

**BEFORE THE UNITED STATES
TRADE REPRESENTATIVE**

**COMMENTS CONCERNING FREE TRADE AGREEMENT WITH
THE REPUBLIC OF KOREA**

FILED BY

**THE AMERICAN FEDERATION OF LABOR &
CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)**

SEPTEMBER 15, 2009

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A. Introduction

In order to create rather than destroy good jobs, trade agreements must be designed to reduce our unsustainable trade deficit by providing fair and transparent market access, preserving our ability to use domestic trade laws, and addressing the negative impacts of currency manipulation, non-tariff trade barriers, financial instability, and high debt burdens on our trade relationships. In order to protect workers' rights, trade agreements must include enforceable obligations to respect the core labor rights of the International Labor Organization (ILO) – freedom of association, the right to organize and bargain collectively, and prohibitions on child labor, forced labor, and discrimination – in their core text and on parity with other provisions in the agreement. Trade policy must protect our government's ability to regulate in the public interest; to use procurement dollars to create good jobs at home, promote economic development and achieve other legitimate social goals; and to provide high-quality public services. Finally, we believe that American workers must be able to participate meaningfully in the decisions our government makes on trade, based on a process that is open, democratic, and fair.

In prominent cases in which the United States has concluded a comprehensive “free trade agreement” with another country, the impact on our trade balance has been negative, despite promises to the contrary. The North American Free Trade Agreement (NAFTA), for example, is estimated to have cost the U.S. more than one million jobs, allowed violations of core labor standards to continue, and resulted in numerous challenges to laws and regulations designed to protect the public interest. A new trade policy is essential to rebuilding our manufacturing base, which should be the cornerstone of our nation's economic recovery. Unfortunately, the KORUS FTA replicates NAFTA in many respects.

In 2008, the U.S. ran a \$13.4 billion trade deficit with Korea, of which \$10.5 billion was concentrated in the autos and auto parts sector. Korea produced 3.8 million motor vehicles and exported 70% of them. By contrast, the U.S. exported only 10,377 vehicles to Korea, of which only 6,980 were American-made vehicles from Ford, Chrysler or General Motors. Despite the concentration of the trade deficit in a single sector, and its sheer size, the USTR refused to table the proposals offered by labor, industry, and by Congress to rectify this trade imbalance. The auto provisions of this agreement are unlikely to open the door for more than a handful of vehicles from U.S. auto companies. Even fewer of those vehicles are likely to be made in the United States, further undermining any potential benefits for American workers.

Aside from the auto sector, Korea and the U.S. have had a long and acrimonious relationship on steel. However, little attention was paid to this issue. The U.S. also runs a significant trade deficit with Korea in textiles, paper, iron and steel, construction machinery, and appliances. Although the U.S. continues to export a significant amount (in terms of value) of semiconductors, machinery, and civilian and military aircraft to Korea, more and more of that production is at risk of moving overseas. Even in those cases where the market access provisions of the agreement may not have much of an impact on our trade relationship, these

provisions when combined with rules on investment, procurement, and services could further facilitate the shift of U.S. investment and production overseas, harming American workers.

Finally, we have several serious concerns with regard to workers' rights in South Korea. Many of Korea's laws fall far short of the core labor standards. Millions of workers are hired on fixed-term contracts or through subcontracts, which frustrates the exercise of basic rights and thus leads to lower pay and less job security. In some cases, riot police have used overwhelming force to break strikes which posed no risk to public order. The penal code is also frequently used to impose massive fines, often leading to bankruptcy, on workers who "obstructed the business" of their employer through collective action.

We are not opposed in principle to expanding trade with Korea, if a trade agreement could be crafted that would promote the interests of working people and benefit the economies of both countries. Unfortunately, the U.S. Trade Representative failed to reach such an agreement with Korea. This report sets forth our concerns with regard to the agreement as negotiated.

B. Comments on Selected Chapters of the KORUS FTA Text

1. Labor Chapter

The KORUS FTA's combination of unregulated trade and increased capital mobility not only puts jobs at risk, it places workers in both countries in more direct competition over the terms and conditions of their employment. High-road competition based on skills and productivity can benefit workers, but low-road competition based on weak protections for workers' rights drags all workers down into a race to the bottom. Congress recognized this danger in TPA, and directed USTR to ensure that workers' rights would be protected in new trade agreements. One of the overall negotiating objectives in TPA is "to promote respect for worker rights ... consistent with core labor standards of the ILO" in new trade agreements. TPA also includes negotiating objectives on non-derogation from labor laws and effective enforcement of labor laws.

Initially, the KORUS FTA contained a placeholder that was essentially the same flawed labor chapter found in DR-CAFTA. On May 10, 2007, however, the Congress and the Bush Administration agreed to a new labor template for bilateral trade agreements. That template has since been incorporated into the pending bilateral FTA with South Korea. While the new template is an improvement over the previous "enforce your own laws" standard found in agreements such as DR-CAFTA, Bahrain, Oman and Morocco, there remain concerns that must still be addressed. As one example, the agreement states in footnote two of Chapter 19 that "the obligations of this agreement, as they relate to the ILO, refer only to the 1998 ILO Declaration on Fundamental Principles and Rights at Work" (emphasis added). This sentence is subject to competing interpretations which may limit the efficacy of the labor chapter and should be eliminated.¹

¹ The labor chapter also includes several minor modifications that potentially weaken the functioning of the agreement. For example, the Labor Advisory Council, in Article 19.5, is no longer comprised of cabinet level officials, but merely "senior officials."

Even with the renegotiated language, there is some concern regarding its enforceability. Successive administrations have failed to consistently and aggressively enforce worker rights conditions in unilateral preference programs or bilateral trade agreements.² During the Bush Administration, numerous legitimate and well-supported worker rights cases initiated by the AFL-CIO and others were summarily rejected without adequate rationale. This refusal to enforce the worker rights provisions in U.S. trade law left serious abuses of workers' rights unchallenged.

Labor Situation in Korea

There is a common misperception that labor relations in South Korea are free of the repression and violence commonly found in less-developed countries around the world. Indeed, when South Korea joined the Organization for Economic Cooperation and Development (OECD) in 1996, it was expected that the country would move quickly to reform the many laws and practices established during the dictatorship that undermined fundamental trade union rights. However, ILO reports demonstrate that South Korea is not in compliance with core labor standards and that labor relations in the country remain highly contentious and at times extremely violent. Below are some of the most pressing concerns in Korean labor law and practice.

a. Problems in Korean Labor Law

Freedom of Association

1. Outlawing Multiple Trade Unions at the Enterprise Level

Under the 1997 Trade Union and Labor Relations Adjustment Act (TULRAA), trade union pluralism is permitted at the industrial and national level. However, the implementation of this law at the enterprise level has been delayed numerous times. This prohibition was most recently extended on December 30, 2006 until December 31, 2009.³ Finding that the “free choice of workers to establish and join organizations is so fundamental to freedom of association,” the ILO Committee on Freedom of Association urged the government to take rapid steps for the legalization of trade union pluralism at the enterprise or establishment level.⁴ Trade unions have criticized the government's continued ban on union pluralism because, in a context where pluralism at the plant level is prohibited by law, some employers have established management-controlled unions. Since it is legally forbidden to organize alternative unions, such workers are left with few, if any, rights and cannot engage in genuine collective bargaining.

² See, e.g., Government Accountability Office (GAO), *Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain* (July 2009).

³ See Addendum, Article 5(1) of the TULRAA.

⁴ ILO Committee on Freedom of Association (CFA) Report No. 353, Case 1865 ¶ 718 (2009)

Article 5 of the Addendum of the Act also calls upon the Minister of Labor to develop procedures by December 31, 2009 for a single bargaining channel for collective negotiations in a worksite with multiple unions. Unions have expressed concerns as to the potential impact of such procedures on minority unions in a workplace.

2. Ban on Paying Wages to Full-Time Trade Union Staff

Article 24(2) of the TULRAA prohibits an employer from paying wages to full-time trade union staff from January 2002 onwards. Implementation of the provision was delayed until 2006 and, through a tripartite agreement in 2007, delayed again until December 31, 2009. The ILO has been unequivocal that the issue of wage payments to full-time staff is properly a subject of bargaining, not of legislation.⁵ Importantly, the vast majority of trade unions in Korea have fewer than 300 members. If and when the law does go into effect, basic trade union activities will be severely affected at small- and medium-size enterprises, as they will be least likely to support full-time staff.

3. Dismissed Workers Unable to Remain in Union

Articles 2(4)(d) and 23(1) of the TULRAA ban unemployed workers from joining a union and also provides that non-union members are ineligible for trade union office. The ILO explained that “such a provision entails a risk of acts of anti-union discrimination being carried out to the extent that the dismissal of trade union activists would prevent them from continuing their trade union activities within their organization.”⁶ Thus, the ILO has called upon the government to repeal those provisions.

Right to Strike

1. Strikes Only For Limited Purposes

According to the International Trade Union Confederation (ITUC), strikes are considered illegal if they are not specifically related to labor conditions such as wages, welfare and working hours. The ILO has stated that “The right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members’ interests.”⁷

2. Essential Public Services

Article 71(2) of the TULRAA provides that the following services are essential: *railroad services, inter-city railroad services and aviation services, water, electricity, gas supply, oil refinery and supply services, hospital and blood supply services, the central bank and*

⁵ CFA Report No. 353 at ¶¶ 701, 719.

⁶ Id. at ¶ 720.

