

**FINAL ENVIRONMENTAL REVIEW**

**UNITED STATES – SOUTH KOREA FREE TRADE AGREEMENT**

**OFFICE OF THE U.S. TRADE REPRESENTATIVE**

**June 2011**

## Executive Summary

Pursuant to authority delegated by the President in Executive Order 13277 (67 *Fed. Reg.* 70305) and consistent with Executive Order 13141 (64 *Fed. Reg.* 63169) and its Guidelines (65 *Fed. Reg.* 79442), the Office of the United States Trade Representative (USTR) submits this Final Environmental Review of the United States – South Korea Free Trade Agreement (KORUS), in accordance with section 2102(c)(4) of the Trade Act of 2002 (Trade Act).

On February 2, 2006, in accordance with section 2104(a) of the Trade Act, U.S. Trade Representative Rob Portman notified the Congress of the President's intent to enter into negotiations for a free trade agreement with the Republic of Korea (South Korea). The United States and South Korea concluded negotiations on April 1, 2007, and U.S. Trade Representative Susan C. Schwab and South Korean Trade Minister Kim Hyun-chong signed the KORUS on June 30, 2007.

The environmental review process examines possible environmental effects that may be associated with the KORUS. In identifying and examining these possible effects, the Administration drew on public comments submitted in response to notices in the *Federal Register* (71 *Fed. Reg.* 6820 (Feb. 9, 2006), 71 *Fed. Reg.* 10999 (March 3, 2006), and 71 *Fed. Reg.* 75281 (Dec. 14, 2006)) and a variety of sources of published information. The review also draws on the environmental and economic expertise of federal agencies. Consistent with Executive Order 13141 and its Guidelines, the focus of the review is on potential impacts in the United States. Additionally, this review includes consideration of global and transboundary effects.

### Findings

1. In this Final Environmental Review, the Administration has concluded that changes in the pattern and magnitude of trade flows attributable to the KORUS will not have any significant environmental impacts in the United States. Although South Korea is a major trading partner of the United States, exports to South Korea currently account for only three percent of total U.S. exports and a very small portion of total U.S. production. Based on existing patterns of trade and changes likely to result from implementation of the KORUS, the impact of the KORUS on total U.S. production through changes in U.S. exports of goods appears likely to be small. As a result, the KORUS is not expected to have a significant impact on goods production in the United States and consequently is not expected to have significant direct effects on the U.S. environment.
2. This review examined two additional domestic environmental concerns related to the importation of goods: the potential for increased trade resulting from the KORUS to contribute to localized environmental impacts at selected U.S. maritime ports and the potential for increased risk of introduction of invasive alien species into the United States. For both concerns, the likelihood and magnitude of any effects of the KORUS are difficult to quantify. Taking into account decreases in U.S. imports from other countries in favor of an increase in imports from South Korea that is likely to result from the

elimination of tariffs, we estimate that the KORUS will have a very small net effect on the volume of total U.S. goods trade. Therefore, based on the information available, the Administration concludes that any incremental air and water pollution at U.S. ports resulting from increases in trade attributable to the KORUS is likely to be small. Because the net change in the volume of trade is likely to be small, change in the associated “commodity pathways” for invasive species also appears likely to be small. However, change in the volume of trade and, as a consequence, the number of possibly invasive species that may be transported is only one factor in a broad-scale assessment of the risk of introducing invasive species. The Environmental Cooperation Agreement between the Government of the United States of America and the Government of the Republic of Korea (ECA), which was negotiated in conjunction with the KORUS, provides enhanced opportunities to cooperate to monitor and address the risk of the introduction of invasive species.

3. In considering whether provisions of the KORUS could affect, positively or negatively, the ability of U.S. federal, state, local or tribal governments to enact, enforce or maintain environmental laws and regulations, the Administration took into account the full range of KORUS obligations, including those related to services, sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT), as well as provisions of the KORUS Environment Chapter and related dispute settlement provisions. The Administration concluded that the KORUS will not adversely affect the ability of U.S. federal, state, local or tribal governments to regulate to protect the U.S. environment, and that these and related KORUS provisions should have positive implications for the enforcement of environmental laws and the furtherance of environmental protection in both the United States and South Korea.
4. This review carefully examined the provisions of the investment chapter and their environmental implications. The Administration has not identified any concrete instances of U.S. environmental measures that would be inconsistent with the KORUS’s substantive investment obligations. The Administration does not expect the KORUS to result in an increased potential for a successful challenge to U.S. environmental measures.
5. This review examined a number of possible transboundary and global environmental effects of the KORUS, such as wildlife trade, marine fisheries and trade in environmental goods and services, but did not identify any specific, significant negative consequences for the U.S. environment. Nevertheless, the possibility of such effects requires ongoing monitoring. Monitoring of conditions in the U.S. environment will continue as an element of existing domestic environment programs. Among other things, the ECA will improve the ability of the United States and South Korea jointly to monitor shared environmental concerns. The ECA establishes a comprehensive framework for developing cooperative activities. An Environmental Cooperation Commission, consisting of high-level officials with environmental responsibilities from each Party, will oversee implementation of the ECA. The United States and South Korea have begun developing a work program that will identify specific areas of cooperation.

