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## **The Korea FTA is Lose-Lose for the U.S. and Korea: The Facts**

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The Korean Embassy recently released claims purporting to rebut the statements in Lori Wallach's February 15, 2011 *Huffington Post* piece about the lose-lose nature of the NAFTA-style deal with South Korea. These statements do not reveal the full truth of the matter and could leave a mistaken impression of the so-called "free trade agreement" (FTA) with Korea and its consequences. Below are the facts in response to the Korean Embassy's misleading claims.

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### **THE FTA, FINANCIAL DEREGULATION AND WEAK LABOR RIGHTS**

**Korean Embassy does not even dispute that the Korea FTA could worsen financial stability and undermine labor rights.** Wallach wrote that, "Another issue intensifying opposition to the FTA in Korea is the pact's pre-crisis era financial deregulation requirements. After the 1997 Asian financial crisis wiped out decades of improvements to Korean living standards, Korea's policy response to the recent global crisis was forceful. Yet, aspects of both Korean and U.S. financial regulation would newly be exposed to direct challenge by the very firms that wrecked the global economy. Finally, the Korean union members on the delegation clearly shocked many of their audiences with their stories of how South Korean labor laws allow for strikers to be arrested for, well, striking and also allow individual strikers to be sued for compensation by their employers for lost profits." The Korean Embassy does not rebut any of these points in their response to Wallach.

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### **THE KOREA FTA'S DAMAGE TO THE U.S. AUTO SECTOR**

**Lori Wallach's *Huffington Post* piece:** "...the ITC [International Trade Commission] study showed that the (overall) U.S. deficit in autos and auto parts would increase by at least \$531 million under the pact."

**Korean Embassy's claim:** "The ITC study predicted that the KORUS FTA would increase U.S. auto exports to Korea by 45.5 percent to 58.9 percent and auto imports from Korea by 9.1 percent to 12.0 percent. At the request of the House Ways and Means Committee, the ITC is investigating potential effects on the U.S. auto industry of FTA modifications agreed upon in December 2010. The ITC expects to submit its findings to the Committee by March 15, 2011."

**Facts: Playing with percentages obscures the projected worsening of the auto trade deficit.** The embassy's use of percentage gains versus the net balance or quantities of vehicles obscures the reality of the data. The USITC's prediction that exports of U.S. autos to Korea would increase by 46-59 percent seems impressive at first glance, but upon closer inspection it becomes clear that the very low starting point of U.S. exports to Korea (about 6,000 vehicles in 2009) means that this percentage increase is small potatoes that will be overwhelmed by the huge increase in Korean auto exports (at about 500,000 in 2009) to the United States projected to occur under the FTA. In the USITC study, U.S. auto exports to Korea start at only \$0.7 billion, but Korean auto exports to the United States start at \$14.5 billion.<sup>1</sup> Thus, an increase in U.S. auto exports of 46-59 percent results in \$294-381 million in greater auto exports, but the increase of 9-12 percent for imports of Korean autos leads to a \$1,324-1,737 million import increase, dwarfing the U.S. exports and resulting in a net increase in the auto trade deficit with Korea of \$1,030-1,356 million. (Note that due to trade diversion effects, the USITC found that the total increase in the U.S. auto trade deficit with the world is less than the increased deficit with Korea itself.)

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## **KOREAN PUBLIC OPINION AGAINST THE FTA**

**Lori Wallach's *Huffington Post* piece:** "A majority of Koreans oppose the (KORUS) FTA."

**Korean Embassy's claim:** "Koreans have been surveyed at least six times on the KORUS FTA since Feb. 1, 2008. None of those polls showed FTA opponents in the majority. The most recent poll, published by the Dong-A Ilbo newspaper on Jan, 13, 2011, showed 55.2 percent approval vs. 28.5 percent disapproval."