⁷ CFA Digest of Decisions at ¶ 531.

telecommunication services. However, a service is not properly deemed “essential” by the ILO unless the interruption of those services would endanger the life, personal safety or health of the whole or part of the population.⁸ The scope of essential public service is under Article 71(2) is impermissibly broad, covering sectors that are not essential in the strict sense. Although hospital services, electricity services, water supply services, telephone services and air traffic control may properly be deemed essential, the ILO has previously determined that radio and television services, the oil sector, banking services, general transportation, airline piloting, railway services and metropolitan transport are not essential.⁹ This distinction is important, as a government may properly restrict or prohibit strikes in sectors properly designated as essential.

Article 42-2 of the TULRAA requires the maintenance of minimum levels of services in all services listed in Article 71(2). A minimum service requirement may properly be imposed in 1) an essential service, 2) services which may not be essential in the strict sense but where the extent or duration of a strike may result in an acute national crisis endangering the normal living conditions of the population and 3) services of fundamental importance.¹⁰ As mentioned above, a number of services listed at Article 71(2) are not properly deemed essential and therefore no minimum service requirement should apply (unless an argument were made that they fell into another one of the categories enumerated above). However, even for those services where a minimum service may properly be imposed, the law in practice has resulted in outcomes that run afoul of ILO jurisprudence.

Under Article 42-3, the parties are to try to negotiate an agreement over minimum services. However, if no agreement is reached, either party can make an application with the Labor Relations Commission to decide the levels of minimum services to be maintained, the specific work designated as minimum services, the necessary number of workers, etc. However, unions have reported that the employer makes no effort to seek an agreement and instead proceeds directly to the Labor Relations Committee, which has imposed excessively high levels of minimum service. For example, the Seoul Metropolitan Transit Corporation went to the Commission for a minimum service determination in January 2008. The Commission set the minimum service at 100% of operation during rush hour, 79.8% during weekdays (non-rush) and Saturday and 50% on Sunday.

In this light, the ILO urged the government to “ensure that, in issuing decisions determining the minimum service, the Labor Relations Commission takes due account of the principle according to which a minimum service should be confined to operations that are strictly necessary to avoid endangering the life or normal living conditions of the whole or part of the population.”¹¹

Article 43 of the Act provides an exception to the rule that an employer may not hire striker replacements or contract or subcontract out work that has been suspended because of a strike.

⁸ CFA Digest at ¶ 583.

⁹ Id. at ¶ 587.

¹⁰ Id. at ¶ 606.

¹¹ CFA Report No. 353 at ¶¶ 711, 749(c)(iii).

Article 43(3) states that these prohibitions do not apply to the employer of essential public services. Article 43(4) provides that an employer can hire replacements or contract out work as long as the proportion of replacement workers does not exceed 50% of strike participants of the business or workplace concerned. The ILO has held that “if a strike is legal, recourse to the use of labor drawn from outside the undertaking to replace the strikers for an indeterminate period entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights.”¹²

Finally, Article 89 of the TURLAA now provides that any person who violates the minimum services requirement may be punished by imprisoned for up to 3 years or fined up to 30 million won (~\$25,000), a punishment which is manifestly excessive.

3. Emergency Arbitration

Articles 76-80 of the TULRAA allow for the imposition of emergency arbitration. Under Article 76, the Minister of Labor may make an “emergency adjustment” when a labor dispute is “related to public services” and there is a “danger of impairing the national economy or the daily lives of the general public.” If the Minister decides to invoke Article 76, the union must immediately suspend any industrial action and proceed to mediation by the National Labor Relations Commission. The Chairman of the Commission may refer the dispute to binding arbitration if it appears that mediation is unlikely to be concluded. The Commission shall also conduct arbitration on the request of one or both of the parties to the dispute.

In reviewing these emergency procedures, the ILO Committee on Freedom of Association recalled that “a system of compulsory arbitration through labor authorities, if a dispute is not settled by other means, can result in a considerable restriction of the right of workers’ organizations to organize their activities and may even involve an absolute prohibition of strikes, contrary to the freedom of association.”¹³ The ILO explained that compulsory arbitration to end a collective labor dispute is appropriate only if 1) it is at the request of both parties or 2) the strike in question may properly be restricted or banned because the strike involves a dispute involving public servants exercising authority in the name of the state or it involves disputes in an essential public services in the strict sense.¹⁴

Here, the emergency adjustments appear to apply to both “public services” under Article 71(1) and “essential public services” under 71(2). The category of public services substantially overlaps essential public services but also includes regular line public transportation services, all banking and mint services and broadcasting. None of these services should be subject to compulsory arbitration. Further, as discussed in the previous section, those improperly deemed essential should also not be subject to compulsory arbitration.

The ILO also recalled that the responsibility for suspending a strike on the grounds of

¹² CFA Report No. 353 at ¶ 711.

¹³ CFA Report No. 353 at ¶ 713.

¹⁴ Id.

national security or public health should lie with an independent body – not the government.¹⁵ Under Article 76, the Ministry of Labor may decide unilaterally to impose emergency measures.

The ILO thus urged the government to amend the emergency arbitration provisions of the TULRAA (sections 76-80) so that emergency arbitration can only be imposed by an independent body which has the confidence of all parties concerned and only in cases in which strikes can be restricted in conformity with freedom of association principles.

Substantial Restrictions on Rights of Public Sector Workers

The Act on the Establishment and operation of Public Officials' Trade Unions was enacted in 2006 in order to better guarantee the trade union rights of government employees. However, the law imposes substantial restrictions on the rights of government employees. The ILO has reviewed this Act and has made the following recommendations:

a) recognize the right to organize for all public servants at all grades without exception and regardless of their tasks or functions, including firefighters, prison guards, public service workers in education-related offices, local public service employees and labor inspectors;

(b) limit any restrictions of the right to strike to public servants exercising authority in the name of the State and essential services in the strict sense of the term;

(c) leave to public officials' trade unions and public employers to determine on their own whether trade union activities by full-time union officials should be treated as unpaid leave;

(d) take into account the following in the framework of the application of the Act on the Establishment and Operation of Public Officials' Trade Unions:

(i) that in the case of negotiations with trade unions of public servants who are not engaged in the administration of the State, the autonomy of the bargaining parties is fully guaranteed and the reservation of budgetary powers to the legislative authority does not have the effect of preventing compliance with collective agreements; more generally, as regards negotiations on matters for which budgetary restrictions pertain, to ensure that a significant role is given to collective bargaining and that agreements are negotiated and implemented in good faith;

(ii) that the consequences of policy and management decisions as they relate to the conditions of employment of public employees are not excluded from negotiations with public employees' trade unions; and

(iii) that public officials' trade unions have the possibility to express their views publicly on the wider economic and social policy questions which have a direct

¹⁵ Id.

impact on their members' interests, noting though that strikes of a purely political nature do not fall within the protection of Conventions Nos. 87 and 98.¹⁶

Additional Issues

1. Fixed-term contracts, dispatch workers and “independent contractors”

a. Fixed-term Contracts

On December 21, 2006, the *Act on the Protection of Fixed term and Part-Time Employees* was enacted. The law governs the use of temporary work and establishes guidelines on the use of part-time and fixed-term or “irregular” workers, which are now a significant percentage of the Korean workforce – 5.5 million workers (roughly one-third of the workforce) according to the Ministry of Labor.

Under the Act, as amended in 2007, employers are currently free to hire workers on fixed-term contracts for any reason – even if the nature of the work is not temporary – for up to two years. After that time, the worker is supposed to be regularized. However, as the two-year period draws near for many firms, the effect has not been conversion to indefinite contracts but rather the mass layoff of employees with nearly two years of service. In response, the Grand National Party (GNP) has recently proposed that employers be able to hire workers under short-term contracts for up to two additional years (a total of four), while the Democratic Labor Party (DLP) proposes limiting the use of temporary contracts for those jobs that are truly temporary in nature. As yet, there has been no resolution to the issue.

Although it is illegal to unreasonably discriminate against irregular workers, they are routinely subject to discrimination in wages and working conditions. In 2008, the wage gap between regular and irregular workers at the same company averaged about 15%. However, irregular workers’ wages generally are only 63.5% (August 2008) of regular workers’ wages.¹⁷ Unions also note that irregular workers suffer from high job insecurity and are unable to exercise their labor rights in practice for fear of losing their jobs.

b. Dispatch Workers

In 1998, the "Act on the Protection of Dispatch Workers" was enacted, which regulated the manner by which workers can be hired by a dispatching company for work at a third-party employer.¹⁸ In most cases, the owner of a dispatching business would dispatch workers and a recipient company would use dispatched workers for a maximum of 2 years. Under the law, workers could be dispatched for any one of 26 jobs, including work requiring expert

¹⁶ CFA Report No. 353 at ¶ 696. See ¶¶ 698-705 of the report for a full discussion of the problems the ILO’s recommendations are meant to address.

¹⁷ KOILAF, *Wage gap between regular and irregular workers appears average 15.2%*, May 28, 2008, available online at www.koilaf.org/KFeng/engStatistics/bbs_read_dis.php?board_no=122.

¹⁸ According to the Korea International Labor Foundation, there are 1,103 temporary service companies (agency employers): 879 of them are with fewer than 50 employees, and 36 with 300 employees or more.

knowledge. However, they are not to be employed in the operation of the direct production process in the manufacturing industry. The owner of a dispatching company and the owner of a recipient company enter into a written contract on issues such as work hours, wages, health and safety, etc.

In practice, dispatch work is insecure because principal employers terminate the contracts and yet are not held accountable as employers. Dispatch workers also tend to earn less than regular workers. Additionally, it is very difficult for a worker under such an arrangement to join or form a union and participate in union activities, as their contract can easily be terminated. Even though the contracting company decides their working conditions, dispatch workers do not have the right to bargain with the user firm since the direct employment relationship is with the dispatcher. Employers at these firms, when faced with pressure to bargain, will often simply terminate the contract without any legal repercussions.

