



July 21, 2005

The Honorable Rob Portman
United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Dear Ambassador Portman:

We are writing to you with respect to current negotiations for an Andean Free Trade Agreement (“FTA”). In this regard, we have had occasion to meet with representatives of the Colombian delegation because they are aware of, and share, some of the same concerns that have been repeatedly expressed by representatives of American state and local governments.¹ In particular, they indicated to us that they were attempting to have certain changes made in language dealing with the interrelation between the expropriation provisions and the legitimate regulatory authority of the parties to the FTA.

In our discussions, it appeared that we shared the concern that **international investment agreements safeguard state and local regulators’ responsibility to protect consumers and public interest and that they not open the door to unjustified challenge of legitimate measures that pursue these objectives.** They noted that the preamble of the recent U.S.-Uruguay Bilateral Investment Treaty does deal with this issue to a degree as does the new model bilateral investment treaty, and we commend the inclusion of language to address those concerns.

The current model language provides in Annex B Expropriation, article 4.b) that “Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.” There are two remaining concerns with the scope of this protective provision. First, there is nothing that describes or illuminates what are the “rare” circumstances where a legitimately applied, non-discriminatory action could still be found to be an expropriation. Second, the scope of “public welfare objectives” leaves out a broad category of such measures, namely those dealing not just with the physical health and safety of the public, but also with its economic well-being. These “consumer protection” measures cover a wide variety of traditional police and regulatory policies, ranging from fraud and unfair tactics directed at individual

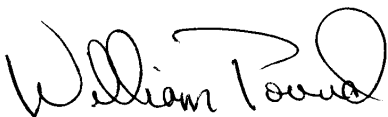
¹ Please reference letters dated September 23, 2003; February 2, 2004; April 12, 2005; and June 13, 2005, all of which are also available from www.ncsl.org/standcomm/scecon/scecon.htm.

consumers, to public policies and enforcement efforts on a global scale, such as antitrust actions and rate setting for utilities and other public services. Any provision dealing with these matters should be clear about the inclusion of such policies as well as being within the zone of protection. Third, it only deals with expropriation and not other potential means of challenging such measures, i.e., as violations of the minimum standard of treatment.

The first issue is perhaps the most important. We believe that a trade promotion agenda that emphasizes free, understandable, and non-discriminatory business between our countries should not limit appropriate governmental authorities. Thus, when one starts with provisions that are, by definition, non-discriminatory, and both designed and applied to legitimate public welfare objectives, it is difficult to imagine what provisions could be subject to attack on this basis. Certainly, the United States law on "regulatory takings," provides little, if any, room for such a challenge. It is our understanding that the Colombian delegation has suggested dropping the opening phrase about "rare circumstances." We would tend to agree with that position, but even if some caveat is to be included, we believe there should be more specificity in order to give those interpreting the agreement more guidance as to what the standards are for when a proper police and regulatory measure can be challenged – i.e., something along the line of the current Supreme Court standard that would allow regulatory measures to be challenged as a taking only when they would destroy all productive use of the asset or investment.

We urge, in any case, that these concepts be included in an unambiguous manner in future investment agreements and investment chapters of free trade agreements. Small changes in current language would result in a provision such as this appropriately being included in all future agreements: *non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, consumer protection and the environment, do not constitute indirect expropriations or a violation of the minimum standard of treatment.* We look forward to working with you as you advance the United States' trade agenda while protecting American federalism.

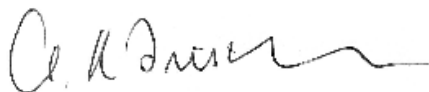
Sincerely,



William T. Pound
Executive Director
National Conference of State Legislatures



Donald J. Borut
Executive Director
National League of Cities



Allen R. Frischkorn, Jr.
Executive Director
National Association of Towns and Townships