members of the agreement. Since the original NAFTA agreement was implemented, trade among NAFTA partners has more than tripled, forming integrated production chains among all three countries. It is vital that these export markets and supply chains not be disrupted by not including any member country in a revised agreement.

IGPAC members believe firmly that all trade agreements should be drafted, implemented, and interpreted, in a manner that respects and gives due consideration to existing state and local level regulatory, tax, and economic development policies and supports the social, economic, and environmental values that those policies promote. Consistent with longstanding principles of federalism, statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect locally appropriate responses to the needs of their constituents, should not be overridden by trade agreements. In addition, our trade agreements must recognize and support the sovereignty of state judicial systems and the enforcement and finality of state court judgements.

These concerns are reflected in directive of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 that trade agreements “ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources.” Further, the Act makes “ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States” a crucial trade policy negotiating objective. Trade agreements must honor and maintain the principle that the United States will request, but not require, states to alter their regulatory regimes in areas over which they hold constitutional authority.

At the same time that the United States pursues greater market access and more emphasis on SMEs in recent FTAs, IGPAC stresses the importance of expanding America’s trade promotion capacity. While it is often stressed that small- and mid-sized firms stand to benefit the most from FTAs, these companies frequently find it difficult to enter foreign markets. The economic literature has extensively reported that US SMEs face numerous barriers to exporting their products. These include tariffs, the cost and resources to explore and test new markets, research and development, product localization, compliance with foreign technical standards and other regulations, trade finance, the small scale of SME production, time-consuming foreign customs procedures, and language and cultural differences. At the state-level, we are well aware of the many local companies that have overcome these obstacles and successfully begun to export for the first time, entered new markets or expanded their exports as a result of both federal and state export promotion programs.

IGPAC believes that the agreement could be significantly improved if the changes discussed below were incorporated in the agreement prior to Congressional consideration.

Trade Remedies

During the negotiations of the Trade Agreement between the United States and Mexico the Administration proposed establishing new fair trade rules for seasonal and perishable products, such as fruits and vegetables, which would make it easier to initiate antidumping and countervailing duty cases by allowing growers to bring an injury case by domestic region and draw on seasonal data. This proposal was ultimately dropped from the NAFTA 2.0 agreement. IGPAC members have varying opinions on this outcome. The IGPAC representative from Florida is disappointed that this provision was left out of the agreement while the representatives from Washington and Arizona support the elimination of this proposal.

Government Procurement

IGPAC supports the decision to not cover sub-central government procurement under the Trade Agreement between the United States and Mexico. At the time of the Administration's notification to Congress, USTR had not posted the annexes which list the many exclusions to the government procurement chapter. However, it is IGPAC's understanding that the exclusions in previous government procurement chapters will be found in the Trade Agreement between the United States and Mexico. IGPAC supports this decision. IGPAC continues its longstanding position that any sub-central procurement commitments must be voluntary positive list commitments to be determined by each state or local government.

IGPAC opposes any U.S. "dollar-for-dollar" market access proposal that would give other FTA signatories the same amount of access the U.S. receives in their markets as this is disproportionate given the relative size of the economies of the three countries.

IGPAC, however, supports the provision under "Conditions for Participation" which explicitly allows procuring entities to promote compliance with labor laws in the territory in which the good or services is produced as set forth in the Labor Chapter.

Investment

Most, but not all, IGPAC members believe that the complete elimination of the investor-state dispute resolution mechanism would improve the Trade Agreement between the United States and Mexico. Many trade organizations have raised legitimate criticisms of traditional ISDS processes. As noted above, the latest draft of the Trade Agreement between the United States and Mexico makes improvements to the ISDS process. More can be done. The USTR should further improve the investor-state dispute mechanisms by drawing upon the variety of thoughtful reform proposals that have been generated by trade groups and bar associations in recent years.

Some of the changes to the dispute mechanism, at least as they apply to Mexico, that IGPAC supports include:

- Article 3 of Annex 11-D (Mexico-United States Investment Disputes) which limits claims to post-establishment national treatment, MFN and direct expropriation for most industry sectors.
- Article 3 of Annex 11-C (Legacy Investment Claims and Pending Claims) Mexico-United States Investment Disputes), which appears to phase out the investor-state dispute mechanism of the original NAFTA over three years.
- Article 11.14: Denial of Benefits, which allows a Party to deny the benefits of the chapter to investors of another party that are controlled by a non-party.
- Article 5 of Annex 11-D (Mexico-United States Investment Disputes, which requires an investor to first exhaust domestic courts or administrative remedies prior to submitting a claim for arbitration.
- The phase-out of ISDS with Canada over three years should Canada be included in the agreement.

- Footnote of Annex 11-D (Mexico-United States Investment Disputes which clarifies that MFN provision cannot be used to bring in the ISDS procedures of other trade agreements into the Trade Agreement between the United States and Mexico.