Under the 2006 law, the scope of occupational categories where dispatch labor is legal can be expanded by presidential decree. In 2009, the Ministry of Labor announced that it intends to expand the occupations allowed for dispatch workers.¹⁹

c. Denial of Rights to So-called 'Self-Employed' Workers

Freight operators and drivers, private tutors, golf-course caddies and insurance salespeople are not considered workers but rather as self-employed. Thus, they are unable to receive the protection of the labor law. They are also banned from forming trade unions and do not have the right to collectively bargain. In practice, however, these workers often work under an individual labor contract with an employer who controls their wages, hours and working conditions.

2. Migrant Workers Denied Basic Rights in Practice.

The Migrants' Trade Union (MTU) attempted to register as a trade union in 2005 but were denied for, among other reasons, because the officers of the union were undocumented workers. The Seoul High Court decided on February 1, 2007 that irregular migrant workers qualify as workers under the Constitution and the TULRAA and therefore, they are vested with legally protected basic labor rights and are allowed to establish trade unions as long as they actually provide labor services and live on wages, salaries or other equivalent income paid for their service. The government subsequently appealed to the Supreme Court and a decision is pending.

Additionally, the government, in 2007, carried out a targeted crackdown on the union by arresting its Presidents Anwar Hossain, Kajiman Khapung, and Toran Limbu, Vice-Presidents Raj Kumar Gurung (Raju) and Abdus Sabur and General Secretary Abul Basher Moniruzzaman (Masum), and subsequently deported many of them.

¹⁹ KOILAF, Employment term of non-regular workers and occupations for dispatch workers to be extended, Labor Today, March 13, 2009.

The ILO, in reviewing the case, noted that all workers, without distinction, should have the right to join organizations of their own choosing. The ILO referred also to the 2004 resolution on migrant workers, adopted by the ILO Conference at its 92nd Session, according to which “(a)ll migrant workers also benefit from the protection offered by the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). In addition, the eight core ILO Conventions regarding freedom of association and the right to bargain collectively, non-discrimination in employment and occupation, the prohibition of forced labor and the elimination of child labor, cover all migrant workers, regardless of status.” The ILO also condemned the arrests and deportation of the union officers, carried out shortly after they were elected to union office, which it found constituted repression to stop the rightful activities of the MTU.²⁰

c. Using Arrests and Lawsuits to Suppress Trade Union Activity

The frequent arrest of workers, including trade unionists and union officers, is a serious problem in Korea. Many of these arrests are undertaken in the course of industrial action, such as strikes or protests over state labor or economic policy. To the extent that those arrests were undertaken to, or had the effect of, suppressing legitimate trade union activity, such arrests violate the right of free association of those trade union activists and their union.. The ILO has been clear that “the detention of trade unionists for reasons connected with their activities in defense of the interests of workers constitutes a serious interference with civil liberties in general and trade union rights in particular.”²¹ Indeed, the ILO has called on the government of Korea specifically to refrain from making arrests, even in the case of an illegal strike, if the latter does not entail any violence.²²

In addition to imprisonment, a trade unionist and/or a union may be fined for what is euphemistically called “obstruction of business” – in some cases for millions of won. In addition to chilling trade union activity, the fines and penal sanctions have driven individuals to bankruptcy and, in some cases, to suicide for not being able to support their families. The use of the obstruction of business law, Section 314 of the Criminal Code, has been repeatedly criticized by the ILO Committee on Freedom of Association. In 2009, the ILO stated that, “section 314 as drafted and applied over the years has given rise to the punishment of a variety of acts relating to collective action, even without any implication of violence, with significant prison terms and fines.”²³ The government had previously promised to reform the way in which it enforces this law but so far has failed to do so.

In July 2008, the KCTU went on strike to protest the pending KORUS FTA, which they argued would have a direct and negative impact on their members. The ILO has long countenanced strikes for reasons of a broad economic or social nature. However, in response to the strike, the government issued arrest warrants against the leadership of the Korean Confederation of Trade Unions, including President Mr. Lee Suk-haeng, First Vice President

²⁰ CFA Report No. 353, Case No. 2620, ¶¶783-94 (2009).

²¹ CFA Digest at ¶ 64.

²² CFA Report No. 353, Case 1865 ¶ 729 (2009).

²³ Id.

Ms. Jin Young-ok and General Secretary Mr. Lee Yong-shik. These and other labor leaders were charged with obstruction of business under Section 314 of the Penal Code.

d. Violent Police Repression of Trade Union Activity

All too often, private and public sector employers turn to the police and private security forces to resolve industrial disputes over wages and working conditions or, at times, matters of national economic policy. Often, these conflicts turn violent. Instead of sustained negotiations to resolve conflicts, overwhelming police force has been used to dislodge striking workers and to harass and intimidate supporters. In many cases, union leaders are targeted for arrest and threatened with bankruptcy through high criminal penalties.²⁴

Since the FTA was negotiated, there have been several such industrial conflicts. The recent siege at Ssangyong Motors is only the most recent example, which drew vigorous condemnation from the international labor movement and various human rights organizations.²⁵

Ssangyong Motor Company was taken over four years ago by China's Shanghai Automotive Industry Corporation. In January 2009, the company decided to file for bankruptcy and filed a proposed reorganization plan, which was approved the following month. On April 8, 2009, the company announced through the media that it planned to dismiss 2,646 workers. Immediately following the company's announcement, workers at the plant responded with warning strikes against the pending layoffs. On May 21, workers went on strike to encourage negotiations over alternative, cost-cutting measures short of mass dismissals. The following day, roughly 1,700 workers engaged in a peaceful sit-down strike at the factory. On June 2, the company notified 1,056 workers of their dismissal effective June 8.

Initially, the police and hired thugs did not engage the strikers physically. In late June, however, the gloves came off. On June 26-7, riot police entered the factory and secured the main building following intense fighting that resulted in several injuries and arrests. The workers retreated to and then held the paint department building. On July 1, all water was cut off and on July 16 all food was blocked from entering the plant.

From July 20-27, thousands of riot police and hired thugs again attempted to take the factory. This time, the police moved in with water cannons and dropped concentrated tear gas and unknown chemicals onto the strikers from helicopters, which caused in some cases severe chemical burns. Several other workers sustained serious injuries at the hands of the police. After renewed negotiations broke down again over the weekend of Aug. 1-2, all power was

²⁴ The ILO has counseled that, "The authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order. The intervention of the police should be in proportion to the threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order." See CFA Digest at ¶ 647.

²⁵ This information is drawn from numerous public statements released by the KCTU, KMWU, the IMF and the ITUC.

cut off. A final confrontation began on August 3rd and continued through the 5th. In the ensuing days, several arrests more were made and the company brought lawsuits against individuals and union officers for obstruction of business, as well as a multimillion dollar lawsuit against the parent union - the Korean Metal Workers Union (KMWU) and the confederation, the Korean Confederation of Trade Unions.

The Ssangyong Motor Company strike ended after 77 days on August 6 with a negotiated settlement with regard to lay-offs and an agreement to drop the lawsuits. However, according to the KMWU, lawsuits against the individuals and unions are still pending. The company has also locked-out all of the union activists who participated in the strike. The company is also actively campaigning to have remaining workers withdraw from the union.²⁶

2. Government Procurement

The KORUS FTA is unique among our trade agreements in that the United States and Korea are already both signatories to the WTO Government Procurement Agreement (GPA). Thus, the procurement chapter of the FTA is a hybrid text that incorporates much of the GPA by reference while adding some modifications and clarifications in wrap-around text.

The AFL-CIO has been critical of both the GPA and the procurement chapter. Of importance to the AFL-CIO is the ability of governments to use procurement dollars to promote local employment and to discourage outsourcing of the goods and services upon which the government relies. These instruments frustrate that flexibility in the following ways:

a. National Treatment

Article III of GPA, National Treatment, incorporated into the FTA, would prevent a public entity from discriminating between two bidders to a procurement contract based on the country from where those goods or services were sourced. If both a U.S. and Korean firm want to bid on a contract and both use U.S. goods or services to fulfill that contract, they deserve to be treated equally. However, under the FTA, a government could not prefer a bidder that employed local employees or used U.S.-made goods. A bidder that used Korean goods, or from any other country, to fulfill a federal procurement contract would have to be treated the same as the bidder who used U.S. made products. We oppose national treatment with regard to procurement.

b. Broadening the Scope

Under Article 17.2, the number of exclusions from the general procurement rules is substantially reduced from the procurement chapters of other recent agreements, such as with Peru, Panama, Colombia and DR-CAFTA. In recent agreements, government provision of goods or services to persons or to regional or local level governments; purchases funded by international grants, loans, or other assistance (where the provision of such assistance is

²⁶ One can view photographs of the police brutality at <http://kctu.org/3740>.

subject to conditions inconsistent with the procurement chapter); and hiring of government employees and related employment measures, were all excluded from coverage. Not so with the KORUS FTA. Also of note is that government assistance in the form of subsidies is not excluded, although it has been in numerous previous agreements. Unless the GPA precludes these exceptions, it is unclear why they are missing from the KORUS FTA.

c. Technical Specifications and Supplier Qualifications

Article VI of the GPA, as modified by Article 17.7, set forth the agreement's rules on technical specifications. Under the GPA, a party cannot prepare, adopt or apply technical specifications that "lay down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities" if they have the intent or effect of "creating unnecessary obstacles to international trade." This provision means that specifications based on how a good is made or how a service is provided are generally prohibited, even if there was no intention in adopting the specification to obstruct trade.

