Speech to the National Conference of State Legislatures

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Thank you for the opportunity to speak to you today about the impact of NAFTA on the states. I wish I could say that I knew exactly what that would be. But unfortunately, the negotiations have been held virtually in secret. To get even the semblance of a credible base for public debate, we've had to rely on a leaked text from the Dallas round of negotiations last February, gossip from journalists who shmooze people close to the negotiations, and then compare that with what our counterparts in Canada and Mexico are hearing.

It's taken a bit of detective work. But fortunately, I like to read mystery stories in airplanes, an experience which serves me well as I try to ferret out NAFTA's implications for farmers and consumers in the 50 states. In mystery stories, someone always gets killed. And with NAFTA, the same is metaphorically true. Fruit and vegetable farmers in southern states debate only whether it will be a slow or sudden death, depending on the timeframe for increased market access of Mexican products. Corn farmers in Mexico have the same question. Workers in two of our nation's largest industries, autos and textiles, are also concerned, as well as small businesses in all three countries. And then of course, there's the environment, and the real threat to public health, currently localized in the border regions.

But I'm not going to focus on these sectors today, as important as they are. After all, I'm addressing that newest of special interest groups, state legislators. Welcome to the club. Because if you're not already as concerned about protecting your jobs as textile workers are, you should be. And unfortunately, you're going to have to do alot of detective work back home to find out why.

Elected officials all over the country are becoming concerned about the impact of free trade agreements on local jurisdictions. They took the lead from organizations like Public Citizen who produced an excellent report on the legal implications of trade agreements. Now they're following up by seeing state legislation through the new lens ground out by free trade agreements. These include the current GATT, proposed changes to GATT in the Uruguay Round, the Canada-U.S. Free trade agreement, and NAFTA.

The Western Governors Association, as you probably know, released a report in May which finds that a broad range of laws may be subject to challenge under the new rules proposed for GATT. Many of these rules are the same as those proposed in NAFTA. States will essentially be stripped of their rights to set policy in three key areas: economic development, health and safety, and environment.

The first broad power to be undermined is the power to determine what kind of development strategy states want to pursue. Beginning in the 70's a new philosophy of development began to take hold. It was built on the work of David Birch, Jane Jacobs and others who demonstrated that more jobs were created by small businesses, that import replacement was as good for the economy as export led growth, and that smokestack chasing could even be detrimental for long term development. Many state programs support this movement to growth from within. And much of the structure of that policy is discriminatory <u>for</u> people in the state. Agricultural price premium legislation such as that passed by Vermont in 1988 to support dairy farmers. Tax incentives for agricultural processing to add value locally. These included the lower excise taxes on locally produced

alcoholic beverages and other supportive programs in more than 30 states that have just successfully been challenged by a landmark GATT decision known as Beer II. Buy local programs, again existing in more than 30 states that promote local consumption of locally produced goods and services. State procurement programs that set aside contracts for minority owned businesses or have Buy America provisions. The list goes on. Basically anything that can be construed as a nontariff barrier to imports. What's ironic is that these policies are part and parcel of the very strategy our nation, an dmore recently industrializing nations like the Asian tigers have used to develop their national economies: targeted development of key sectors through the use of incentives, including import restrictions, that keep money circulating in the local economy rather than flowing out to distant exporters.

Export promotion programs don't go untouched, by the way. Export subsidies like low interest or no interest loans or grants may be vulnerable to challenge, as well as state funding for Trade Offices and missions. Most of these provisions would be challenged as technical barriers to trade or violations of procurement provisions under the Uruguay Round and NAFTA.

The second very important area up for political redefinition is the protection of public health. Here, we have a mutually respectful system, at its best, with federal regulators that allow states to have stronger standards than the feds on food safety and environmental protection. Many states have adopted standards higher than the federal standards for food safety. California's Proposition, the most famous, requires labeling of carcinogenic and reproductive toxins in food, drugs and cosmetics. The states of Iowa, Maryland, Massachussetts, Minnesota and Wisconsin and others have banned the use of pesticides or restricted their use where the EPA has placed no restrictions on them. Minnesota requires an environmental review of releases of genetically engineered organisms in the state. These standards are vulnerable to international challenge as being trade restrictive under the sanitary-phytosanitary provisions of the Uruguay Round and NAFTA.

