

## **U.S. - Chile Free Trade Agreement - Impact on State and Local Governments**

### **I. Introduction**

The United States - Chile Free Trade Agreement (FTA), the first comprehensive trade agreement between the United States and a South American country, cuts tariffs and opens markets for American workers, farmers, investors and consumers, reduces barriers for services, protects leading-edge intellectual property, keeps pace with new technologies, ensures regulatory transparency and provides effective labor and environmental enforcement.

Throughout the negotiations, the Office of the United States Trade Representative (USTR) held public hearings and consulted frequently with the Congress and interested parties. U.S. negotiators also held more than 100 meetings with some 700 cleared advisors from business, farm groups, labor unions, environmental groups, consumer organizations, and state and local governments and associations to discuss and seek their advice on U.S. negotiating positions. The text of the U.S.-Chile FTA was made available to advisors in early January via a new secure encrypted section of the USTR website, in order to better facilitate access.

One of USTR's 31 chartered advisory committees, the Intergovernmental Policy Advisory Committee on Trade (IGPAC), is made up exclusively of state and local representatives and associations representing executive, legislative and judicial branches of sub-federal government, as well as states, counties, and cities. The National Governors Association, Council of State Governments, the National Conference of State Legislatures, the National League of Cities, the National Association of Counties, and the National Association of Attorneys General are among the organizations represented on the IGPAC. Each of the advisory committees including the IGPAC was required to produce a report on the impact of the U.S.-Chile FTA, pursuant to section 135(e) of the Trade Act of 1974. USTR also maintained and used the "State Point of Contact" (SPOC) system, whereby the Governor's offices in each of the states or territories designate a single contact for the purpose of receiving information from USTR and disseminating it to interested parties within the state, or transmitting information to USTR.

In the IGPAC report on the U.S.-Chile FTA (available in full at [www.ustr.gov](http://www.ustr.gov)), the Council of State Governments observes that "State governments are strong supporters of expanding international trade and investment. The 50 states spend approximately \$100 million each year on trade and investment promotion and maintain a network of over 240 overseas offices. Given this commitment to international commerce, states have a clear interest in increasing market access for state businesses. However, this support is tempered by a deep commitment to protecting the independent powers and responsibilities of states within the federal system."

Similarly, the National League of Cities "enthusiastically supports trade investments because they generate jobs and economic growth in our local communities. Our ardent support for free trade is balanced by our commitment to fair trade laws that respect the authority of states and municipalities to regulate land-use, health, safety, welfare, and environment measures." (From the IGPAC report, available in full at [www.ustr.gov](http://www.ustr.gov))

Based upon these and other comments received regarding the potential impact of the Chile FTA on sub-federal governments, USTR has addressed three main areas of interest to states and localities in the U.S.-Singapore FTA: government procurement, services, and investment. Additionally, USTR has also taken into account states and localities' overall interest in preserving sub-federal regulatory abilities and prerogatives.

## **II. Government Procurement**

During the Uruguay Round negotiations, 37 states agreed to follow the Agreement on Government Procurement (GPA), an agreement under the auspices of the World Trade Organization (WTO), with respect to the procurement of the entities that each state specified in Annex 2 to the GPA. In return for the benefits that Chile will accord to the United States pursuant to the FTA provisions on government procurement, those states will treat Chilean suppliers essentially the same way they treat signatories of the GPA. Finally, the United States-Chile FTA will not require local governments to devote any resources to implementation, as they are not covered by the FTA.

## **III. Chapter 8: Cross-Border Trade in Services**

This Chapter covers the supply of services on a cross-border basis, which includes services supplied from the United States into Chile or vice versa; by a national of a Party in the territory of the other Party; as well as the consumption of services in the other Party. Services supplied by an investor or investment are covered under the Investment Chapter and also benefit from a few provisions in the Services Chapter. While state and local governments are subject to the obligations of this Chapter, they will not be required to make any changes to existing laws or regulations which may be inconsistent with core obligations such as national treatment and most-favored-nation treatment. In its market access commitments, the U.S. included a reservation for existing state level non-conforming measures (a "grandfather" clause); existing local level non-conforming measures are given the same protection through the text itself.