Article 17.7, as modified by the May 10th agreement does clarify that a party may prepare, adopt or apply technical specifications "to require a supplier to comply with generally applicable laws regarding fundamental principles and rights at work and acceptable conditions of work with regard to minimum wages, hours of work and occupation safety and health." One assumes that any such specifications would be permissible only to the extent that they do not create an unnecessary obstacle to trade. Although a step forward, this does not address all of our concerns. For example, future living wage laws could be put in jeopardy, as the revisions only covers minimum wages – not living wages.

Article VIII of the GPA and Article 17.5 of the KORUS FTA contain the relevant provisions on supplier qualifications. These qualifications are the conditions that a government may require a supplier to meet in order to be eligible to apply for a government contract. Article 17.5 provides that "a procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal, commercial, technical, and financial abilities to undertake the relevant procurement." As with previous FTAs, we are concerned that limiting conditions to those that are essential – an ambiguous term - could be used to prohibit, for example, the exclusion of a company based on its labor and environmental record. It is unclear whether articles 17.5 (3)(c) or (d) are sufficient to bar bidders that have seriously or repeatedly violated federal labor laws.

d. Application to Sub-Federal Entities?

The KORUS FTA is unique in that it provides no list of sub-federal entities that have expressed their wish to be bound to the agreement. There are two possible explanations: 1) no states expressed an interest to be bound to the procurement provisions of the FTA, or 2) the 37 states that have agreed to be bound to the GPA have been bound to the KORUS FTA

by reference. Although the “wrap-around” provisions do not do much to modify or clarify the commitments already made under the GPA, further clarification is needed to as to whether the 37 states are now bound to these modifications and clarifications introduced through the FTA even though they may not have consented to be bound by the FTA itself.

3. Services

Important public services should be performed by the government, not privatized or, in some cases, outsourced. Maintaining public control over these services is essential to maintaining accountability to the local consumers of those services. As in previous agreements, the KORUS FTA does not contain a broad, explicit carve-out for these essential public services. Rather, public services provided on a commercial basis or in competition with private providers are generally subject to the rules on trade in services, unless specifically exempted. There are few public services within the United States, however, that would qualify for the exception as it is written.

Unfortunately, the specific exemptions for services in the KORUS FTA fall short of what is needed to protect these important sectors. There are, for example, no U.S. exceptions for energy services (except atomic), water services, sanitation services, public transportation, education or health care. Even for those services that the U.S. did make exceptions for, the exemption only applies to some of the core rules of the FTA, not all. Any trade agreement should preserve the ability of federal, state and local governments to regulate services for the public benefit, allowing distinctions between domestic and foreign service-providers and setting appropriate qualifications or limitations on the provision of those services.

The services chapter does make a modest improvement as to domestic regulation by eliminating the requirement that measures relating to qualification requirements be “not more burdensome than necessary.” Additionally, the article recognizes the “right to regulate and to introduce new regulations on the supply of services in order to meet national policy objectives.”

4. Investment:

As with the investment chapters of previous free trade agreements, we remain deeply concerned by this agreement’s rules on expropriation, its broad definition of what constitutes an investment and the vague and open-endedness of the fair and equitable treatment standard. In addition, the agreement’s deeply flawed investor-to-state dispute resolution mechanism contains none of the controls, such as exhaustion requirements, a standing appellate mechanism or a diplomatic screen, that could limit abuse of this private right of action. While some progress has been made since NAFTA, they are by no means sufficient. Further, the KORUS FTA succeeds in giving us new causes for concern due to new and unprecedented language and the expansion of the scope of property.

Below are two areas of concern that are unique to the KORUS FTA.

a. Expropriation

Expropriation, and in particularly indirect expropriation, has been the subject of considerable concern to unions and non-governmental organizations for a long time. The principle concern has been that investment rules provide insufficient guidance to arbitral panels, which may interpret the agreement in a way that limits the policy space of a central or state-level government to regulate in the public interest – e.g., regulation related to the environment, public health, consumer safety, and worker rights. Inexplicably, the KORUS FTA includes numerous revisions to Annex B that creates even greater uncertainty in an already flawed standard of expropriation.

Article 3(a) and (b) set forth the standards to be used to determine whether an indirect expropriation has taken place. Under U.S. law, the question as to whether indirect expropriation has occurred is determined by applying the several factors set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). For nearly 30 years, this and subsequent cases have informed U.S. takings jurisprudence. However, the KORUS FTA diverges from *Penn Central* in several important ways.

3(a)(ii): Section 3(a)(ii) provides that whether a government action constitutes indirect expropriation depends, among other factors, on the distinct, reasonable expectations of the investor. Here, the negotiators added a new footnote, fn. 18, which does not appear in any previous trade agreement. The footnote provides a general rule of thumb that an investor’s expectations may be less reasonable in a heavily regulated industry than in a less heavily regulated one. However, there is no evidence to support that generalization. It is quite possible that a nascent, lightly regulated industry will experience more regulatory change as a government steps in to fill in regulatory gaps or correct previous regulations based on partial information.

3(a)(iii): In previous trade agreements, this subsection required only consideration of “the character of government action,” a vague standard at best. The KORUS FTA provides that relevant considerations could include “whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest.” First, the “special sacrifice” standard has no corollary in U.S. or international law. Furthermore, this language, if read as an independent test as to whether indirect expropriation has occurred, grants broad discretion to an international arbitration panel to determine what is the proper balance between private expectations and the public interest.

3(b): In previous agreements, this subsection provided that “except in rare circumstances, non-discriminatory regulatory actions by a party that are designed to protect legitimate public welfare objectives...do not constitute indirect expropriations.” Perhaps attempting to clarify the meaning of the “rare circumstances” exception, the negotiators here created new tests for indirect expropriation unknown to U.S. or international law. The KORUS FTA provides that indirect expropriation will have occurred if a government action is “extremely severe” or

“disproportionate in light of its purpose or effect.” Arbitrators, interpreting these vague new terms, could strike down any number of laws intended to protect public health, safety, the environment, etc., if they find that congress somehow erred in striking the proper balance between public and private interests. As such, this provision could afford foreign investors greater rights than U.S. investors, as U.S. law does not recognize a taking solely on the basis of the measure’s proportionality. Finally, we raise once again the absence of non-discriminatory labor regulations from the list of what does not constitute an indirect expropriation, taking due note that the list is not exhaustive.

b. Confirming Letter Regarding Property Rights

The first of its kind confirming letter on property rights states that the term “tangible or intangible property right” in paragraph 1 of Annex 11-B (Expropriation) shall include “rights under contract and all other property rights in an investment.” Never before in a bilateral trade or investment agreement have all contract rights been deemed property rights and thus eligible to be investments subject to arbitration. Although many contracts are already covered under the definition of investment, there is no reason to further expand the already broad reach of arbitral tribunals and remove all contract disputes involving foreign investors and the United States from the U.S. judicial system.

5. Intellectual Property Rights and Pharmaceuticals

In the TPA, Congress instructed our trade negotiators to ensure that future trade agreements respect the declaration on the Trade Related Aspects on Intellectual Property Rights (TRIPs) agreement and public health, adopted by the WTO at its Fourth Ministerial Conference at Doha, Qatar. However, the KORUS FTA contains a number of “TRIPs-plus” provisions, including on patents, test data and marketing approval. These provisions, in combination with other provisions of the agreement, provide excessive patent protection for the pharmaceutical industry, leaving consumers and public health departments to pick up the tab for industry profits that exceed what could otherwise be earned under existing national and international laws. A Pharmaceuticals and Medical Devices Chapter, stronger than the text negotiated for the U.S.-Australia FTA (Annex 2-C), poses additional challenges to the access of affordable medicines.

Recognizing the overreach of these TRIPs-plus provisions and the effect they could have on public health, the May 10th Agreement mandated changes to the then-pending FTA with Peru and the pending FTAs with Panama and Colombia. The May 10th Agreement as to pharmaceuticals did not apply to the KORUS FTA. Below are some of the more troubling TRIPs-plus provisions.

a. Chapter 18 on Patents

1. Under Article 18.8(2)(a) and (b), the scope of what is subject to patentability is quite sweeping, excluding only diagnostic, therapeutic and surgical procedures, as well as those inventions of which the prevention of commercial exploitation is necessary to protect public

order or morality. A party cannot, however, exclude such commercial exploitation under the agreement simply because such exploitation is currently prohibited by law. Everything else, including the patenting of plants and animals, is covered.

2. Article 18.8(1) of the FTA provides for the granting of a new patent on products that are already known if a new use or method of using the product is discovered. This clause was excluded from past agreements over the obvious concern that a patent could be extended for decades beyond the initial inventive step. In essence, this clause grants additional monopoly rights without any innovation. As discussed below, this also means that data exclusivity would be granted for the second patent.

3. The pharmaceutical industry has argued that the process needed to obtain marketing approval of new chemical entities reduces the effective term of patent protection and the possibility of recovering research and development costs. Thus, they have lobbied for and obtained the right to extend the patent term to compensate for delays in granting marketing approval as well as delays in the examination of the patent application. No maximum period is provided for this extension. Moreover, the right to extend the term of the patent for delays in patent approval is triggered after four years under the KORUS FTA, not five as in previous FTAs, and there is no minimum defined period that will trigger patent extension for delays in granting marketing approval. In the Peru, Panama, and Colombia FTAs, such extensions are optional, not mandatory.

4. Although TRIPS requires members to protect undisclosed test data on pharmaceutical products against unfair competition, it does not require members to grant exclusive rights over data. However, Article 18.9 of the KORUS FTA obliges parties to grant exclusive rights for at least five years from the date of marketing approval in the party, regardless of whether it is patented or not or whether the data are undisclosed. The agreement also provides that data exclusivity extends to information used to obtain marketing approval for a new pharmaceutical product in a third country. The protection for data is also not affected by the expiration (or non-existence of) a patent, potentially granting additional protection beyond the patent life or in absence of any patent. Finally, the agreement allows a producer to obtain consecutive periods of data exclusivity, which would extend the protection well beyond 5 years.