**Facts: Embassy misrepresents Korean public opinion, while citing methodologically suspect poll.** First, there are polls that have shown opposition to the Korea FTA by wide margins. For instance, a May 2008 poll revealed that 55 percent of Koreans opposed the U.S.-Korea FTA, while only 29 percent supported it.<sup>2</sup> Moreover, the widespread Korean opposition to the FTA is clear for all to see. According to the *New York Times*, a deal related to the Korea FTA has provoked "the biggest anti-government demonstrations since the end of military dictatorship in the late 1980s" and almost brought down the Lee administration. The FTA has spawned a steady stream of protests since 2008.<sup>3</sup> Upon announcement of the broad outlines of the deal in December 2010, the main Korean opposition party stated that the deal was "humiliating." The chairperson of the main opposition party declared that the FTA "damaged the two countries' alliance."<sup>4</sup>

The central fact highlighted in the *Huffington Post* piece was that prominent members of the Korean National Assembly and leaders of the powerful Korean Confederation of Trade Unions are so opposed to the Korea FTA that they traveled to Washington to share the basis for their opposition with members of the U.S. Congress.

The Korean Embassy has no response to this central point. Instead, they cite a methodologically suspect poll that is at odds with the obvious political situation on the ground. The methodology

of the Dong-A Ilbo poll cited by the Korean Embassy was conducted over only one day, resulting in a response rate of 16 percent, meaning that 84 percent of the homes called by the surveyors did not answer the survey.<sup>5</sup> According to the American Association for Public Opinion Research, “Failure to follow up non respondents and refusals, in particular, can severely undermine an otherwise well-designed survey. To deal with this possibility...allowance is made for repeated attempts (e.g., callbacks at different times and days) to thoroughly work the selected sample in not-at home and related situations....”<sup>6</sup> Low response rates can indicate biased results since individuals holding certain views may be less likely to answer the phone when first contacted. Since the Dong-A Ilbo surveyors did not attempt to contact non-respondents over multiple days, contrary to standard public opinion polling practice, the poll may have failed to pick up on the widespread opposition to the U.S.-Korea FTA in Korea. Because the Embassy does not provide any of the details of the remaining polls, it is impossible to know their validity.

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## **THE KOREA FTA’S CONTRIBUTION TO THE U.S. TRADE DEFICIT**

**Lori Wallach’s *Huffington Post* piece:** The “U.S. International Trade Commission has concluded that the Korea agreement will increase the overall U.S. trade deficit.”

**Korean Embassy’s claim:** “The ITC clearly cautioned users of its data against doing exactly what Ms. Wallach and others have done: the ITC’s simulation results “should not be interpreted as changes in total imports and exports, or as implying meaningful information about the balance of trade impact of the entire U.S.-Korea FTA.” In its 2007 report, “U.S.-Korea Free Trade Agreement: Potential Economy-wide and Selected Sectoral Benefits,” the ITC predicted that the agreement would increase U.S. merchandise exports to Korea by \$9.7 billion to \$10.9 billion and merchandise imports from Korea by \$6.4 billion to \$6.9 billion.”

**Facts: Embassy continues to dodge the fact that the Korea FTA will be lose-lose. While it cites the USITC projections on the bilateral trade balance showing Korea would lose, it ignores the fact that the U.S. global trade deficit is expected to increase – and it is the U.S. global balance that will affect jobs here.**

The USITC’s study on the Korea FTA predicted that implementation of the Korea FTA would cause total U.S. exports to rise by \$4.8-5.3 billion dollars and total U.S. imports to rise by \$5.1-5.7 billion, resulting in an increased trade deficit of \$308-416 million.<sup>7</sup> This result is inseparable from the other findings in the report, including those that the FTA boosters prefer to highlight.

Interestingly, the USITC has not in the past made caveats like the one quoted in regards to its findings, despite the fact that its model’s track record has proven to be overly optimistic. For instance, a 1999 USITC study using roughly the same model estimated that China’s tariff offer for WTO accession would increase the U.S. trade deficit with China by only \$1 billion dollars.<sup>8</sup> In reality, the trade deficit with China skyrocketed by \$167 billion between 2001 and 2008.<sup>9</sup> Although China’s WTO accession alone (and the favorable trade treatment that came with it) likely did not cause the entirety of the huge rise in the trade deficit with China, it almost certainly

contributed more than \$1 billion dollars to the rise in the deficit. The USITC should indeed provide caveats that show that its own predictions have been overly optimistic.