Cross Border Trade in Services

Given the growing importance of services industries to the US economy, state and local governments generally support the objective of FTAs to liberalize trade in services industries as a means of increasing market access for US firms and for furthering trade development objectives. IGPAC, however, has always been concerned by the potential impact of trade rules on the ability of states to regulate services in the public interest. US states regulate a broad range of service activities, including health care, communications, financial, utilities, and professional services. States maintain many non-discriminatory regulations to advance important policy objectives that are not related to the quality of service at issue, including those related to environmental protection, land use, fair competition and economic development.

IGPAC members are very pleased that the Trade Agreement between the United States and Mexico services text does not contain a domestic regulation “necessity test” which would require that services regulation be no more burdensome than necessary to ensure the quality of the service. Inclusion of such a test in the disciplines themselves would effectively reverse the deference that US courts have given for many years to state economic legislation. Dating back to at least the 1930s, US courts have deferred to legislatures’ choice of the degree of burden to impose on commerce, as long as such regulations are not applied without a rational basis or discriminatorily. For these reasons, IGPAC has been very concerned by the inclusion of a necessity test in earlier US FTAs. The absence of a necessity test in the Trade Agreement between the United States and Mexico services domestic regulation text is a very positive outcome.

IGPAC continues to be concerned by the narrow exemption for services supplied in the exercise of government authority contained in the WTO General Agreement on Trade in Services (GATS) and FTAs, including the Trade Agreement between the United States and Mexico, which excludes “services supplied in the exercise of government authority.” The text provides that “services supplied in the exercise of governmental authority means, for each Party, any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers.” The concepts of “commercial basis” and “in competition” are undefined and are subject to conflicting interpretations. At worst, if narrowly interpreted the exclusion of services supplied in the exercise of government authority could expose state public service programs to challenge.

Although the absence of a necessity test is a positive outcome, IGPAC members are concerned with the “negative list” approach to scheduling commitments for services trade liberalization and would strongly prefer a positive scheduling approach. The WTO tribunal ruling against the United States in the GATS internet gambling case brought by Antigua and Barbuda illustrates the inherent peril of the “negative list” approach, which risks covering economic activities that were expected to be exempted, either by inadvertence or by lack of knowledge of relevant laws and regulations.

Digital Trade

Some IGPAC members have raised concerns that this new chapter, which applies to sub-federal governments, could limit state efforts to ensure compliance with personal information protections by requiring “that any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented.”

Some IGPAC members have raised the concern that the exceptions to the broadly written limitations on access to source code and algorithms (Article 19.16(2)) are written too narrowly and could limit access to source codes and algorithms needed for state licensure, oversight and enforcement activities.

In addition, it needs to be broadened to “Nothing in this Article shall preclude a regulatory body or judicial authority of a Party from requiring a person of another Party to preserve and make available the source code of software:, or an algorithm expressed in that source code, to the regulatory body or judicial authority for a specific investigation, inspection, examination enforcement action or judicial proceeding, subject to safeguards against unauthorized disclosure.”

Intellectual Property Rights

IGPAC recognizes the importance of intellectual property-intensive industries to the economy of our country and the estimated 40 million Americans jobs that are directly or indirectly related to these industries. The enforcement of strong intellectual property rights (IPR) helps ensure that IPR holders reap the benefits of their creativity and innovation, while preserving the comparative advantage of US intellectual property-intensive industries. The failure to enforce strong IPR damages US firms and workers and potentially exposes consumers to harmful counterfeit and pirated products.

At the same, the Trade Agreement between the United States and Mexico text must find the appropriate balance between protecting IPR and the affordability of products and services to consumers. In particular, given the increasing costs of healthcare, the affordability of pharmaceutical products is extremely important for consumers at home and abroad. This is a very important issue for state governments, which foot the bill for the federal-state Medicaid program, in which pharmaceutical costs continue to rise. Policies that delay the availability of generics and biosimilars increase state costs and can result in reduced access to medicines. Any provisions that address patent linkage, the ever-greening of patents and excessive data exclusivity periods must distinguish between respecting the bona fide rights of intellectual property holders and the efforts of pharmaceutical companies to expand their profits at the expense of consumers.

Intellectual Property Rights – Medpharm Annex

IGPAC appreciates that sub-central government healthcare programs are not directly subject to this annex. IGPAC’s representative from Maine, however, is concerned that the review process under Article 3 for listing new pharmaceutical products or medical devices for reimbursement purposes, or setting the amount of such reimbursement, could be used by pharmaceutical companies to drive up the costs for U.S consumers.