Nothing in Chapter 8 or any other provision of the United States.-Chile FTA requires the privatization or deregulation of any government services, including water supply or distribution services, education services or health services. The Chapter also excludes services supplied in the exercise of governmental authority.

The implementation of the Cross-Border Services Chapter should not require an additional commitment of resources by state and local governments.

## **IV. Chapter 10: Financial Services**

This Chapter covers measures relating to U.S. and Chilean financial institutions, U.S. and Chilean investors and investments in such institutions, and cross-border trade in financial services. The Chapter does not apply to measures relating to public retirement plans or social security systems. While states and local governments are subject to the obligations of this Chapter, they will not be required to make any changes to existing laws or regulations which may

be inconsistent with core obligations pursuant such as national treatment and most-favored-nation treatment. In its market access commitments, the U.S. included a reservation for existing state level non-conforming measures (a “grandfather” clause); existing local level non-conforming measures are given the same protection through the text itself.

The implementation of the Financial Services Chapter should not require an additional commitment of resources by state and local governments.

#### **IV. Investment**

The investment chapter of the FTA draws upon and clarifies investment protections that have been included in U.S. treaties and free trade agreements for decades. Consistent with the Trade Act of 2002, the provisions of the FTA on investment are designed to ensure that foreign investors do not receive greater substantive rights than U.S. investors. We have also taken additional steps to protect States’ regulatory authority.

First, existing State laws are not covered by the provisions in the investment chapter pertaining to most-favored nation treatment, national treatment, performance requirements, and senior management and boards of directors. Only future State measures will be covered by these provisions.

Second, the investment chapter draws directly upon U.S. legal principles and practices. For example, consistent with U.S. takings and due process protections, the FTA clarifies that only property rights or property interests in an investment are entitled to expropriation protection. The expropriation provision also incorporates standards defined by the U.S. Supreme Court for determining when a government measures rises to the level of an expropriation.

Third, we have taken measures to ensure that arbitration panels interpret the FTA in accordance with its intent. For example, governments that are party to the FTA have the authority to issue interpretations of the investment provisions that are binding on arbitration panels. Furthermore, both governments that are party to the FTA will be engaged at every step of the litigation process. Even FTA partners who are not litigants in the dispute may make submissions during litigation commenting on the interpretation of the investment provisions. An interim review procedure will allow review of draft decisions by litigants, and by the other FTA partner not directly involved in the dispute. Litigants, including the defending government, will be given an opportunity for comment at this stage.

Fourth, we have refined the investor-state dispute resolution process to help expedite the process and weed out frivolous claims. For example, we have developed procedures to expedite the selection of arbitrators. Furthermore, the FTA includes an expedited procedure to dismiss frivolous claims and handle jurisdictional objections. To further deter frivolous claims, the FTAs expressly authorize awards for attorneys’ fees and costs after deciding whether a claimant has raised a frivolous claim.

Finally, we have taken steps to enhance transparency and public involvement in the investor-state

arbitration process. Amicus submissions are expressly authorized and open hearings are required. The Administration will provide an opportunity for public input into U.S. Government positions in matters related to investment disputes. In the past, we have provided briefings and shared proposed positions with a variety of stakeholders on a regular basis. We will continue to do so as a general matter and upon request.

## **V. Regulatory Interests**

The United States-Chile FTA does not affect the right of the United States and sub-federal governments to establish, maintain, and fully enforce domestic laws protecting consumers, health, safety, and the environment.

## **VI. Conclusion**

The States and local governments are poised to benefit from the United States-Chile FTA, which will give America preferential access to one of the world's fastest growing economies, enabling products and services to flow back and forth from the United States and Chile with no tariffs and under streamlined customs procedures. Given the size of Chile's economy, however, we do not believe that state and local governments will need additional resources to deal with the effects of increased trade under the United States-Chile FTA.