Also, in the past, the USITC has not urged us to ignore its model results when its model has predicted an improved trade balance under an FTA. Its study of the Central America Free Trade Agreement (CAFTA), which used the same type of model as the Korea FTA study, predicted that the overall U.S. trade balance would improve as a result of the trade pact.<sup>10</sup> The CAFTA study did not urge its readers to ignore its predictions of changes in imports and exports as the Korea FTA study does. Indeed, the CAFTA study calls attention to the change in the trade balance.<sup>11</sup> CAFTA proponents from both parties seized on this fact. We should focus on the actual quantitative results of the study, rather than the needless editorial caveat that could apply to any imperfect model of the economy, especially since the caveat is appearing long after the USITC has adopted this technique for evaluating trade agreements.

Lastly, the Korean Embassy's ostensible concern about the sanctity of the USITC's findings is belied by the Embassy's twisting of the quantitative results of the study to claim that the agreement will create 70,000 jobs.<sup>12</sup> The 70,000 jobs figure does not come from the USITC study (which assumes that the number of jobs does not change). The Embassy has apparently applied a standard jobs multiplier from the U.S. Department of Commerce to the value of the USITC's estimate of a change in bilateral U.S. exports to Korea. The figure the embassy has created does not include imports – or the net impact – much less use the appropriate data with respect to how the U.S. would be affected. That would be the ultimate effect of the FTA on the U.S. global trade balance – an increased deficit and the related negative impact of imports on jobs. Put simply, the Embassy should not be in the business of splicing two completely distinct methodologies – one from the USITC, and one from the Department of Commerce. But if the Embassy is going to engage in such illegitimate splicing, it should at least be consistent. Since the USITC predicted a greater deficit with the Korea FTA, a proper accounting of the impact of exports and imports would find a net job loss from the FTA.

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## **THE KOREA FTA: PUTTING CORPORATIONS BEFORE THE PUBLIC INTEREST**

**Lori Wallach's *Huffington Post* piece:** The Korea FTA's investor-state dispute resolution mechanism "empowers foreign investors to skirt domestic courts and seek cash compensation for regulatory costs before foreign tribunals..."

**Korean Embassy's claim:** "The investor-state dispute resolution mechanism in the KORUS FTA is a common feature of free trade agreements and bilateral investment treaties, of which there are more than 3,000 worldwide. NAFTA has an identical investor-state dispute resolution chapter. Since it took effect in 1994, Mexican and Canadian companies have filed 18 requests for arbitration against the U.S. government. They have won none of them." Elsewhere, the Embassy adds that, "Some opponents of the FTA have alleged that this section will provide Korean companies with rights greater than those afforded to U.S. companies. Not only is that not true, it is directly rebutted in the text of the agreement which says, "foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic

investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement.”<sup>13</sup>

**Facts: Opposition to the investor-state system is at an all time high, in part because of such callous attitudes from governments.** In July of last year, 110 members of Congress sent a letter to President Obama opposing the investor-state mechanism in the Korea FTA, among other provisions.<sup>14</sup> A bipartisan group of 146 legislators (including the majority of House Democrats) cosponsored the TRADE Act, which called for elimination of the investor-state system. And in September 2010, over 550 faith, family farm, environmental, labor, and consumer protection organizations signed a letter to President Obama urging that he remove the investor-state mechanism from the Korea FTA.<sup>15</sup>

The Embassy would like to portray the investor-state dispute settlement mechanism as mundane and uncontroversial. Nothing could be farther from the truth. In October 2010, Korean legislators and members of the U.S. Congress sent a joint letter to President Obama and President Lee that called on them to change the text of the FTA to eliminate the threat of investor-state lawsuits.<sup>16</sup> The recent joint statement of Korean lawmakers, labor unions, farmers and civil society groups highlighted in Lori Wallach’s *Huffington Post* piece reiterates the deep concern of Koreans that the investor-state mechanism would allow multinational corporations “to bring our government to the foreign arbitration tribunals to demand compensation over public policy standards, even those that apply to domestic and foreign corporations alike.”<sup>17</sup>

**Language cited by Embassy is non-binding.** To counter the fact that the FTA’s clear language in Chapter 10 does provide Korea firms operating here better rights than domestic firms, the Embassy quotes a provision of the FTA (e.g. “foreign investors are not hereby...”) that is in the preamble of the agreement and thus non-binding. The non-binding nature of the preamble was noted most recently by the U.S. State Department in the *Grand Rivers et. al. vs. United States* investor-state arbitration under NAFTA, which stated: “the key to interpreting the provisions of the NAFTA must be the text itself, as informed by the treaty’s context, object, and purpose, only to the extent those additional sources are relevant to, and consonant with, the substantive provision at issue. This approach is grounded in the well-accepted principle that general objectives can shed light on treaty provisions, but cannot impose independent obligations on treaty signatories.”<sup>18</sup>