State Owned Enterprises

IGPAC welcomes the inclusion of a chapter establishing rules for state-owned enterprises (SOEs) as US companies are facing increasing competition from them in international markets. Frequently, US companies cannot compete against SOEs on a level-playing field as they often receive government support including discounted loans, land grants, lower input costs or other subsidies, preferential access to government procurement, trade protection, regulatory advantages including national standards, and relaxed regulatory enforcement that unbalance the playing field. The Trade Agreement between the United States and Mexico contains welcome transparency provisions that will throw light on the operation of SOEs and rules to help to ensure that US companies can compete with them on a level playing field.

As of this time the Chapter currently only covers central government SOEs but calls for negotiations to determine the future coverage of sub-federal SOEs within six months after the agreement enters into force. IGPAC supports the postponement of sub-federal coverage as it is unclear how the text would impact US sub-federal SOEs, and believe that additional information and a more robust consultation process with potentially affected states is needed before further commitments are made.

Labor

Overall, the labor provisions of the Trade Agreement between the United States and Mexico contain many improvements over earlier labor chapters. The inclusion of the provisions relating to Migrant Workers (Article X.8); Violence Against Workers (Article 7), and the provisions related to Forced or Compulsory Labor (Article X.6) are improvements over past FTAs. In addition, the annex on Worker Representation in Collective Bargaining (Annex 23-A) could lead to improvements in labor conditions in Mexico.

The committee also appreciates the exclusion of state and local labor laws that are not enforceable by action of the federal government from the enforcement provisions of the TPP labor chapter.

However, in light of the recent successful defense by the Government of Guatemala, in a case brought by the United States under the labor provisions of the CAFTA-DR Agreement, the standards for proving violations under the Trade Agreement between the United States and Mexico Labor Chapter need to be strengthened in order to ensure that the chapter can be effective and enforceable. In particular, the Enforcement of Labor Laws provision (Article X:5) requiring complaining parties to demonstrate that the defending party violated the agreement in a manner that constitutes "a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties" might establish a bar that is too high of a bar to meet, even with the addition of the explanatory footnote.

IGPAC endorses the decision to provide the same binding dispute settlement provisions to the labor chapter that are applied to commercial disputes.

Environment

IGPAC members support the increasing focus on environmental issues. The committee also appreciates the exclusion of state and local environmental laws that are not enforceable by action of the federal government from the enforcement provisions of the Trade Agreement between the United States and Mexico environment chapter.

As with the labor chapter, the Enforcement of Environmental Laws provision (Article X:4) requiring complaining parties to demonstrate that the defending party violated the agreement in a manner that constitutes "a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties" might establish a bar that is too high to meet, even with the addition of the explanatory footnote.

IGPAC endorses the decision to provide the same binding dispute settlement provisions to the environmental chapter that are applied to commercial disputes.

Good Regulatory Practices

IGPAC appreciates that this chapter does not apply to the sub-central level of government but firmly believes that dispute settlement should not apply.

Review and Term Extension

Almost all IGPAC members strongly believe that this provision is unhelpful as the Parties already have the ability to terminate the agreement. This provision just creates uncertainty, discourages trade and investment and will reduce rather than enhance the competitiveness of the North American region.

Dispute Settlement:

IGPAC supports the binding dispute settlement procedures in the Trade Agreement between the United States and Mexico. IGPAC's views on the ISDS provisions of the Trade Agreement between the United States and Mexico are noted above under "Investment."

Currency Manipulation

In recent years an increasing number of economists and trade policy experts have identified currency manipulation as causing the United States to experience much larger trade deficits and jobs losses than the country otherwise would have experienced absent such manipulation. The current international economic system has been ineffective in addressing currency manipulation. While the Macroeconomic Policies and Exchange Rate Matters chapter of the Trade Agreement between the United States and Mexico is a step in the right direction, it is uncertain whether the provisions are strong enough to prevent currency manipulation, particularly since the key provisions are not enforceable under dispute settlement.

VI. Membership of Intergovernmental Policy Advisory Committee (IGPAC)

Carol Colombo	Arizona Commerce Authority
Robert Hamilton	Committee Chair, Washington State Department of Commerce
Julia Hurst	National Lieutenant Governors Association (NLGA)
Jon Jukuri	National Conference of State Legislators (NCSL)
Andy Karellas	Council of State Governments (CSG)
Joe McKinney	National Association of Development Organizations
Judge Gregory Mize	National Center for State Courts
Ekrem Sarper	National Association of Insurance Commissioners (NAIC)
Sharon Treat	Maine Citizen Trade Policy Commission
J. Stuart Adams	Utah State Senate
Paul Farrow	Waukesha County, Wisconsin
Burt Jones	Georgia State Senate
Robert Loughery	Bucks County, Pennsylvania
Larry Obhof	Ohio State Senate
Joey Songy	Office of Mississippi Governor Phil Bryant
Karthryn Starkey	Pasco County, Florida
Libby Szabo	Jefferson County, Colorado
Wes Ward	Arkansas Agriculture Department
Acquanetta Warren	Fontana, California