Working Group on International
Investment Agreements and
Federalism

1. Why organize a working group?

a. Sovereignty at risk. NAFTA's chapter 11 on investment and more recent and pending investment agreements modeled on chapter 11 may present an unprecedented threat to America's system of federalism. These investment agreements have, for the most part, been included as little noticed chapters of larger trade agreements like NAFTA. The result is that the public and Congress have little appreciation of how little investment chapters have to do with effective free trade agreements, and indeed how radically the current model for investment chapter provisions intrudes upon the authority of local democratic institutions.

(1) Greater procedural rights. NAFTA chapter 11 and similar agreements (many of which are based on the model Bilateral Investment Treaty) provide extraordinary procedural rights for foreign corporations to initiate suits before international tribunals and to seek uncapped money damage awards in compensation for government regulation, including state and local regulation. For example, in one NAFTA chapter 11 case, *Methanex v. United States*, a Canadian corporation is seeking $1 billion in damages from the United States because of its alleged loss of future profits resulting from the California legislature's ban on the toxic gasoline additive MTBE.

(2) Greater substantive rights. Because investment disputes can result in damage awards causing severe financial pain, one would assume that the legal standards found in investment agreements are extremely precise and provide explicit guidelines for governments regarding the permitted scope of regulation. But, such is not the case. On the contrary, rules are vague and leave significant discretionary authority in the hands of tribunals composed of experts in international commerce who may not have a background in or an appreciation for America's constitutional system of federalism.

In short, the legal standards in international investment law provide greater substantive rights to foreign investors than are provided by the protections provided for business and property owners found in the U.S. Constitution, such as the Fifth Amendment's takings clause.

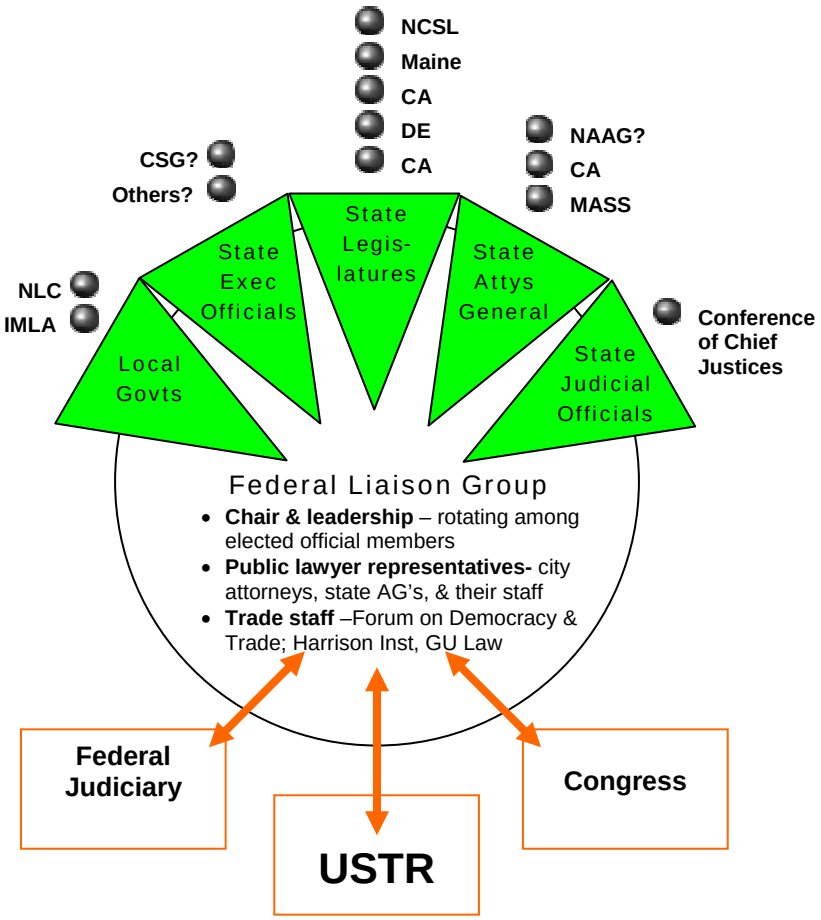
b. The need to master the complexities. Unless state and local officials (and their attorney-advisors) are better organized to deal with these complex legal issues, they may be unprepared for the job of effectively defending federalism interests in the Washington D.C. policy debate. And, if they do not effectively engage in this debate, the result could be a significant loss of state sovereignty and local autonomy. State and local laws, particularly those related to land-use planning and economic regulation, will be at risk, but that risk has not been documented and assessed in adequate detail.

c. The need for an authoritative record and report. The potential threat to American federalism posed by international investment agreements suggests the

need for a program of action on many fronts. Among other necessary steps, it suggests the need for more in-depth analysis of the federalism issues that arise from international investment agreements and the need communicate this analysis to key decision makers and the public. It suggests creation of a working group on international investment agreements and federalism.

