

# The Korea Free Trade Agreement: Bad for the Environment

The U.S.-South Korea Free Trade Agreement<sup>1</sup> and in particular its investment chapter and the side agreement on autos threaten to undermine environmental and climate protection policies in both countries. South Korea is attempting to clean up its environment by adopting improved regulatory standards,<sup>2</sup> but the Korea FTA would facilitate challenges to these standards by U.S. investors, as well as weaken critical fuel efficiency measures. In the United States, adoption of the FTA would similarly facilitate challenges to enforcement actions against South Korean investment projects, especially in sensitive activities, such as uranium mining.

## Korea FTA chapter 20 on environment: will it be enforced?

To its credit, the text of chapter 20 of the Korea FTA calls on both parties to enforce environmental laws at the national level and to observe listed multilateral environmental agreements.<sup>3</sup> And, provision is made for state-to-state dispute resolution to enforce these obligations.<sup>4</sup> However:

- *Limited coverage for sub-national measures.* Strictly state and local environmental regulations are exempt from chapter 20 coverage, limiting its efficacy.<sup>5</sup> Many environmental regulations dealing with water, as one illustration, are strictly state and local policies. They would be unprotected by chapter 20, even though water policy issues are frequent topics of international trade or investment litigation.<sup>6</sup> Typical of such frequently litigated cases is *Metalclad v. Mexico*, where a North American Free Trade Agreement tribunal found Mexican state and local governments in violation of the investment chapter for shutting down a hazardous waste facility believed to pollute the local source of drinking water.<sup>7</sup>
- *Questions about enforcement.* It is unclear whether, as a consequence of chapter 20 obligations, the U.S. or Korea would choose to more effectively enforce its own laws or invoke state-to-state dispute mechanisms to ensure the other party's compliance. For example, the environmental chapter in the U.S.-Peru FTA has a similar provision. Nonetheless, loggers have been harvesting mahogany from land occupied by uncontacted indigenous tribes in the Peruvian Amazon region, and exporting it to the U.S. This is alleged to violate Peru's obligations under the environment chapter of the U.S.-Peru FTA.<sup>8</sup>

1 U.S.-Korea Free Trade Agreement, Final Text. <http://www.ustr.gov/trade-agreements/free-trade-agreements/Korus-fta/final-text>.

2 Shinhye Kang, *South Korea to Cut Greenhouse Emissions by 30% by 2020 (Update2)*, Bloomberg, November 17, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aTCt6NfyRFDQ>; Fung An, Amanda Sauer, *South Korea, Comparison of Passenger Vehicle Fuel Economy and Greenhouse Gas Emission Standards Around The World*, p. 17 Energy And Transportation Technologies LLC & World Resources Institute, prepared for the Pew Center on Global Climate Change, December 2004.

3 Korea FTA, Ch. 20.

4 Korea FTA, Ch. 20, 20.9; Ch. 22.

5 Korea FTA, Ch. 20, Art.20.11.

6 See generally, William Warren, *Final Report on Water Policy and International Trade Law*, prepared for the Maine Citizens Trade Policy Commission, the Office of the Maine Attorney General, and the Maine Water Resources Planning Committee, December 8, 2009. pp.26-27.

7 *Metalclad v. Mexico*, Final Award. [http://naftaclaims.com/disputes\\_mexico\\_metalclad.htm](http://naftaclaims.com/disputes_mexico_metalclad.htm).

8 The Upper Amazon Conservancy argues that because "illegal mahogany loggers are plundering uncontacted Indian land" in the Amazon, Peru is in violation of its environmental and forestry obligations under the 2009 U.S.-Peru Free Trade Agreement. Survival International, "US timber demand threatens uncontacted Peruvian tribe," 13 July 2010, <http://www.survivalinternational.org/news/6196>; Jeremy Hance, Photos reveal illegal logging near uncontacted natives in Peru, Mongabay.com, August 17, 2009, [http://news.mongabay.com/2009/0816-hance\\_uncontacted\\_logging.html](http://news.mongabay.com/2009/0816-hance_uncontacted_logging.html).



