



STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
BILL LOCKYER
ATTORNEY GENERAL

April 3, 2002

The Honorable Barbara Boxer
United States Senate
112 Hart Senate Office Bldg.
Washington, D.C. 20510

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Bldg.
Washington, DC 20510

Re: H.R. 3005 - Threat to State and Local Regulatory Programs

Barbara + Dianne
Dear Senators Boxer and Feinstein:

I wanted to let you know that on March 22, 2002, the National Association of Attorneys General, representing 54 states and territories, passed the attached resolution expressing concern over the inclusion of provisions in international trade agreements granting individual foreign investors new rights to challenge and seek compensation for state, local or federal government regulatory actions as "expropriations." I believe that similar provisions may proliferate in future trade agreements enacted under the pending "fast track" legislation unless Congress amends H.R. 3005 to ensure that foreign investors receive no greater rights than those afforded U.S. citizens under our constitutional guarantees.

As you know, I strongly support the promotion of international trade, including elimination of unfair and discriminatory barriers to the importation of foreign products and to foreign investment. However, the potential in H.R. 3005 to create an expansive new international law of takings is unnecessary and, ultimately counter-productive to achieving the goals of promoting free trade and increased foreign investment.

1300 I STREET • SUITE 1740 • SACRAMENTO, CALIFORNIA • 95814 • 916-324-5437

P: 2/5

TO: 3243036

APR-3-2002 13:57 FROM: SENATOR SHEILA KUEHL 916 324 4823

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My concerns arise from direct experience with a similar investor protection provision in Chapter 11 of the North American Free Trade Agreement (NAFTA). That provision has raised serious concerns over its impact on the power of government to act to protect welfare and the environment.

It mandates compensation for disappointed investors from other countries under a vague standard potentially much more expansive than that available for domestic investors who claim a regulatory taking. In effect, it may require government to pay foreign investors for the right to enforce its environmental regulations.

The "measure" for which compensation is required may include any "law, regulation, procedure, requirement or practice." In fact, claimants under Chapter 11 have claimed compensation for the statements of government officials in debates over legislation, e.g., *Ethyl Corp. v. Canada*.

Compensation is provided by arbitration panels that meet in secret and are not bound by precedent. Even pleadings filed before these panels may not be disclosed without the consent of the parties. These decisions are virtually nonappealable on the merits.

As currently proposed, H.R. 3005 broadly authorizes U.S. trade negotiators to include similar expropriation language in future trade agreements. Our recent experience under NAFTA demonstrates how drastically such provisions in international trade agreement can depart from American constitutional standards. Although NAFTA applies only to Canada, the United States and Mexico, the pending trade legislation could potentially subject the United States to liability to foreign investors from any nation.

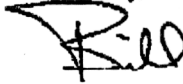
The investor provisions found in H.R. 3005 provide substantially greater rights to foreign investors than American ones. They potentially go far beyond the carefully fashioned rules for compensation under the Fifth and Fourteenth Amendments articulated by the U.S. Supreme Court and implemented by trial judges who reach their decisions publicly, are bound by applicable precedent, and whose decisions are subject to appellate review.

I would urge you to consider this one provision of H.R. 3005 and to support amendments to insure in any future trade agreements or in any new legislation providing for international trade agreements that foreign investors receive no greater rights than American ones when they seek compensation for regulatory takings. Our constitutional takings jurisprudence recognizes

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the vital importance of private property rights, but the court's decisions also recognize the responsibility of elected representatives to protect the public health and welfare without the need to pay compensation to those subject to reasonable laws and regulations.

Sincerely,



BILL LOCKYER
Attorney General

RESOLUTION

WHEREAS, in the past many of us have joined together to protest efforts in Congress to invade state sovereign prerogatives with regard to takings claims issues; and

WHEREAS, state and local governments are by law uniquely situated to provide the best safeguards for their citizens in many areas involving consumer and environmental protection; and

WHEREAS, we strongly support the promotion of international trade, including elimination of unfair and discriminatory barriers to the importation of foreign products and foreign investment; however,

WHEREAS, H.R. 3005 as currently drafted may allow trade negotiators to grant foreign investors new and greater rights to seek financial compensation based on state, local, or federal governmental regulatory actions; and

WHEREAS, implementation of the standards in Chapter 11 of the North American Free Trade Agreement (NAFTA) raises serious concerns over its potential impact on the power of state or local governments to protect the welfare and environment of their citizens; and

NOW, THEREFORE BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1. Encourages Congress to ensure that in any new legislation providing for international trade agreements foreign investors shall receive no greater rights to financial compensation than those afforded to our citizens;
2. Authorizes the Executive Director of the National Association of Attorneys General to transmit these views to Members of Congress, and to work with appropriate Federal government officials on initiatives consistent with this resolution and with the needs of the Attorneys General.