The State Department quote above references concepts from the Vienna Convention on the Interpretation of Treaties, which also states that “A party may not invoke the provisions of its own internal law as justification for its failure to perform a treaty.” In other words, even if the preamble was non-hortatory, the United States could not invoke its own internal laws as a reason not to provide greater rights to Korean investors than that provided U.S. investors under the U.S. Constitution.

This conclusion is borne out by the empirical track record of FTAs. Over 90 percent of panels that granted awards under investor-state cases under U.S. trade and investment agreements ignored the preamble, selectively paid attention only to pro-investor clauses, or found that preambular provisions were purely hortatory. The panels in the remaining cases found that pro-investor provisions had to be given as much or more weight as pro-public interest provisions.

Members of Congress and civil society are so concerned about the investor-state provisions in the Korea FTA because laws protecting the environment and consumers' safety have repeatedly come under attack through the investor-state mechanisms in trade agreements. In fact, there are nearly \$9.1 billion in claims in the 14 known investor-state cases outstanding under NAFTA-style deals. None of them relate to traditional trade concerns; all of them relate to environmental, public health and transportation policy. Members of Congress and the public have raised some of the following concerns:

**NAFTA:** Thirty eight NAFTA investor-state cases targeted laws protecting the environment, natural resources, and food and drug safety.<sup>19</sup> The Embassy claims that the U.S. is not in danger from the investor-state provisions of the Korea FTA. In fact, the United States lost a \$725 million case on the merits of the claim, but a tribunal dismissed the case on a technicality voiding the U.S. liability, so the danger of these cases is very real. Furthermore, the government has had to shell out millions of dollars in taxpayer-funded attorney fees and arbitration costs to defend these claims even when they 'win'. With Canada and Mexico having paid out \$326.9 million to nine foreign investors, it may be only a matter of time before a tribunal rules against the United States.<sup>20</sup> At this point in time, there are five active NAFTA foreign investor claims against the U.S. working their way through the arbitration process.<sup>21</sup>

**CAFTA:** Two multinational mining corporations have already taken aim at El Salvador's mining regulations through investor-state claims filed under CAFTA. Pacific Rim Mining Corporation ran afoul of El Salvador's mining regulations by never completing a feasibility study necessary to obtain an exploitation permit for its mine.<sup>22</sup> Pacific Rim has demanded hundreds of millions of dollars in compensation under CAFTA's investor-state mechanism, alleging that El Salvador's environmental regulations and processes constitute an "expropriation" of their "investment."<sup>23</sup>

The Wisconsin-based Commerce Group Corporation filed a \$100 million CAFTA lawsuit when its environmental permits for its gold mining and milling operations in Northeastern El Salvador were revoked after the company failed its environmental audit.<sup>24</sup> This case was recently dismissed, although the tribunal made clear that Commerce Group had the right under CAFTA to challenge El Salvador's mining policy. The case was dismissed on a technicality: If Commerce Group had simply written a letter to the Salvadoran judiciary informing it that it was waiving its right to challenge revocation of its environmental permits in Salvadoran courts, then Commerce Group's attack on Salvadoran mining policy would likely be going forward under CAFTA. Indeed, when El Salvador attempted to recoup its legal costs, the tribunal sided with Commerce Group that its case was not frivolous. The fact that a corporate attack on a sovereign country's domestic environmental policy before a foreign tribunal would even be possible – much less cost a country almost a million dollars when they win the case – highlights what is wrong with our current trade agreement model. These latest lawsuits under CAFTA demonstrate the persistent threat that the Korea FTA would present to both U.S. and Korean environmental laws.