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## **I. LEGAL AND POLICY FRAMEWORK**

### **A. The Trade Act of 2002**

The Trade Act of 2002 (Trade Act) establishes a number of negotiating objectives and other priorities relating to the environment. As relevant here, the Trade Act contains three sets of objectives: (i) overall trade negotiating objectives; (ii) principal trade negotiating objectives; and (iii) promotion of certain priorities, including associated requirements to report to Congress.

The Trade Act's "overall trade negotiating objectives" with respect to the environment include:

- (1) ensuring that trade and environmental policies are mutually supportive and seeking to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources (section 2102(a)(5)); and
- (2) seeking provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental laws as an encouragement for trade (section 2102(a)(7)).

In addition, the Trade Act establishes the following environment-related "principal trade negotiating objectives":

- (1) ensuring that a party to a trade agreement with the United States does not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, while recognizing a party's right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to prioritize allocation of resources for environmental law enforcement (sections 2102(b)(11)(A)&(B));
- (2) strengthening the capacity of U.S. trading partners to protect the environment through the promotion of sustainable development (section 2102(b)(11)(D));
- (3) reducing or eliminating government practices or policies that unduly threaten sustainable development (section 2102(b)(11)(E));
- (4) seeking market access, through the elimination of tariffs and non-tariff barriers, for U.S. environmental technologies, goods and services (section 2102(b)(11)(F)); and
- (5) ensuring that environmental, health or safety policies and practices of parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against U.S. exports or serve as disguised barriers to trade (section 2102(b)(11)(G)).

The Trade Act also provides for the promotion of certain environment-related priorities and associated reporting requirements, including:

- (1) seeking to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science, and reporting to the Committee on Ways and Means and the Committee on Finance (“Committees”) on the content and operation of such mechanisms (section 2102(c)(3));
- (2) conducting environmental reviews of future trade and investment agreements consistent with Executive Order 13141 and its relevant guidelines, and reporting to the Committees on the results of such reviews (section 2102(c)(4)); and
- (3) continuing to promote consideration of multilateral environmental agreements and consulting with parties to such agreements regarding the consistency of any such agreement that includes trade measures with existing exceptions under Article XX of the General Agreement on Tariffs and Trade 1994 (GATT 1994) (section 2102(c)(10)).

## **B. The Environmental Review Process**

The framework for conducting environmental reviews of trade agreements is provided by Executive Order 13141 – *Environmental Review of Trade Agreements* (64 *Fed. Reg.* 63169) and the associated Guidelines (65 *Fed. Reg.* 79442). The Order and Guidelines are available on USTR’s website at: <http://www.ustr.gov/trade-topics/environment/environmental-reviews>.

The purpose of environmental reviews is to ensure that policymakers and the public are informed about reasonably foreseeable environmental impacts of trade agreements (both positive and negative), identify complementarities between trade and environmental objectives and help shape appropriate responses if environmental impacts are identified. Section 5(b) of Executive Order 13141 provides that “as a general matter, the focus of environmental reviews will be impacts in the United States,” but “[a]s appropriate and prudent, reviews may also examine global and transboundary impacts.” Reviews are intended to be one tool, among others, for integrating environmental information and analysis into the fluid, dynamic process of trade negotiations. USTR and the Council on Environmental Quality (CEQ) jointly oversee implementation of the Order and Guidelines. USTR, through the Trade Policy Staff Committee (TPSC), is responsible for conducting the individual reviews.

The environmental review process provides opportunities for public involvement, including an early and open process for determining the scope of the environmental review (“scoping”). Through the scoping process, potentially significant issues are identified for in-depth analysis, while issues that have been adequately addressed in earlier reviews, or are less significant, are eliminated from detailed study.

The Guidelines recognize that the approach adopted in individual reviews will vary from case to case, given the wide variety of trade agreements and negotiating timetables. Generally, however, reviews address two types of questions: (i) the extent to which positive and negative environmental impacts may flow from economic changes estimated to result from the prospective agreement; and (ii) the extent to which proposed agreement provisions may affect

U.S. environmental laws and regulations (including, as appropriate, the ability of state, local and tribal authorities to regulate with respect to environmental matters).