5. In those cases where a party requires a pharmaceutical producer to submit new clinical information for marketing approval when the producer is seeking protection for a second usage of the same chemical entity that was previously granted marketing approval in another product, the party must refuse to authorize another producer to market a similar product for three years based on the new clinical information submitted by the original producer, or evidence or marketing approval based on the new clinical information. In essence, this language extends additional data protection to a producer when a second use is found for the original drug.

6. Finally, the FTA requires a linkage between the drug registration and patent protection. Consequently, the national health authority must refuse to grant marketing

approval to a generic drug if a patent is in force. Such “linkage” gives any person or entity claiming a patent on a pharmaceutical the power to stop it from reaching the market, even if the patent is invalid. Generics can come on the market much faster if they are able to obtain marketing approval before the patent expires, ensuring that their product is ready for market introduction as soon as any patent barrier to introduction is withdrawn.

Another serious problem with linkage is that it requires the agency responsible for drug safety to be responsible for verifying the patent status of the product and informing the patent holder, a function outside that agency’s mandate or expertise. Moreover, the government will be held liable if marketing approval is granted to a product that is later found to have a valid patent, when it should be the violator (e.g. generics company) that should be held liable. The government should not be tasked with protecting the rights of brand-name pharmaceutical companies over generics companies.

b. Chapter 5 on Pharmaceuticals and Medical Devices

In addition to these provisions found in the chapter on intellectual property, the parties negotiated Chapter 5 on Pharmaceutical Products and Medical Devices. Experts expressed concern over similar, and weaker, language in Annex 2-C of the U.S. Australia FTA, which posed a potential threat to the ability of governments to use preferred drug lists to control costs of pharmaceuticals. However, the KORUS FTA Chapter on Pharmaceutical Products, based on Annex 2-C, is far more burdensome. It will likely force Korean public health officials to favor more expensive, brand name drugs, and to pay more for any drugs, when negotiating drug reimbursement rates for the national health insurance program.

For example, the chapter calls for covered federal programs that create lists of covered drugs, or set reimbursement rates for them, to “appropriately recognize the value of patented pharmaceutical products and medical devices in the amount of reimbursement it provides” (Article 5.2(b)). This provision will likely require drug price negotiators to pay higher prices. Further, the “patented pharmaceutical product” in KORUS FTA is broader than “innovative pharmaceutical product” in Annex 2-C because a non-innovative drug can be patented so long as it is not obvious. Therefore, the recognition of the value of patented products may require the recognition of the monopolistic price of a non-innovative drug, which can lead to increases in reimbursement expenditures.

Chapter 5 also gives the pharmaceutical industry almost unlimited opportunities to challenge and appeal government decisions about the choices and prices of drugs. This is likely to favor including more brand-name drugs, and paying higher prices for all drugs. Health care authorities are required to provide pharmaceutical companies “meaningful and detailed written information regarding the basis for recommendations or determinations of the pricing and reimbursement of pharmaceutical products or medical devices.” This provision does not exist in the Australia agreement. Changes in procedures for determining formulary listings may be made only if the government formally solicits comments and replies to them in writing. A confirmation letter from the Korean Minister of Trade agrees to create an “independent review body” that is composed of individuals completely outside of the health

ministry. Whether this body will have the authority to overturn decisions of the health authorities is left ambiguous.

Together, these rules would curb the Korea National Health System's new programs to implement a "positive list" of reimbursable prescription drugs with proven efficacy and price competitiveness, in order to control drug expenditures.

Most, if not all, U.S. programs appear to have been excluded from Chapter 5, as the chapter only applies to programs administered by the central level of government. U.S. negotiators explicitly exempted Medicaid, which is federally authorized but administered at the state level. The U.S. also exempted VA and DoD health benefit programs from this chapter by stating that those federal programs should be covered by the rules on government procurement. Medicare Part D relies on private contractors to provide outpatient drugs to beneficiaries, and is also therefore not covered by Chapter 5. U.S. programs that might be covered by Chapter 5 include Medicare hospital drug purchases, and federally authorized 340 drug discount programs for other providers including community clinics. Further review should be undertaken to determine whether Chapter 5 does in fact implicate these or any other U.S. program.

5a. Intellectual Property and Entertainment

The AFL-CIO, and in particular its entertainment unions, do support the strong intellectual property rights protections found in the KORUS FTA. America's entertainment workers are among the most vibrant and successful creative class in the world, and too frequently their creations are misappropriated through theft of their property or by virtue of the maintenance of market access barriers that limit the ability of US goods and services to enter foreign markets. We are pleased that the agreement not only requires Korea to ratify the WIPO Performances and Phonograms Treaty (WPPT), which contains the most up to date international norms of any international instrument, but it also embodies Korea's commitment to prioritize the fight against Internet piracy, and to extend its term of protection for performers and labels to 70 years from the time of the performance or the publication of the recording.

We are concerned, however, that Korea maintains the right to withhold payment to U.S. performers and labels with respect to remuneration for broadcasting and communication to the public. We do not believe that any country should discriminate in this manner, and hope that this provision is addressed. More fundamental, we hope that the U.S. Congress will act quickly to plug the gap in U.S. law under which performers and labels are not paid for such communications and broadcasting. The U.S. is the only member of the OECD that does not extend such protection. Joining the rest of the members of the OECD that do honor a performance right in sound recordings, the ability of other foreign countries to deny such rights will be removed.

6. Dispute Settlement

We are troubled by changes made to this chapter with respect to commercial disputes, and find Annex 22A (discussed below in Section B.1), which establishes alternative procedures for automotive product disputes, of little additional benefit, if any, for American workers or the US auto industry. The threat of a 2.5% tariff, albeit important, is insufficient to open the hermetically sealed Korean auto market.

Indeed, the KORUS Dispute Settlement Chapter in many respects is inexplicably weaker than even our most recently negotiated trade agreements, such as the Peru FTA. The accumulation of several minor additions or deletions to the text significantly alters the character of the dispute resolution process. Below are some of the most troubling changes.

1. In the first sentence of Article 22.4, negotiators inserted the clause “or as the parties otherwise agree.” The effect of this clause, which does not exist in, e.g., the Peru FTA, is to allow the parties to alter the scope of what is subject to dispute resolution – potentially expanding, restricting, or prohibiting the kinds of actions that may be brought under the chapter.
2. In previous FTAs, one could bring a claim to challenge an “actual or proposed measure of another party.” Under Article 22.4 of KORUS, a claim can only be brought against a “measure.” Thus, a party may not invoke dispute resolution procedures to challenge a potentially damaging proposed measure, and must instead wait until the proposed measure becomes an actual one, potentially injuring U.S. interests in the process.
3. In the Peru FTA, if the parties are unable to agree on compensation, or if a party believes that the other party has failed to observe the terms of an agreement, a party may suspend the application of benefits of an equivalent effect. However, in considering what benefits to suspend, the complaining party should first seek to suspend benefits in the *same sector or sectors* as that affected by the measure or other matter that the panel has found to be inconsistent with the obligations of the agreement or to have caused nullification or impairment. If that is not practicable or effective, a party may suspend benefits in other sectors. Under Article 22.13 of KORUS, however, any sector may be the subject of the suspension of benefits, even if that sector is wholly unrelated to the dispute.
4. Article 22.9 of KORUS inexplicably eliminates the requirement found at Article 21.9(c) of the Peru FTA, namely that a party “endeavor to select panelists who have expertise or experience relevant to the subject matter of the dispute.”
5. Throughout the dispute resolution chapter, the agreement extends procedural deadlines such that it may extend for months beyond the maximum period established under FTAs with far less developed countries. The accumulation of delays throughout the dispute resolution process could have an injurious effect upon a complaining party.

For example:

Article 22.8: Referral to the Joint Committee: KORUS requires a party to wait 20, not 15, days (as under the Peru FTA) to take a claim from consultation to the Joint Committee when a dispute concerns perishable goods. An additional five days delay could be meaningful in some cases.

Article 22.9, Establishment of Panel: Under KORUS, the joint committee has twice the time to deliberate and resolve a dispute, 60 days – not the 30 days in the Peru FTA. Further, should the dispute go to an arbitral panel, the allotted time for selecting panelists is much lengthier, substituting 28 days for the various 15-day periods set out in the Peru FTA.

Article 22.11: Panel Report: The procedural timeline is much longer, giving the panel an additional 60 days to prepare the initial report and an additional 15 days to present the final report.

These further delays are of additional concern to the AFL-CIO, as the labor provisions of the KORUS FTA will be processed through the commercial dispute resolution provisions. We see no reason why the timelines for labor or commercial provision need be any longer than they are under our other FTAs.

7. Trade Remedies

Workers have extensive experience with large international transfers of production in the wake of the negotiation of free trade agreements and thus are acutely aware of the need for effective safeguards. A surge of imports from large multinational corporations can overwhelm domestic producers quickly, causing job losses and economic dislocation that can be devastating to workers and their communities. The safeguard provisions in the KORUS FTA are simply not sufficient. In the case of autos, for example, the current safeguard is practically useless. Should auto exports from Korea, the majority of which enter the country duty free upon the implementation of the agreement, cause serious injury to the U.S. auto industry, the only tool the U.S. has is a snap-back provision – imposing a 2.5% tariff. That tariff has posed little to no barrier to the over 600,000 autos exported to the U.S. in 2008.