**U.S.-Argentina BIT:** These harmful investor-state provisions have been replicated under other deals. Argentina has been the subject of 43 corporate attacks from the likes of Enron and BP. These corporations attacked the Argentine government's emergency measures from the 2001-02

financial crisis – measures which successfully put the economy back on track. Argentina has been ordered to pay out about \$430 million.<sup>25</sup>

**Chilling effect:** Corporations want these rules in order to make an example of regulators that interfere with corporate profits, even when they’re protecting the public interest. They have a potent chilling effect. For instance, in 2004 the provincial government of New Brunswick, Canada sought to significantly reduce the cost of auto insurance by establishing a public auto insurance program. The effort was abandoned when critics noted that the program could be challenged as an “expropriation” under the NAFTA investor-state mechanism.<sup>26</sup>

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## **KOREA FTA BENEFITS CHINA AT THE EXPENSE OF U.S. AND SOUTH KOREAN WORKERS**

**Lori Wallach’s *Huffington Post* piece:** “The FTA allows its benefits to accrue to autos that contain only 35 percent U.S. or Korean content.”

**Korean Embassy’s claim:** “The KORUS FTA stipulates that 35% of the components used to manufacture products (under the build-up method/net cost method) or 55% of the components of the final product (using the build-down method) must originate in one of the two countries to be eligible for preferential treatment. A 45% maximum foreign content rule under the Korea-EU FTA corresponds with the minimum 55% domestic contents rule under the KORUS FTA (using the build-down method). Also, the EU’s standard foreign content rule was 40%, not 45%.” Elsewhere, the Embassy has gone further, stating that the build-up and build-down methods “are supposed to be equivalent to each other. The 20% difference between the methodologies reflects the operation cost in the final product processing stage and manufacturers’ dividends, etc.”<sup>27</sup>

**Facts: These two methods are not equivalent. Multinational companies have pushed for rules that intentionally allow them the discretion to include as much as 65 percent content from outside the FTA countries, at the expense of workers in both the U.S. and South Korea.**

As the United Autoworkers and others have repeatedly noted, Korean automakers have the option to use the “build-up” method to calculate the domestic value content under the US-Korea FTA, which requires that only 35 percent of the value of the motor vehicle be comprised of domestic parts to qualify for FTA benefits. This method allows – but does not require – that importers deduct certain “fringe” costs like transportation when calculating the maximum permissible share of content from non-FTA countries.<sup>28</sup>

The EU-Korea FTA provides for only one way for automakers to calculate the domestic value content. **Under the EU-Korea FTA, a Korean motor vehicle qualifies for FTA benefits only if its foreign content comprises 45 percent or less of the vehicle.**<sup>29</sup> Put differently, the minimum domestic value content for the EU-Korea FTA is 55 percent. Given that the EU-Korea FTA mandates that 55 percent of the value of a Korean auto must be of domestic components, while the “build up” method of the US-Korea FTA mandates that only 35 percent of the value of

a Korean auto must be of domestic components, Korean automakers will be able to put a much greater portion of Chinese components into vehicles destined for the United States, undercutting auto production in the United States.

Members of Congress and fair trade groups have long raised concerns about the low percentage of originating content required for goods to qualify for duty-free FTA treatment. The Labor Advisory Committee for Trade Negotiations and Trade Policy has warned that the lax rules of origin in the Peru, Oman, and Korea FTAs would allow large quantities of goods from third countries such as China to enter the United States duty-free under the FTAs.<sup>30</sup> Reports on previous FTAs have made similar points.<sup>31</sup> However, industry representatives have successfully pushed the U.S. Trade Representative to include lax rules of origin in FTAs.<sup>32</sup>

## ENDNOTES

<sup>1</sup> U.S. International Trade Commission. "U.S.-Korea Free Trade Agreement: Potential Economy-wide and Selected Sectoral Effects." USITC Publication 3949. September 2007, Corrected printing March 2010, at 2-8, Table 2.2, Available at: <http://www.usitc.gov/publications/332/pub3949.pdf>

<sup>2</sup> *Views & News*, "[여론조사] 한미FTA 반대, 58.6%로 급증," May 30 2008, Available at: <http://www.viewsnnews.com/article/view.jsp?seq=35414>

<sup>3</sup> Choe Sang-Hun, "South Koreans Press Anti-Government Protests," *New York Times*, June 20, 2008. Available at: <http://www.nytimes.com/2008/06/20/world/asia/20korea.html>

Choe Sang-Hun, "Beef Furor Provokes a Turnover in Seoul," *New York Times*, June 21, 2008. Available at: <http://www.nytimes.com/2008/06/21/world/asia/21korea.html?ref=asia>