## **II. BACKGROUND<sup>1</sup>**

South Korea occupies the southern half of the Korean Peninsula, bordering the Democratic People's Republic of Korea, the Sea of Japan and the Yellow Sea. South Korea is approximately the size of the State of Indiana (38,022 square miles). The Korean Strait, off the country's southeastern coast, is an important maritime passage in Eastern Asia. South Korea has a largely temperate climate.

South Korea is a developed country, with a population of approximately 49 million and one of the highest population densities in the world (483 persons per square kilometer, compared to 33 persons per square kilometer in the United States). Much of South Korea's population is concentrated in urban areas: more than 40 percent of the population lives in cities of over one million residents.

### **A. Economy in South Korea**

Over the past 40 years, South Korea has transformed itself from a relatively poor developing country into one of the world's leading economic powers using a development strategy based on the export of goods. Initially, South Korea's exports were concentrated in labor-intensive light industries; later, exports from heavy industries and high technology industries became more important. Exports of goods account for approximately 47 percent of South Korea's gross domestic product.<sup>2</sup>

For some time, the United States has been one of South Korea's largest trading partners; exports to the United States currently account for about 11 percent of South Korea's total exports. South Korea's other major trading partners are China, the European Union and Japan. Electrical machinery and transportation equipment (especially automobiles) currently account for nearly half of the value of South Korean exports to the United States.

### **B. Environment in South Korea<sup>3</sup>**

Many of South Korea's environmental concerns are directly related to pressure on the environment and natural resources resulting from high population density and the legacy of rapid economic development. Public awareness regarding the importance of environmental protection

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<sup>1</sup> Additional background information is available in the Interim Environmental Review, available at: <http://www.ustr.gov/trade-topics/environment/environmental-reviews> and in the Korea country report of the Organization for Economic Cooperation and Development (OECD) (available at: <http://www.oecd.org/korea>).

<sup>2</sup> The comparable figure for the United States in 2010 is 8.7 percent.

<sup>3</sup> Information for this section was drawn from the 2006 Korea Environmental Performance Review available at: [http://www.oecd.org/document/27/0,3746,en\\_2649\\_34307\\_37435483\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/27/0,3746,en_2649_34307_37435483_1_1_1_1,00.html).

and resource conservation has increased along with an increase in per capita income and, as a consequence, environmental regulation has grown and matured as South Korea has prospered.

### **Key Environmental Trends**

Although South Korea's rapid economic development led to air and water quality problems, ambient levels of carbon monoxide and hydrocarbons have been decreasing in recent years. Nevertheless, air quality in major cities is often below World Health Organization standards. A major contributor to air pollution is the increasing number of motor vehicles. In spite of improvements in fuel quality and engine technology, rapid growth of the vehicle fleet and automobile use has resulted in increased emissions. Regional cooperation plays an important role in addressing air pollution in South Korea because transboundary sources of pollution are as significant as domestic sources.<sup>4</sup>

Management of water resources and solid waste is also an important environmental issue for South Korea. Extensive dams and water supply and sewage systems have been constructed to help mitigate the risks of flooding, improve the supply of clean water and assist in the disposal of waste water. Numerous coastal fisheries motivate efforts to properly manage water resources and waste disposal. Nevertheless, two thirds of wastewater sludge is dumped offshore.

The need for proper solid waste management is heightened by South Korea's high population density. South Korea has begun to utilize more effective landfill technologies (including improved incinerators) and has high recycling rates. However, while South Korea has been successful in decoupling economic growth from waste generation and improving municipal waste management, management of hazardous waste is a continuing challenge.

South Korea became a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1993 and South Korea's Law Concerning the Protection of Wildlife and Game, administered by the Ministry of Environment, was revised in 1994 to include legal provisions to control trade in CITES-listed fauna and flora. Traditional medicine, however, continues to be culturally important in South Korea and presents an ongoing challenge for regulating the domestic use and import of CITES-listed species.

### **C. United States – South Korea Goods Trade**

South Korea is the world's 12th largest economy and the United States' seventh largest goods trading partner.<sup>5</sup> The value of South Korea's trade in goods (exports and imports) is equivalent to 90 percent of its economy, whereas the value of trade in goods for the United States is equivalent to 22 percent of the U.S. economy.<sup>6</sup> Two-way goods trade between the United States

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<sup>4</sup> Prevailing winds carry air pollutants from China to South Korea compounding the effect of local sources. Additional information on this subject is available from the South Korean Ministry of the Environment at: <http://eng.me.go.kr/> and the U.S. Environmental Protection Agency at: <http://www.epa.gov/oia/air/index.html>.

<sup>5</sup> Based on purchasing power parity.