Korea made several demands of the U.S. during the negotiations on trade remedies. Fortunately, those demands were largely rejected. For example, Article 10.5 of the trade remedy provisions of the FTA does not contain an exemption from future global safeguard actions that the U.S. may undertake. Nor does Article 10.5 give Korea the right to have the impact of its exports on the U.S. industry assessed separately from that of other countries' exports also covered in a trade remedy dispute. However, the FTA does extend to Korea a "permissive safeguard" under which the U.S. may exempt Korea from a future global safeguard.

a. Safeguards

The safeguard provisions of the KORUS FTA will expire 10 years following the entry into force of the agreement, unless the tariff phase-out for that good is longer (in which case the safeguard mechanism would no longer be available at the end of the tariff phase-out). We believe that the safeguard provisions of the FTA simply should not expire. Article 10.2(5)(b) also provides that a safeguard measure may be applied for a period not to exceed three years, which is one year less than found in many other recently negotiated FTAs. Given that the Korean economy poses a much greater risk to the U.S. than the economies of Central America or the Andean region, reducing the effectiveness of the safeguard makes no sense whatsoever.

b. Antidumping and Countervailing Duties

There are several unprecedented provisions in Section B on Antidumping and Countervailing Duties. Articles 10.7(3) and (4) obligate the U.S. to notify Korea of an antidumping or countervailing duty application and afford Korea a meeting regarding the application prior to any investigation. If, after the investigation, a preliminary affirmative determination is made, the U.S. must inform Korea of its right to seek a suspension agreement in either an antidumping or countervailing duty case. In an antidumping case, for example, Korea will have the right to negotiate a price undertaking. In a CVD case, Korea will have the right to negotiate a quota and price arrangement.

Section C requires the formation of a Committee on Trade Remedies, comprised of officials of each party that have responsibility for trade remedy matters. While some of the vague functions outlined appear innocuous, we are concerned that the committee is charged with oversight of the trade remedies chapter, and compliance with the notification, consultation and undertakings provisions of Section B. The potential for Korea to unduly influence the outcome of decisions as to whether trade remedies should be applied is disconcerting. The mandate of this committee ought to have been more clearly defined and appropriately limited in scope.

Together, Sections B and C tend toward converting what should be a trade enforcement chapter into a trade negotiation chapter. While negotiations may bring about positive resolutions to conflicts, they should not stand as a barrier to vigorous enforcement when necessary. If either party violates anti-dumping or countervailing duty laws, those laws must be enforced. All too often, previous administrations have opted for negotiation over enforcement, allowing domestic industries to suffer the consequences.

8. Outward Processing Zones - Kaesong

Inclusion of goods from the Kaesong Industrial Complex (KIC), a free trade zone located in North Korea, was one of the most politically sensitive issues in the negotiations. The AFL-CIO's opposition to the inclusion of such goods has two prongs: 1) grave concerns over the

lack of basic labor rights in the KIC and 2) the impact on jobs and wages of the exports of these goods -- produced at perhaps the lowest wage levels in the world.

Despite several assurances that the KIC would not be included in the FTA, USTR returned with Annex 22-B of the Dispute Resolution Chapter - the Committee on Outward Processing Zones on the Korean Peninsula – which contemplates the possibility that goods from the KIC be covered under the FTA.²⁷

a. Labor Conditions in the KIC

It is our understanding that core labor rights, especially freedom of association and the right to organize and bargain collectively, are completely repressed in North Korea, and the KIC is no exception. Further, workers' wages are not paid directly to the worker but rather to the government of North Korea, which then makes an unknown number of arbitrary deductions, including at least 30% for "costs" associated with housing, education and health care. Some analysts have estimated that the workers eventually receive only a few dollars a month. Unfortunately, the North Korean government has yet to provide information necessary to determine workers' actual wages.²⁸ It has also been reported that employees at times face excessive hours of work. We have requested access to the KIC to investigate conditions for ourselves, but to date have not been granted access.

b. The Annex – What Does it Mean?

Annex 22-B does erect hurdles that would have to be overcome before any product from the KIC could enter the U.S. market under the FTA. Nevertheless, we have serious concerns that this door was left open. Under this Annex, the parties will establish a committee to "review whether conditions on the Korean Peninsula are appropriate for further economic development through the establishment and development of outward processing zones." The Committee will meet on the anniversary of the agreement's entry into force, and at least once annually thereafter. The Committee is empowered to identify geographic areas that may be designated as an OPZ, the goods of which may therefore be considered "originating goods" for the purposes of the rules of origin chapter of the agreement.

The Committee is required to establish criteria that must be met before goods from any outward processing zone may be considered "originating goods." These criteria include, but are not limited to: "progress toward the denuclearization of the Korean Peninsula; the impact of the outward processing zones on intra-Korean relations; and the environmental standards, labor standards and practices, wage practices and business and management practices prevailing in the outward processing zone, with due reference to the situation prevailing elsewhere in the local economy and the relevant international norms."

²⁷ See, e.g., *Schwab Raises Doubt About Concluding All Outstanding Free Trade Agreements*, Inside US Trade, Aug. 18, 2006 (reporting that USTR Schwab and Deputy USTR Bhatia had both stated that goods from Kaesong could not be eligible for access to the U.S. market under the FTA).

²⁸ See, e.g., Human Rights Watch, *North Korea: Workers' Rights at Kaesong Industrial Complex*, Oct. 2, 2006; James Brooke, *An Industrial Park in North Korea Nears a Growth Spurt*, NY Times, Feb. 28 2006.

Although “labor standards and practices” and “wage practices” are included among the listed criteria (assuming that these are mandatory criteria), the Annex does not specify which “labor” or “wage” standards. The text also directs the committee to give “*due reference* to the situation prevailing elsewhere in the local economy.” In the case of Kaesong, North Korea, the labor standards prevailing elsewhere in the local economy fall far short of international standards (indeed, they are practically non-existent), and wages are even lower in the surrounding area. As to international norms, they should not be given mere due reference but rather should be a deciding factor.

c. Unenforceability of FTA outside of South Korea

Should an OPZ be established in North Korea, one also faces the problem that the violations of labor rights there would not be actionable under the KORUS FTA, as North Korea would not be a signatory to the agreement. This presents a problem already present in the Singapore FTA, where, for rules of origin purposes, products made on three Indonesian islands were deemed to have originated in Singapore. In 2006, Indonesia considered banning unions on the island, which the FTA would have been useless to address. Fortunately, Indonesia did not move forward with this plan. A similar problem exists here, where actions taken by North Korea would fall outside the scope of the KORUS FTA.

d. Final Concerns

Finally, we are very concerned about the potential for transshipment of North Korean made goods to South Korea and subsequently to the United States. It does not appear from the text that this issue was adequately addressed. Effective enforcement of rules of origin must be undertaken in order to prevent such illegal transshipment.

It is our firm position that no goods from the KIC be able to enter the U.S. market until workers there have the right to freely exercise their internationally recognized worker rights, and that the government effectively enforce those rights. Failure to do so would have to be subject to dispute resolution under the KORUS FTA, despite the fact that North Korea is not a party to the agreement. However, our opposition should not be read as opposition to economic opportunity for the impoverished people of North Korea. We fully understand that employment of any kind is scarce, and that living conditions are very dire. Further development of North Korea is also undoubtedly important to any future reunification of North and South Korea. However, we believe that traded goods and services must be produced or performed under internationally recognized labor standards. Only in this way will working people obtain a fair share of any potential gains from trade.

B. Sectoral Concerns

1. Automotive

Bilateral auto trade between the U.S. and Korea remains seriously unbalanced. In 2008, the U.S. ran a \$13.4 billion trade deficit with Korea, of which \$10.5 billion is concentrated in the autos and auto parts sector. In units sold, that translates into 615,798 Korean vehicles exported to the U.S. The U.S. exported only 10,377 vehicles to Korea. To deal with this reality, a five-point proposal supported by labor, industry and Congress was delivered to USTR in 2006 as a roadmap for a successful automotive negotiation. The proposal included a 15-year phase-out on U.S. auto tariffs and the exclusion of trucks from any tariff reduction, tariff reduction incentives for opening the Korean auto market, enhanced safeguards, elimination of non-tariff barriers, and a mechanism to address future non-tariff barriers. The USTR incorporated none of these provisions.

a. Tariffs

The United States will immediately eliminate its 2.5% tariff on autos under 3000ccs, which accounts for the vast majority of Korean autos. The U.S. will also immediately eliminate its 2.5 % tariff on most auto parts. The 2.5% tariff on autos over 3000ccs will be phased out over three years. The 25% tariff on pickups will be phased out over 10 years. Korea will immediately eliminate its 8% tariff on autos greater than 1500ccs, and phase out said tariff over three years on autos less than 1500ccs and all diesel passenger cars. Korea will also eliminate immediately its 10% tariff on trucks.

These terms are unacceptable. Indeed, we are absolutely opposed to any immediate reduction of tariffs. Any tariff reduction should not commence until after there is a verifiable and significant opening of the Korean auto market, measured against objective criteria. The U.S. tariff on pickup trucks should not have been considered in the KORUS FTA negotiations, but only in multilateral negotiations.

The LAC believes that these terms will trigger a surge in auto imports from Korea. It will be relatively easy for Korean automakers to ramp up production for export to the U.S. The government of South Korea stated shortly after the agreement was signed that it expected the proposed free trade deal to boost its auto trade surplus with the U.S. by \$1 billion, and result in the export of Korean pickup trucks to the U.S.²⁹ Furthermore, Japanese and other foreign auto companies will have an incentive to locate production in Korea and use it as a platform to export pickup trucks duty-free into the U.S.