The working group would bring together state and local elected officials and their lawyers for the purposes of holding public hearings, collecting scholarly and expert analyses, and publishing findings. It would develop an authoritative and public record and report that would serve much the same purpose as a congressional committee record and report resulting from oversight and investigative hearings.

2. How should a working group be structured?



a. Purpose. A working group on international investment agreements and federalism would strengthen oversight capacity of state and local officials regarding trade negotiations on international investment agreements. It would not take positions or lobby. The roles of the working group would be to:

(1) link diverse public officials**,** *e.g.*, state/local, legislative/executive/judicial officials;

(2) provide staff expertise on the potential local impact of investment agreement rules;

(3) hold public hearings or symposia to collect a diversity of views on the federalism impact of international investment agreements; and

(4) prepare and publish a report on the federalism impact of international investment agreements.

b. Oversight topics.

(1) Comparative analysis of international investment law and U.S. constitutional law. Based on a review of the case law, the text of agreements. the academic literature, and the testimony received at public hearings, the group would investigate the degree to which existing or proposed international investment rules will, among other things:

- provide an international forum with more favorable rules for unsuccessful plaintiffs who typically sue U.S. state and local governments based on "takings," "dormant commerce clause," or "substantive due process" theories;

- provide an international forum for the review of U.S. court decisions at both the state and federal levels; and

- provide greater procedural and substantive rights for foreign investors in the United States than U.S. investors enjoy under the U.S. Constitution.

(2) Analysis of alternatives to the NAFTA chapter 11 model for international investment agreements. The group also would consider alternative models with a particular focus on those that would provide maximum protection for U.S. investors in developing countries, which lack developed and predictable legal systems for guaranteeing property rights. Areas of investigation would include, among others, alternatives to the NAFTA model, with respect to:

- investor –to-state dispute resolution;

- the definition of investment;

- the definition of measures covered by investment agreements;

- the exhaustion of local remedies;

- the substantive standards protecting property rights and fundamental fairness to foreign investors;

- the availability of diplomatic and judicial review; and

- alternatives to international investor rights, *e.g*., investment risk insurance.

3. Working group roles. Working group roles would include leadership, staff support and liaison between public officials or national associations and national policymakers.

a. ***Leadership*** – Leadership for the working group would be provided by the elected state and local officials participating (or their designated staff representatives). The chairmanship of the group would rotate among participating elected officials. The chair would approve draft work products and convene the meeting.

b. ***The public lawyer representatives*** – The public lawyer representatives would provide expertise based on experience with NAFTA chapter 11 litigation, experience with "takings," "dormant commerce clause" and "substantive due process" challenges to state and local measures, and experience with issues of judicial autonomy.

c. ***The trade policy staff*** – The policy staff would analyze the potential for conflict between trade agreements and state or local measures and participate in meetings with USTR or other agencies. The staff on trade law and policy would be drawn from the Forum on Democracy and Trade, and its legal counsel at the Harrison Institute for Public Law, Georgetown University Law Center.

d. ***Federal liaison group*** – The group would conduct public hearings and symposia, inviting the participation of USTR, members of Congress, state and local officials, academics, and other experts representing a variety of viewpoints. It would include the chair and leadership team, public lawyer representatives, trade staff, and representatives of national associations and individual jurisdictions who are available to attend a particular meeting.

4. **Public hearings and symposia.** – The federal liaison group would hold hearings or symposia, perhaps commencing in late 2004. Hearings would be held at locations around the country that would be convenient for public lawyers and participants. The purpose of the hearings would be to solicit testimony and papers from:

b. ***The Office of the U.S. Trade Representative and other federal agencies***: in order to get a full explanation of Administration policy and of the trade-offs between the interest in protecting U.S. investors and the interest in protecting the United States from challenges based on state and local measures;

c. ***Members of Congress and their staffs***: in order to fully understand congressional intent related to NAFTA chapter 11, the "no greater rights" mandate in Trade Promotion Authority legislation, and similar acts of Congress bearing on the issue;

d. ***Academics and legal experts***: in order to get a more analytic understanding of the text of agreements and the cases;

e. ***State and local officials***: in order to get a better understanding of the policy impact; and

f. ***Business, labor, and civil society groups*****:** in order to develop a more robust dialogue on investment issues

5. **The hearing record & working group report**: The working group would prepare a final report, providing its analysis of the issue, along with any additional individual opinions. The working group report would include the pro's and con's of various policy options but, consistent with the Forum's 501c3 status, would make no recommendations. A summary of hearing and symposium proceedings as well as all papers and written testimony presented by witnesses would be posted on the Forum's website.