Most important of all, when considered as a whole, the Korea FTA would weaken environmental regulation. It is based on the flawed model of the NAFTA<sup>9</sup>, and includes provisions, most notably the investment chapter and the side agreement on autos, that undermine environmental and climate protections.

### **Korea FTA chapter 11 on investment: threat to environment & climate change policies**

Multinational corporations are eager to extend investor-state dispute resolution, as provided in chapter 11, across the world.<sup>10</sup> Many of these firms appear to be motivated by a desire to avoid new environmental and other regulations or tax and royalty adjustments that could affect their expectations for return on investment. They, evidently, want to freeze regulations and revenue measures in place once an investment is made.<sup>11</sup>

The Korea FTA's investment chapter replicates the most undesirable provisions of NAFTA's chapter 11 on investment, including:

- *A separate court for foreign capital.* Foreign investors are granted expansive rights by the investment chapter of the Korea FTA. It would allow these investors to bypass domestic courts and bring suit before special international tribunals designed to encourage international investment.<sup>12</sup> Chapter 11 of the Korea FTA would allow investors to seek awards of money damages, of unlimited size, in compensation for the cost of complying with environmental and other public interest regulations, including climate change measures.<sup>13</sup>
- *Greater rights than the U.S. Constitution.* Chapter 11 would allow foreign investors to sue governments directly when they believe laws or regulations impinge upon their rights under the agreement. These rights are more broadly defined in the Korea FTA than in U.S. constitutional law. They include the designation of expected future profits as a property interest<sup>14</sup> and procedural rights that are unavailable under U.S. law.<sup>15</sup>

Many Korean companies are invested in environmentally sensitive projects in the U.S. This may well increase the likelihood of investment chapter litigation. Examples of such projects include:

- *Korea Electric & uranium mining.* The Korea Electric Power Corporation is invested in Dennison Mines, a Canadian company seeking to mine uranium near the Grand Canyon. The U.S. Bureau of Land Management is proposing to bar new mining claims in a 1 million acre area near the Grand Canyon.<sup>16</sup>
- *Samsung Engineering & Texas hydrocarbon plant.* On January 11, 2011, Samsung, in a joint venture with Dow Chemical and Mitsui, signed a \$411 million contract in a ceremony held in Seoul to build a chlorine plant in

9 Todd Tucker, "A Bad Trade," *Foreign Policy*, April 18, 2011.

10 For example, see: Emergency Committee for American Trade, *Statement on the Administration's Review of the Model Bilateral Investment Treaty*, July 31, 2009, <http://www.ecattrade.com/uploads/content/D8E14AD1AD7B4E-F196C0E53E710E7925.pdf>.

11 *Occidental Petroleum v. Ecuador*, para. 191 (UNCITRAL Arb.)(2004); See generally, Matthew C. Porterfield, "An International Common Law of Investor Rights?" 27 *U. Pa. J. Int'l Econ. L.* 79 (2009).

12 Testimony of Professor Robert K. Stumberg, Georgetown University Law Center, "Reform of Investor Protections," U.S. House Committee on Ways and Means, May 14, 2009, <http://waysandmeans.house.gov/media/pdf/111/stumberg.pdf>.

13 *Ibid*; See generally, Kate Miles, "International Investment Law and Climate Change: Issues in the Transition to a Low Carbon World," *Society of International Economic Law*, Working Paper No. 27/08 (2008). [www.ssm.com/link/IIEI-inaugural-Conference.html](http://www.ssm.com/link/IIEI-inaugural-Conference.html).

14 Korea FTA, Ch. 11, Art. 11.28.

15 Korea FTA, Ch. 11, Art. 11.15-11.20.

16 Manuel Quinones, "Foes Highlight Companies' Foreign Ownership in Bids to Halt Uranium Mining," *New York Times*, May 4, 2011, <http://www.nytimes.com/gwire/2011/05/04/04greenwire-foes-highlight-companies-foreign-ownership-in-90317.htm>.