The Uruguay Round of the GATT negotiations has proposed harmonization with a set of international of standards promulgated by the Codex Alimentarius. A word about the Codex is in order here. For even if the NAFTA negotiators back off strict adherence to the standard, the move for international harmonization of food safety standards will continue and the Codex is the likely body to set the norms. Based in Rome, the Codex is dominated by executives from chemical and food companies including the American Association of Cereal Chemists, the American Frozen Food Institute, Hershey foods, Kraft, Nestle and PepsiCo. One out of every six of the Codex pesticide standards is weaker than those now set by U.S. law. Codex allows tolerances 10 to 50 times the US standard for DDT, heptachlor and aldrin. And Codex standards cover only 200 out of 10,000 chemicals in use.

In both the Uruguay Round language and NAFTA, states and federal governments are allowed to have higher standards than the agreements mandate. However, they must show that their approach is the least trade restrictive. On health questions, they must show that health impacts have always been weighed against business impacts, and where there is conflicting scientific evidence, the least trade restrictive approach must be used.

The third key area is environment. States have moved to protect and preserve their environments through changes in solid waste management, groundwater protection, forestry management, auto emissions standards, among others. Many of these laws are vulnerable, such as laws in New England states requiring packaging to be recyclable and Washington's raw log export ban on timber from public lands. Again, these fall under technical barriers to trade.

Canada has challenged the U.S. asbestos standard on the grounds that the scientific evidence is conflicting on asbestos and that there may be a less trade restrictive way to handle the risk of asbestos exposure than our policy currently allows. On another continent, Portugal is challenging Germany's recycling law stating that the least trade restrictive way to handle waste is to incinerate it. And Canada is challenging state procurement of recycled paper with the argument that Canada doesn't have as much capacity to produce recycled paper, and therefore the state procurement policy is a thinly veiled ploy to protect domestic paper manufacturers.

The recent decision by a GATT panel that upheld Mexico's challenge to the U.S. embargo on tuna with a dolphin-kill ratio higher than that allowed by the Marine Mammal Protection Act set several precedents important for the states. Perhaps most important, it ruled that units of government could not discriminate against a product because of the process by which it is made. On the one hand, that means that we can't keep out imports made from slave labor. But on the other hand, it means that wine is wine. It doesn't matter if its made from Minnesota grapes. You can't discriminate for Minnesota grapes because then you discriminate against French grapes. Yet to be determined is whether a potato is a potato if it has a pig gene in it. The process by which the food is produced is immaterial if it is considered to be a like product by the GATT arbiters.

Your main problem in maintaining your authority to make policy in any of the areas I've mentioned is that GATT has been declared superior to state law. This was explicit in the recent Beer II decision. The dispute resolution mechanism proposed for NAFTA which includes the technical barriers to trade and sanitary phytosanitary rules that threaten state laws has been thrown into the GATT system. What's more, states don't have standing in disputes, so they must rely on USTR to defend them against challenges to dispute resolution panels.

Countries may challenge any state law they believe is a barrier to trade. NAFTA disputes on sanitary-phytosanitary standards and technical barriers to trade will be thrown to the GATT dispute resolution process. Under this process, a three person panel of non-involved countries meets behind closed doors, reviews the challenge, without public comment, and issues a decision. As mentioned earlier, states do not have standing and may have only an advisory role to USTR in the preparation of their case. If the party who brings the challenge wins, the U.S. must change its law or face countervailing sanctions. In the case of differential standards on pesticides between federal and state units of government, the states will be on shaky ground because the fact that the federal government sees no need to regulate the pesticide means that there is a less restrictive alternative to trade and that there is different assessment of the scientific evidence. The congress has the constitutional power to compel the states to rescind the pesticide ban. In addition, the Executive Branch would have the power to sue states to bring their laws into compliance with another superior law--that of the GATT or NAFTA.