Choe Sang-Hun, "South Korea and U.S. Reach Deal on Beef Imports," *New York Times*, June 22, 2008. Available at: <http://www.nytimes.com/2008/06/22/world/asia/22korea.html>

Mark McDonald, "Protesters Rally in Seoul Ahead of G-20 Summit," *New York Times*, November 7, 2010, Available at: <http://www.nytimes.com/2010/11/08/world/asia/08korea.html>

<sup>4</sup> "Rival parties wrangle over U.S. FTA, budget," *The Korea Herald*, December 6, 2010, Available at: <http://www.koreaherald.com/national/Detail.jsp?newsMLId=20101206000907>

<sup>5</sup> *Dong-A Ilbo*, "정치.사회 현안 관련 국민여론조사(2010년도 제5차)," January 2011, Available at: [http://www.donga.com/docs/news/img/201101/20101226\\_3.hwp](http://www.donga.com/docs/news/img/201101/20101226_3.hwp)

<sup>6</sup> American Association for Public Opinion Research, "Best Practices," Accessed February 28 2011, Available at: [http://www.aapor.org/Best\\_Practices/2845.htm](http://www.aapor.org/Best_Practices/2845.htm)

<sup>7</sup> U.S. International Trade Commission. "U.S.-Korea Free Trade Agreement: Potential Economy-wide and Selected Sectoral Effects." USITC Publication 3949. September 2007, Corrected printing March 2010, at 2-14, Table 2.3, Available at: <http://www.usitc.gov/publications/332/pub3949.pdf>

<sup>8</sup> U.S. International Trade Commission, "Assessment of the Economic Effects on the United States of China's Accession to the WTO," August 1999, at xi.

<sup>9</sup> Trade flow data from the USITC DataWeb. Deficit calculated on a domestic imports minus imports for consumption basis. Figures inflation-adjusted to 2009 using the CPI-U-RS.

<sup>10</sup> U.S. International Trade Commission. "U.S.-Central America-Dominican Republic Free Trade Agreement: Potential Economy-wide and Selected Sectoral Effects," USITC Publication 3717, August 2004, at 76, Table 4-5, Available at: <http://www.usitc.gov/publications/332/pub3717.pdf>

<sup>11</sup> On page 76, it states that, "The changes in trade arise from trade balance, changes in demand, and factor supply."

<sup>12</sup> Adolfo Guzman-Lopez, "Korean ambassador stumps in LA for free trade agreement," Southern California Public Radio, Jan. 25, 2011, Available at: <http://www.scpr.org/news/2011/01/25/korea-trade-feature/>

<sup>13</sup> <http://www.koreauspartnership.org/pdf/foreign-investor-protection.pdf>

<sup>14</sup> Letter on the Korea Free Trade Agreement to President Obama from 110 members of Congress, July 22 2010, Available at: <http://www.citizen.org/documents/KORUSLetterJuly2010.pdf>

<sup>15</sup> Letter on the Korea Free Trade Agreement to President Obama from 550 organizations, September 22 2010, Available at: [http://www.citizenstrade.org/pdf/Korea\\_Opposition\\_Final.pdf](http://www.citizenstrade.org/pdf/Korea_Opposition_Final.pdf)

<sup>16</sup> Joint letter of Korean legislators and members of the U.S. Congress to President Obama and President Lee regarding the U.S.-Korea Free Trade Agreement, October 18, 2010, Available at: <http://www.michaud.house.gov/images/stories/koreauslegislatorsletter.oct.18.2010.pdf>



<sup>17</sup> Joint Statement of Korean lawmakers, labor unions, farmers and civil society groups on the proposed Korea - U.S. FTA, January 27, 2011, Available at: [http://viacampesina.org/en/index.php?option=com\\_content&view=article&id=1021:joint-statement-of-korean-lawmakers-labor-unions-farmers-and-civil-society-groups-on-the-proposed-korea-us-fta&catid=24:10-years-of-wto-is-enough&Itemid=35](http://viacampesina.org/en/index.php?option=com_content&view=article&id=1021:joint-statement-of-korean-lawmakers-labor-unions-farmers-and-civil-society-groups-on-the-proposed-korea-us-fta&catid=24:10-years-of-wto-is-enough&Itemid=35)

