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August 19, 2005

The Honorable Rob Portman
United States Trade Representative
600 - 17th Street NW
Washington, D.C. 20508

Dear Mr. Ambassador:

I am writing to express my strong concerns over the investor-state dispute provisions of recently enacted and proposed international trade agreements. These investment provisions are not an appropriate model. They should be significantly revised to bring the rights of foreign investors in line with those accorded to domestic investors under the U.S. Constitution.

I am extremely concerned about the potential impact that the investor-state dispute mechanism will have on policies essential to the public interest, including those relating to environmental protection, public health and safety, workers' rights, and consumer protection. As you are aware, the investor-state dispute resolution mechanism of NAFTA (Chapter 11) has been used to challenge government measures designed to safeguard the public interest in areas such as these. Originally, the mechanism was created to ensure that investors would be protected from illegitimate direct seizures and expropriations of their property. It since has taken on a far broader role and now enables foreign investors to challenge traditional regulatory actions – even when those provisions do not appear to contain any language that discriminates against them.

It is deeply troubling that foreign investors can use this mechanism to bypass domestic courts to directly challenge legitimate and broadly applicable government measures before international arbitration panels. It is one thing for individual commercial enterprises to settle business disagreements through private dispute resolution. It is quite another for governments to leave determination of the validity of their regulations to ad hoc bodies – entities that have no settled body of law to rely upon and to apply, no life-time tenure to ensure their independence, and no appellate mechanism that can be used to review their decisions and assure uniform outcomes and analyses.

In response to concerns over NAFTA Chapter 11, Congress included language in the Trade Act of 2002 that directed future trade agreements not to provide foreign investors with “greater substantive rights” than those accorded to U.S. citizens under domestic law. Despite this guidance from Congress, it appears that U.S. trade negotiators have failed to adequately address this matter in the investment chapters of recently enacted and proposed trade agreements. Under CAFTA and the Moroccan Free Trade Agreement, for example, the type of property eligible for



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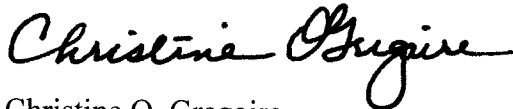
regulatory takings includes the “expectation of gain or profit” and the “assumption of risk.” This definition is far broader than that found in U.S. law, which to a large degree is restricted to real property.

The investment provisions of recent trade agreements also allow the investor to argue for compensation even when the measure causes only a “significant” or a “substantial” reduction in the value of the property. By contrast, U.S. courts require the value of the property to be almost completely destroyed or demonstrate a compensable taking. As a result, foreign investors can challenge many more regulatory actions in lawsuits that, if filed by a domestic investor, would be considered frivolous.

Until these critical problems are addressed, foreign investors will continue to seek compensation whenever their interests have been hurt by regulations that fall within the traditional scope of government authority. And, unless the current model for resolving investment disputes is significantly altered, federal and state governments will find it difficult to protect our environmental, health, and safety laws.

Again, I strongly urge that the investor-state dispute mechanism be revised to ensure that foreign investors are not granted greater substantive rights than domestic investors. Thank you for your attention to this vitally important issue.

Sincerely,



Christine O. Gregoire
Governor

cc: The Honorable Maria Cantwell, U.S. Senate
The Honorable Patty Murray, U.S. Senate
The Honorable Brian Baird, U.S. House of Representatives
The Honorable Norm Dicks, U.S. House of Representatives
The Honorable Richard Hastings, U.S. House of Representatives
The Honorable Jay Inslee, U.S. House of Representatives
The Honorable Rick Larsen, U.S. House of Representatives
The Honorable Jim McDermott, U.S. House of Representatives
The Honorable Cathy McMorris, U.S. House of Representatives
The Honorable Dave Reichert, U.S. House of Representatives
The Honorable Adam Smith, U.S. House of Representatives