The current GATT mandates that federal governments are responsible for anything states do. But the Uruguay Round takes this mandate one step further and states that the federal government must take affirmative actions and create positive mechanisms to force compliance with the GATT rules. Such a positive mechanism could be the rescinding of states' rights to go beyond the Food Drug and Cosmetic Act in standard setting, for example.

More important, and more subtle than the challenge to existing standards, is the detrimental effect free trade agreements could have on future policymaking on these issues where public health is given less weight than trade considerations.

Here's an example of how this is working in the present. In 1990 the FDA discovered residues in imported wine of a pesticide, procymidone, for which there is no standard in the U.S. Some scientific studies indicated that procymidone was carcinogenic and that it might have reproductive effects, but the data were inadequate to permit the full analysis normally required for the establishment of a tolerance. However, the EPA, at the urging of the wine manufacturers, proposed the establishment of an interim tolerance, largely in response to manufacturer's complaints that trade was being negatively affected. "EPA decided that because of the overwhelming trade issues, it would deviate from its usual administrative practice and review studies which did not meet all guideline requirements to determine if nonetheless there was sufficient information to make the statutory 'public health' finding." And in a recent memo from the Illinois Retail Merchants Association about a proposed food toxic disclosure bill similar to California's Proposition 65, they state that differing standards between states will ". . . create a barrier to international trade: imported food products acceptable in other states would be unacceptable in Illinois, and exporting countries would certainly raise this as a trade issue at the federal level."

Where this really gets murky is when legislatures try to take a preventive approach before a product has sufficiently maimed, mutated or killed enough people for the conclusive epidemiological evidence necessary to constitute "scientific justification." With the explosion of new food products that will be coming on the market as a result of genetic engineering, this issue assumes even greater importance. Recently the FDA, in accord with this administration's policy of deregulation, ruled that it will not require pre-market notification, testing, or labeling of genetically engineered foods. It's ironic that working away in another corner of that august body is a research team, trying to understand what happened in the rash of deaths and disabilities resulting from ingestion of genetically engineered L-tryptophan. Thirty-one people died and more than 1,500 became ill, some with permanent disabilities. When the outbreak occurred, the FDA was able to identify the manufacturer and lot numbers to recall the product. There will be no such possibility for genetically engineered foods under the current ruling.

Given the lack of federal protection, what will happen to states that want to be more cautious and not simply accept the gene splicers' claims that peanut genes in corn plants won't hurt people who are allergic to peanuts? In Minnesota, we've been embroiled in a debate about whether or not we should require an environmental review of any release of a genetically engineered organism into our environment. Our legislature determined that we should. If this law were to be challenged as trade restrictive, how would we determine whether or not there is scientific justification for either the gene splicers' or consumers' stance? The real question is whether or not people in Minnesota want to take the risk. And that is the question that no longer has a place under our proposed trade policy.

How will these issues affect you as legislators? Will they have a dampening effect on your efforts to innovate, given that you might be sued by our own government to bring laws into line with GATT and NAFTA? Would states in New England have passed laws banning food packaging that cannot be recycled, knowing they could be challenged? Or California its strcit air pollution requirements on automobiles? I hope the answer is yes, and that the leadership in our states would force other countries to go through the time and expense of a challenge.

But a better approach is to nip this trend in the bud. To work offensively to make sure that states maintain their power to legislate for the common good. You have until March of next year to make your concerns known to USTR about specific impacts on your state laws. I urge you to get the Western Governors' Association report and compare the provisions in NAFTA with WGA's assessment of the impact of the Dunkel text. Call Public Citizen and

get a copy of Patti Goldman's paper. There are fair trade coalitions in 20 states concerned about these issues who could build the public support to defend state laws.

To quote David Morris of the Institute for Local Self Reliance, "Democracy without authority is process without substance."

Of course that's not what you had in mind when you passed bottle bills or groundwater bills or biotech release restrictions. You were trying to promote the public good. The public good in the United States is an endangered species the way these trade agreements are written. Our trade negotiators have motive, and they have opportunity. You need to help with the detective work to ensure that democracy isn't the final victim in this whodunit.