<sup>18</sup> <http://www.naftaclaims.com/Disputes/USA/GrandRiver/GRE-USA-Merits-Counter-Memorial-R.pdf>

<sup>19</sup> Scott Sinclair, “NAFTA Chapter 11 Investor-State Disputes,” Canadian Centre for Policy Alternatives, November 2010, Available at:

<http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2010/11/NAFTA%20Chapter%2011%20Investor%20State%20Disputes.pdf>

Cases tallied on page 22 of the report were summed if the type of measure challenged was “natural resources”, “environmental protection”, “health or drug”, or “health, food safety, or drug”.

<sup>20</sup> Public Citizen, “Table of NAFTA Chapter 11 Foreign Investor-State Cases and Claims,” November 2010, Available at:

[http://www.citizen.org/documents/NAFTA\\_Investor\\_State\\_Chart\\_Nov\\_2010.pdf](http://www.citizen.org/documents/NAFTA_Investor_State_Chart_Nov_2010.pdf)

<sup>21</sup> These cases are the Cemex case notified in September 2009, the Apotex case notified in June 2009, the CANACAR case notified in April 2009, the Apotex case notified in December 2008, and the Domtar case notified in April 2007.

See Public Citizen, “Table of NAFTA Chapter 11 Foreign Investor-State Cases and Claims,” November 2010, Available at:

[http://www.citizen.org/documents/NAFTA\\_Investor\\_State\\_Chart\\_Nov\\_2010.pdf](http://www.citizen.org/documents/NAFTA_Investor_State_Chart_Nov_2010.pdf)

<sup>22</sup> Pacific Rim Mining Corp, “El Dorado, El Salvador.” Accessed May 25, 2010. Available at:

[http://www.pacrimmining.com/s/ES\\_Eldorado.asp](http://www.pacrimmining.com/s/ES_Eldorado.asp).

<sup>23</sup> Pac Rim Cayman LLC, “Notice of Arbitration Under the Rules of Arbitration of the International Centre for Settlement of Investment Disputes, the Central America – United States – Dominican Republic Free Trade Agreement and the Foreign Investment Law of El Salvador,” Pac Rim Cayman LLC v. Republic of El Salvador, April 30, 2009.

<sup>24</sup> Administrative Litigation Chamber of the Supreme Court of Justice of El Salvador, Case Number 308-2006, April 29, 2010, English translation at page at page 5, paragraph 2. (note that the English translation follows the Spanish). Available at:

[http://www.commercegroupcorp.com/images/cafta/R-5.\\_Decision\\_Case\\_308-2006%5B1%5D.pdf](http://www.commercegroupcorp.com/images/cafta/R-5._Decision_Case_308-2006%5B1%5D.pdf)

<sup>25</sup> Luke Eric Peterson, “Argentina by the numbers: where things stand with investment treaty claims arising out of the Argentine financial crisis,” *Investment Arbitration Reporter*, Vol. 4, No. 2, February 1, 2011. Available at:

[http://www.iareporter.com/articles/20110201\\_9?](http://www.iareporter.com/articles/20110201_9?)

<sup>26</sup> Mary Bottari and Lori Wallach, “NAFTA’s Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005,” Public Citizen, February 2005, at xvii, Available at:

<http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf>

<sup>27</sup> <http://www.koreauspartnership.org/pdf/Other%20Issues.pdf>

<sup>28</sup> As Annex 6-A states:

“Chapter 87

Vehicles Other Than Railway or Tramway Rolling-Stock, and Parts and Accessories Thereof

87.01 – 87.06

“No change in tariff classification is required, provided that there is a regional value content of not less than:

- (a) 35 percent under the build-up method; or
- (b) 55 percent under the build-down method; or
- (c) 35 percent under the net cost method.”

87.03 is the HS code for most passenger cars.