²⁹ See Yonhap News, *FTA to boost S. Korea's auto-related surplus by US\$1billion*, April 11, 2007. "The ministry said at a meeting co-hosted by the Korea Automobile Manufacturers Association in the port city of Gunsan that exports of finished cars may shoot up around \$810 million due to Washington's scrapping of its 2.5 percent tariff for South Korean cars. Imports could rise \$72 million after Seoul removes its 8 percent tariff, giving South Korea a surplus of about \$740 million a year."

At the same time, the KORUS FTA simply establishes a toothless process for addressing non-tariff barriers. There is absolutely no guarantee that the process will produce any concrete, measurable access to the Korean auto market. In our judgment, this new process is likely to prove as ineffective as the similar promises made in the failed 1995 and 1998 agreements. There is every reason to believe that Korea will continue to find new non-tariff barriers that it can use to keep its market closed to U.S.-built automotive products.

b. National Treatment and Market Access for Goods

Article 12: Engine Displacement Taxes

Proposed Article X.12 concerns the treatment of Korea's Special Consumption Tax and Annual Vehicle Tax, two non-tariff barriers (NTBs) that facially discriminate against large engine vehicles and have a disparate impact on U.S.-manufactured automobiles.

In the 2006 National Trade Estimate Report on Foreign Trade Barriers, USTR stated,

The United States has also expressed concern that Korea's current system of auto taxes discriminates against the larger vehicles that exporters tend to sell in the Korean market. Noting the MOU commitment to restructure and simplify the automotive tax regime in a manner that enhances market access for imported vehicles, the U.S. Government has urged the Korean government to lower the overall tax burden, reduce the number of taxes assessed on vehicles, and move away from engine-displacement taxes towards a value-based system.

According to the 2009 National Trade Estimate, the engine displacement taxes remains in force. Unfortunately, the trade agreement allows engine displacement taxes to persist indefinitely, and allows for discrimination between those engines above and below 1000ccs.

As to the *Special Consumption Tax*, the agreement contemplates a permanent discrimination between engines smaller than 1000ccs and those that are larger. In the first three years, engines between 1001ccs and 2000ccs (the majority of Korean cars) will face a tax of no more than 5%. Engines larger than 2000ccs (the majority of U.S. cars) will face a tax of no greater than 8%. After three years, all engines larger than 1000 ccs will be taxed at a single rate of no greater than 5%.

As to the *Annual Vehicle Tax*, the agreement maintains a discriminatory tax structure disadvantageous to U.S. autos. An auto with an engine of 1000 ccs or less will face a tax of no more than 80 won (\$.08) per cc. A vehicle with an engine between 1001 and 1600 (mostly Korean autos) will face a tax of no more than 140 won per cc (\$.15, or \$150 on a 1001 cc engine). One with an engine larger than 1600 ccs (mostly U.S. autos) will face a tax of no more than 200 won per cc (\$.21, or \$336 on a 1600cc engine).

As to the Subway Bond Tax, the FTA only discourages any increase in discrimination based on engine size; it does not eliminate the existing problem, nor prevent the adoption of a different, but similarly discriminatory mechanism, for this tax.

The United Auto Workers (UAW), the U.S. auto industry and Congress have all demanded that these taxes be eliminated immediately, to the extent they discriminate against imported vehicles.

c. Dispute Resolution

Although touted by trade officials as a significant tool for the enforcement of the auto-related provisions of the KORUS FTA, Article 22-Annex A does little more than expedite slightly the joint committee review and arbitration process. At best, the autos dispute resolution process: 1) obviates the need for consultations, 2) requires the joint committee to resolve a matter within 30, not 60, days (like most FTAs), and 3) expedites the seating of the arbitration panel, as well as the hearing and rendering of a final report. However, even this process could take several months to complete.

Below are our central concerns with Annex A.

1. The special dispute resolution procedures does not allow for participation by non-governmental interested parties, including unions.
2. The threshold for stating an actionable claim is higher in this case. As to non-auto related disputes, the dispute settlement procedures may be applied “with respect to the avoidance or settlement of all disputes between the parties regarding the interpretation or application of this Agreement or wherever a Party considers that:
 - (a) a measure of the other Party is inconsistent with its obligations under this Agreement;
 - (b) the other Party has otherwise failed to carry out its obligations under this Agreement; or
 - (c) a benefit the Party could reasonably have expected to accrue to it under this Agreement is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement.”

Annex B now requires a further showing of injury, namely that “the non-conformity or the nullification or impairment that the panel has found has materially affected the sale, offering for sale, purchase, transportation, distribution, or use of originating goods of the complaining Party.” As explained in a footnote, “If the panel determines that the non-conformity or the nullification or impairment that the panel has found has not materially affected the sale, offering for sale, purchase, transportation, distribution, or use of originating goods of the complaining Party, the procedures provided for in Articles x.12 and x.13 [for non-auto related disputes] shall apply.”

3. The dispute panel does not utilize panelists with automotive knowledge and experience.

4. The proposed penalty is ill equipped to address the central problem – the Korean government’s restrictions on access for imports in the Korean auto market. If, for example, Korea fails to harmonize and/or reduce or eliminate its engine displacement taxes as promised, or otherwise fails to allow a significant level of imports into its market, raising U.S. tariffs to pre-FTA levels does nothing to improve the situation for exporters of U.S.-manufactured vehicles. The inability to go beyond the imposition of the pre-FTA tariff would also prevent the collection of duties that would offset the value of the damage to U.S. exports caused by the Korean government’s import barriers.³⁰

5. If the panel determines that an actionable violation has occurred, the complaining party can only apply the prevailing MFN rate on autos (8703), not to light trucks (8704) (which was included in a previous draft of this annex).

6. It is unclear how long the safeguards may last, although they could sunset in as early as ten years. Section Eight notes that the safeguard will not expire if a panel has found that a party has failed to conform with its obligations under the agreement. It does not explain whether such a finding merely extends the effective life of the safeguard or converts it into a permanent safeguard. In any case, we believe that the safeguard should be permanent.

d. Technical Barriers to Trade

The Automotive Working Group Annex does not appear to take on any additional function other than what currently exists in the context of the WP-29. Moreover, civil society, and in particular trade unions, have no role, formal or otherwise, in the process. Unions do and should continue to play a part in review and setting of motor vehicle standards. Although a union could be included when a party deems it to be necessary and appropriate, we have little confidence that the current Administration would automatically include us in this process. At best, labor may send comments pursuant to a federal register notice should such notice and comment be necessary. We therefore do not perceive any real advantage from the inclusion of this article.

Indeed, the U.S. government established a similar working group with the government of Japan to address market access restrictions more than 10 years ago, but no meaningful progress was made over many years of meetings. The limitations of this proposal, including the narrow definition of “good regulatory practice,” would not produce the market-opening results that U.S. negotiators expected from the U.S.-Japan process and that have been identified as the goal of the negotiations with Korea.

USTR also negotiated a letter on additional non-tariff barriers, entitled “Confirming Letter to U.S.-Korea (KORUS) FTA (K-ULEV, OBD II, self-certification).” The LAC is concerned

³⁰ Further, it is our position that there should be no immediate reduction in tariffs, and thus no room for a tariff snapback, until a significant level of market presence has been established.

that this confirming letter, and the other autos provisions, will not effectively end the Korean government's ongoing efforts to use technical standards as a tool to discriminate against imported automotive products.

Indeed, since the FTA was negotiated, Korea has attempted to impose additional non-tariff barriers on autos.

Korea's Auto Insurance Reform Proposal

In March 2008, the Korea Insurance Development Institute (KIDI) released a reform package for automobile insurance calculations. The new methodology to determine the insurance rate was based on vehicle model brand for imports, and vehicle model for domestics. The result was that the insurance rates increased for most imported vehicles compared to comparable domestic vehicles. Prior to the reform, the premium paid was determined by each individual's characteristics, not the model brand or source (domestic or import) of the insured vehicle. As soon as it became aware of this problem, the import industry objected stating that the rate should not be higher based on whether a vehicle is imported. Based on pressure from importers and the U.S. government, Korea made some changes that mitigated the worst effects of the insurance rate schedule. However, the new schedule continues to result in higher insurance rates for imports.

Witness Testing

In February 2008, U.S. automakers certifying vehicles for sale in Korea were informed of a significant change to Korea's auto emissions testing/certification process, namely that it would no longer allow importers to certify compliance with emissions standards by witness tests at the location of the automaker's test facilities. The Korean government claimed that the change was a cost and a corruption reduction effort. The change would have adversely affected the ability of U.S. automakers to introduce several new models into the Korean auto market in 2008. U.S. automakers (Chrysler, Ford and GM) had scheduled witness tests for nine vehicle models in 2008. U.S. automakers requested that Korea's governing agencies continue to allow for auto emissions witness testing, which had been a successful and effective practice. After the U.S. government brought considerable pressure to bear on the Korean government, reminding them that the timing of this change was not helpful to getting support for the U.S.-Korea FTA, the Korean government backed off.

e. Auto Conclusion

USTR had a very practical proposal, supported by labor, industry and congress that would have conditioned new market access for Korea on the creation of new market access for U.S. manufacturers. Unfortunately, that proposal was ignored. More frustrating, USTR had at one time proposed language that conditioned US tariff reductions on Korean auto and truck imports reaching a "significant" level. Although insufficient, it was a step forward. In the rush to reach an agreement, that modest proposal was also abandoned. As a result, the auto provisions of the KORUS FTA put our domestic auto industry and thousands of U.S. auto

jobs in jeopardy. The LAC strongly opposes these provisions in the agreement and will not support any future agreement that does not adequately address these concerns.