Freeport Texas. The factory is expected to be one of the world's largest, producing 816,000 tons of the chemical every year.<sup>17</sup>

- *Other investors.* Many other Korean multinational companies, investing in the United States, operate in environmentally sensitive sectors, for example: Daewoo International in chemicals; SK Group in oil exploration and production; Hyundai Engineering and Construction in infrastructure development, including dams, and harbor projects; and Hanwha Machinery in explosives, pesticides, chemicals, and construction.<sup>18</sup>

South Korean firms are significant investors in the United States.<sup>19</sup> Prior to the recession, between 2002 and 2007, Korean investments in the United States grew by 77%, from \$3 billion to \$13 billion.<sup>20</sup> Given this scale of investment and the environmentally sensitive nature of many of these projects, adoption of the Korea FTA would likely result in an increase in investor-state suits, challenging U.S. laws and regulations.

### Side agreement on autos: threat to fuel economy & greenhouse gas policies

Korea's fuel economy standards are an effective tool for reducing oil consumption and greenhouse gas emissions.<sup>21</sup> Given the current volume of U.S. auto exports to Korea, the side agreement would exempt nearly all US auto exports from these rigorous Korean measures. Between 2012 and 2015, U.S. automakers would be allowed to sell up to 4500 cars to Korea that meet fuel economy standards that are 19% less stringent than Korean standards.<sup>22</sup>

The side agreement on auto fuel standards is a reversal of the longstanding U.S. position that private corporations should bear the consequences of their decisions to export less fuel efficient vehicles. In 1994, the European Union challenged U.S. Corporate Average Fuel Economy (CAFE) standards at the World Trade Organization (WTO), arguing that CAFE was discriminatory.<sup>23</sup> The U.S. strongly rebutted these claims, at the time, in defense of its own regulations.<sup>24</sup>

- June 17, 2011

17 Samsung Engineering, Press Release, "Samsung Engineering breaks into U.S. Market with historic contract," January 11, 2011. [http://www.samsungengineering.co.kr/eng/sustain/PressReleasesView.jsp?category=14&tb2\\_seq=315&onPage=1&ViewYear=2011](http://www.samsungengineering.co.kr/eng/sustain/PressReleasesView.jsp?category=14&tb2_seq=315&onPage=1&ViewYear=2011).

18 Public Citizen Global Trade Watch, "Multinational Corporations To Be Given Rights Beyond the Rights of U.S. Companies Under Korea Free Trade Agreement" (undated), <http://www.citizen.org/documents/KoreancompaniesintheUS.pdf>; SK Engineering & Construction, Brochure: "The Best Refinery Contractor," <http://www.naukri.com/gpw/skec/index.html>; Hyundai E & C, press release, "Hyundai E & C Headed for Global Top Tier Company," <http://en.hdec.kr/eng/pr/news.asp>; FundingUniverse, Hanwha Group. <http://www.fundinguniverse.com/company-histories/Hanwha-Group-Company-History.html>; Reuters, "Daewoo International Corporation." <http://www.reuters.com/finance/stocks/overview?symbol=047050.KS>.

19 Stumberg, *supra*.

20 *Ibid*.

21 Feng & Sauer, *supra*.

22 Agreed Minutes on regulations pertaining to automotive fuel economy and greenhouse gas emissions, December 3, 2010: <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/legal-texts-reflecting-december-3-2010-agreement> The agreed minutes are legal texts – signed by U.S. Trade Representative Ron Kirk and Korean Trade Minister Kim Jong-Hoon – December 3, 2010.

23 World Trade Organization/ Environment: Disputes 6, EU versus US: "Car Taxes." [http://www.wto.org/english/tratop\\_e/envir\\_e/edis06\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis06_e.htm).

24 World Trade Organization/ Environment: Disputes7, Venezuela, Brazil versus US: "gasoline." [http://www.wto.org/english/tratop\\_e/envir\\_e/edis07\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm).



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