To see what this methods, mean, see Article 6.2 of the U.S.-Korea Free Trade Agreement:

“ARTICLE 6.2: REGIONAL VALUE CONTENT

1. Where Annex 6-A specifies a regional value content test to determine whether a good is originating, each Party shall provide that the importer, exporter, or producer may calculate regional value content based on one or the other of the following methods:

- (a) Method Based on Value of Non-Originating Materials (Build-down Method)

$$RVC = (AV - VNM)/AV \times 100$$

- (b) Method Based on Value of Originating Materials (Build-up Method)

$$RVC = (VOM/AV) \times 100$$

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where,

RVC is the regional value content, expressed as a percentage;

AV is the adjusted value of the good;

VNM is the value of non-originating materials, other than indirect materials, acquired and used by the producer in the production of the good; VNM does not include the value of a material that is self-produced; and

VOM is the value of originating materials, other than indirect materials, acquired or self-produced and used by the producer in the production of the good.”

Article 6.4.2 specifies that, for what “adjusted value” means in this context:

“Each Party shall provide that, for non-originating materials, the following expenses, where included under Article 6.3, *may be deducted* from the value of the material:

(a) the costs of freight, insurance, packing, and all other costs incurred in transporting the material within a Party’s territory or between the territories of the Parties to the location of the producer;

(b) duties, taxes, and customs brokerage fees on the material paid in the territory of one or both of the Parties, other than duties and taxes that are waived, refunded, refundable, or otherwise recoverable, including credit against duty or tax paid or payable;

(c) the cost of waste and spoilage resulting from the use of the material in the production of the good, less the value of renewable scrap or by-product; and

(d) the cost of originating materials used in the production of the non-originating material in the territory of a Party.” [italics added]

The operative word in Article 6.4.2 is “may.” The discretion is left up to the importer to include or not include these costs in the value of the non-originating material. If an importer chose to include them, the value of the non-originating material could be up to 65 percent.

Available at: [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file680\\_12704.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file680_12704.pdf). See also: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), “The Social and Economic Impact of the US-South Korea Free Trade Agreement (KORUS FTA),” September 14, 2010, Available at: [http://www.imfmetal.org/files/10102608591310005/UAW\\_KORUS\\_FTA\\_ENGLISH.pdf](http://www.imfmetal.org/files/10102608591310005/UAW_KORUS_FTA_ENGLISH.pdf)

<sup>29</sup> See Protocol 1 of the E.U.-Korea Free Trade Agreement, Available at: <http://trade.ec.europa.eu/doclib/html/145192.htm>

<sup>30</sup> Labor Advisory Committee for Trade Negotiations and Trade Policy, “The U.S.-Oman Free Trade Agreement,” November 15, 2005, at 9, Available at: [www.citizenstrade.org/pdf/omanLACreport\\_11152005.pdf](http://www.citizenstrade.org/pdf/omanLACreport_11152005.pdf)

Labor Advisory Committee for Trade Negotiations and Trade Policy, “The U.S.-Peru Free Trade Agreement,” February 1, 2006, at 1, Available at: [www.citizenstrade.org/pdf/peruLACreport\\_02012006.pdf](http://www.citizenstrade.org/pdf/peruLACreport_02012006.pdf)

Labor Advisory Committee for Trade Negotiations and Trade Policy, “The U.S.-Korea Free Trade Agreement,” April 27, 2007, at 28, Available at:

[http://ustraderep.gov/assets/Trade\\_Agreements/Bilateral/Republic\\_of\\_Korea\\_FTA/Reports/asset\\_upload\\_file698\\_12781.pdf](http://ustraderep.gov/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Reports/asset_upload_file698_12781.pdf)

<sup>31</sup> See Labor Advisory Committee for Trade Negotiations and Trade Policy, “The U.S.-Singapore Free Trade Agreement,” February 28, 2003, at 14-15. Available at:

[http://ustraderep.gov/assets/Trade\\_Agreements/Bilateral/Singapore\\_FTA/Reports/asset\\_upload\\_file77\\_3220.pdf](http://ustraderep.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Reports/asset_upload_file77_3220.pdf)

<sup>32</sup> For example, the Industry Sector Advisory Committee on Transportation, Construction, Mining, and Agricultural Equipment urged USTR to allow the build-down method to calculate the domestic content for autos in the Chile FTA after the initial draft agreement only included the build-up method. The final agreement allowed the both methods. See ISAC 16, “Report for the Chile Free Trade Agreement,” February 2003, at 6; USITC, “U.S.-Chile Free Trade Agreement: Potential Economywide and Selected Sectoral Effects,” June 2003, at 80; Chapter 4 of U.S.-Korea FTA.