2. Steel

Few issues in the bilateral economic relations between the U.S. and Korea have been as politically charged as steel. Following the Asian Financial Crisis in 1997, South Korean steel exports to the United States provoked a number of anti-dumping and countervailing duty cases, and Presidents Clinton and Bush each granted safeguard relief for U.S. steel producers. The major issue in bilateral steel trade with Korea is not tariffs, but rather non-tariff barriers that block access to the Korean market and the extent to which unfair trade practices in Korea, such as the dumping of excess steel capacity and use of government subsidies by the steel industry, harm U.S. producers and their workers.

In 2006, the U.S. steel trade deficit with Korea was \$2.1 billion, exceeding the peaks reached after the Asian financial crisis. In addition to the antidumping (AD) and countervailing duty (CVD) orders against steel from South Korea, trade remedy laws have also been essential in redressing unfair trade practices affecting imports of several key steel product lines from South Korea. There is also an indirect steel trade deficit with Korea, owing to the trade deficit faced in industries that consume U.S. steel, such as the auto industry, machinery makers and other manufacturing sectors. Imbalanced trade in these products, due to high tariff and non-tariff barriers on these goods in South Korea and a relatively open market in the U.S., directly harms the U.S. steel industry and its workers.

One of the key concerns for the LAC is the KORUS FTA's rules of origin as they apply to steel. In the past, the U.S. steel industry made it very clear that rules of origin language patterned after CAFTA would be unacceptable in the KORUS FTA, as such rules would allow certain Chinese steel products galvanized in Korea or subject to other minimal processing in Korea to enter the U.S. as a Korean product. The rules of origin for steel contained in the NAFTA, however, generally require a greater amount of processing in order to confer origin. Any weakening of the NAFTA rules of origin for steel in an FTA with a country such as Korea – a country that is located in a major steel producing region and has its own significant steel processing capabilities – is unacceptable.

Although the U.S. already grants duty-free treatment to many steel products on a most-favored nation basis even to countries without preferential FTA access, the KORUS FTA, with its CAFTA-modeled rules of origin, could help countries in the region with booming steel capacity, such as China, circumvent antidumping and countervailing duty orders by shipping steel to Korea for minimal processing before export to the U.S. Such minimally processed steel would be treated as of Korean origin under the FTA and receive duty-free access to the U.S. market. While the Department of Commerce has the ability to include such minimally processed steel from Korea within the scope of an existing antidumping or countervailing duty order on steel from China, it is not clear how the lax rules of origin in the Korea FTA may affect the Department's treatment of such goods in an anti-circumvention proceeding. In addition, if Chinese producers take advantage of the FTA's weak rules of

origin to ship steel to the U.S. through Korea (with minor processing), it could make it more difficult for the U.S. steel industry and its workers to meet legal thresholds regarding injury or import surges directly attributable to China when bringing future trade remedy cases against imports from China.

D. Conclusion

It is obvious that the Bush Administration USTR, tasked with negotiating the most significant trade agreement in over a decade, failed. In the waning moments of eligibility for trade promotion authority, it appears that concerns for the economic futures of workers both in the United States and Korea were largely ignored. This is an unacceptable manner to conduct economic policy. Negotiations with one of our largest trading partners must be handled with far greater deliberation and consultation with civil society and the Congress. We urge the Obama Administration to review the KORUS FTA in light of these comments and negotiate such modifications. American workers are willing to support increased trade if the rules that govern it stimulate growth, create good jobs, and protect fundamental rights. However, we will oppose trade agreements, including the KORUS FTA, which do not meet these basic standards as currently negotiated.

**Committee on Freedom of Association Report
Republic of Korea (Case No. 1865)**

Report No. 353
(Vol. XCII, 2009, Series B, No. 1)

Recommendations

749. In light of its foregoing conclusions, the Committee requests the Governing Body to approve the following recommendations:

(a) With regard to the Act on the Establishment and Operation of Public Officials' Trade Unions and its Enforcement Decree the Committee requests the Government to give consideration to further measures aimed at ensuring that the rights of public employees are fully guaranteed by:

(i) ensuring that public servants at all grades, regardless of their tasks or functions, including firefighters, prison guards, those working in education-related offices, local public service employees and labour inspectors, have the right to form their own associations to defend their interests;

(ii) ensuring that any restrictions of the right to strike may only be applicable in respect of public servants exercising authority in the name of the State and essential services in the strict sense of the term; and

(iii) allowing negotiation on the issue of whether trade union activity by full-time union officials should be treated as unpaid leave.

The Committee requests to be kept informed of any measures taken or contemplated in this respect.

(b) The Committee requests the Government to ensure that the following principles are respected in the framework of the application of the Act on the Establishment and Operation of Public Officials' Trade Unions:

(i) that in the case of negotiations with trade unions of public servants who are not engaged in the administration of the State, the autonomy of the bargaining parties is fully guaranteed and the reservation of budgetary powers to the legislative authority does not have the effect of preventing compliance with collective agreements; more generally, as regards negotiations on matters for which budgetary restrictions pertain, to ensure that a significant role is given to collective bargaining and that agreements are negotiated and implemented in good faith;

(ii) that the consequences of policy and management decisions as they relate to the conditions of employment of public employees are not excluded from negotiations with public employees' trade unions; and

(iii) that public officials' trade unions have the possibility to express their views publicly on the wider economic and social policy questions which have a direct impact on their members' interests, noting though that strikes of a purely political nature do not fall within the protection of Conventions Nos 87 and 98.

The Committee requests to be kept informed in this respect.

(c) As regards the other legislative aspects of this case, the Committee urges the Government:

(i) to take rapid steps to continue and undertake full consultations with all social partners concerned with a view to the legalization of trade union pluralism at the enterprise level, so as to ensure that the right of workers to establish and join the organization of their own choosing is recognized at all levels;

(ii) to expedite the resolution of the payment of wages by employers to full-time union officials so that this matter is not subject to legislative interference, thus enabling workers and employers to conduct free and voluntary negotiations in this regard;

(iii) to ensure that, in issuing decisions determining the minimum service, the Labour Relations Commission takes due account of the principle according to which a minimum service should be confined to operations that are strictly necessary to avoid endangering the life or normal living conditions of the whole or part of the population and to continue to keep it informed of the specific instances in which minimum service requirements have been introduced, the level of minimum service provided and the procedure through which such minimum service was determined (negotiations or arbitration).

(iv) to amend the emergency arbitration provisions of the TULRAA (sections 76-80) so that emergency arbitration can only be imposed by an independent body which has the confidence of all parties concerned and only in cases in which strikes can be restricted in conformity with freedom of association principles;

(v) to repeal the provisions prohibiting dismissed and unemployed workers from keeping their union membership and making non-union members ineligible to stand for trade union office (sections 2(4)(d) and 23(1) of the TULRAA); and

(vi) to bring section 314 of the Penal Code (obstruction of business) in line with freedom of association principles.

The Committee requests to be kept informed of the progress made in respect of all of the abovementioned matters.

(d) The Committee requests the Government to keep it informed of the progress of the appeal proceedings in respect of Kwon Young-kil.

(e) The Committee once again requests the Government to reconsider the dismissals of Kim Sang-kul, Oh Myeong-nam, Min Jum-ki and Koh Kwang-sik Han Seok-woo, Kim Young-kil, Kang Dong-jin and Kim Jong-yun in the light of the subsequent adoption of the Act on

the Establishment and Operation of Public Officials' Trade Unions. The Committee requests to be kept informed in this respect.

(f) With regard to section 314 of the Penal Code on obstruction of business, the Committee once again urges the Government to consider all possible measures, in consultation with the social partners concerned, so as to revert to a general practice of investigation without detention of workers and of refraining from making arrests, even in the case of an illegal strike, if the latter does not entail any violence. The Committee requests to be kept informed in this regard, including by providing copies of court judgments on any new cases of workers arrested for obstruction of business under the terms of the present section 314 of the Penal Code.

(g) The Committee requests the Government to keep it informed of the outcome of the appeal filed by Choi Seong-jin against his dismissal for having participated in a strike staged by KALFCU in 2005.

(h) Recalling that the death of Kim Tae Hwan, President of the FKTU Chungju regional chapter, took place in the context of an industrial dispute, the Committee requests the Government to provide a copy of the relevant investigation report.

(i) The Committee urges the Government to take all necessary measures to ensure that the investigation under way concerning the death of Ha Jeung Koon, member of the Pohang local union of the KFCITU, is concluded without further delay so as to determine where responsibilities lie, allowing for the guilty parties to be punished and the repetition of similar events to be prevented. The Committee requests to be kept informed in this respect.

(j) The Committee requests the Government to take all necessary measures for the effective recognition of the right to organize of vulnerable "daily" workers in the construction sector, notably by refraining from any further acts of interference in the activities of KCFITU affiliates representing such workers, to keep it informed of the outcome of proceedings pending at the final instance with regard to the Daegu Construction Workers Union, and to review the convictions of the members and officials on grounds of extortion, blackmail and related crimes, for what appears to be ordinary trade union activities. The Committee requests to be kept informed of developments in this respect.

(k) The Committee once again requests the Government to undertake further efforts for the promotion of free and voluntary collective bargaining over terms and conditions of employment in the construction sector covering, in particular, the vulnerable "daily" workers. In particular, the Committee requests the Government to provide support to construction sector employers and trade unions with a view to building negotiating capacity and reminds the Government that it may avail itself of the technical assistance of the Office in this regard if it so wishes. The Committee requests to be kept informed of developments in this respect.

(l) The Committee recalls the Government's indication of its willingness to ratify Conventions Nos 87 and 98, in the near future, which it made to the ILO High-level Tripartite Mission in 1998 and which was reported to the Governing Body in March 1998

(see document GB.271/9) and requests the Government to keep it informed of developments in this respect.

(m) The Committee calls the Governing Body's attention to this serious and urgent case.