<sup>6</sup> Based on current dollar values. Sources for these statistics are the IMF (for GDP) and South Korean and U.S. trade

and South Korea totaled \$88 billion in 2010, with U.S. goods exports to South Korea totaling \$38.8 billion (up 115 percent from 1994) and goods imports from South Korea at \$48.9 billion (up 149 percent from 1994).<sup>7</sup>

Electrical machinery, machinery, and vehicles were the largest sectors of goods imported by the United States from South Korea, accounting for \$15.3 billion, \$9.3 billion, and \$9.3 billion of imports, respectively in 2010. Electric apparatus for telephone lines (accounting for \$8.6 billion in imports), office machine parts (\$2.7 billion), and passenger motor vehicles (\$6.6 billion) were the largest subsets within these categories in 2010. U.S. exports to South Korea were more evenly distributed among sectors, with machinery, electrical machinery, optic and medical instruments, and civilian aircraft occupying the top of the list in 2010. In 2010, South Korea was the fifth largest export market for U.S. farm and ranch products and the fourth largest export market for U.S. fishery products.<sup>8</sup>

### **III. THE UNITED STATES – SOUTH KOREA FREE TRADE AGREEMENT**

#### **A. Overview of the United States – South Korea Free Trade Agreement**

The KORUS is a comprehensive trade agreement addressing areas such as trade in goods and services, investment, trade-related aspects of intellectual property rights, government procurement and trade-related environmental and labor matters.

The KORUS consists of a preamble and the following 24 chapters and associated annexes: initial provisions and definitions; national treatment and market access for goods; agriculture; textiles and apparel; pharmaceutical products and medical devices; rules of origin and origin procedures; customs administration and trade facilitation; sanitary and phytosanitary measures; technical barriers to trade; trade remedies; investment; cross-border trade in services; financial services; telecommunications; electronic commerce; competition-related matters; government procurement; intellectual property rights; labor; environment; transparency; institutional provisions and dispute settlement; exceptions; and final provisions. The complete text of the KORUS, related annexes and side letters, and summary fact sheets are available on USTR's website at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

On December 3, 2010, the United States and South Korea reached agreement on a deal that resolved outstanding issues related to the KORUS. On February 10, 2011, South Korea and the United States signed legal texts of the agreements reflecting the December 3, 2010 deal. These texts are available on USTR's website at: <http://www.ustr.gov/about-us/press-office/press-releases/2011/february/signed-legal-texts-related-us-korea-trade-agreeme>.

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statistics.

<sup>7</sup> See <http://www.census.gov/foreign-trade/balance/c5800.html> for additional data.

<sup>8</sup> Data taken from <http://www.fas.usda.gov/gats/default.aspx>.

Based on the scoping process (see Section IV), public comments and developments since the Interim Review, the following is a summary of the KORUS provisions most relevant to this Final Environmental Review. The provisions of the Environment Chapter are described in Section III.B.

#### *Market Access for Goods*

The KORUS requires each Government to accord the other Government's goods national treatment, provides specific definitions, and includes related industrial goods provisions. Tariff commitments by the United States and South Korea (the Parties) will provide immediate benefits for both countries. Over 95 percent of U.S. exports of consumer and industrial products to South Korea will become duty free within five years after entry into force of the KORUS and virtually all remaining tariffs on consumer and industrial goods will be eliminated within ten years after the agreement enters into force. South Korea's average tariff on these products is 6.2 percent, over two times greater than the U.S. average of 2.8 percent. With respect to agricultural products, nearly two-thirds of current U.S. farm exports to South Korea will become duty free on the day that the agreement enters into force.

#### *Customs Procedures and Rules of Origin*

The KORUS includes commitments on customs administration and rules of origin and origin procedures that will make it easier for importers to utilize the benefits of the agreement. These commitments cover a variety of topics such as transparency and publication of customs proposed rules, rules and decisions; and, the adoption of clear and comprehensive product-specific rules for determining which products benefit from preferential tariff treatment under the KORUS. The agreement also calls for each Party to adopt or maintain streamlined customs procedures that are designed to facilitate the timely and efficient release of goods. In addition, the KORUS establishes methods for calculating the regional value content of products to determine whether they qualify for preferential treatment. The agreement also calls for the United States and South Korea to cooperate in achieving compliance with their respective customs laws and regulations.

#### *Sanitary and Phytosanitary Measures*

Under the agreement, the United States and South Korea reaffirm their commitments under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The KORUS also creates a process for enhanced cooperation and coordination between the Parties on SPS issues.

#### *Technical Barriers to Trade*

The agreement also reaffirms each Party's commitment to the WTO Agreement on Technical Barriers to Trade and builds on those commitments by including further obligations in the area of transparency, the use of international standards and conformity assessment. The KORUS chapter on technical barriers to trade also creates a process for enhanced cooperation and coordination on technical regulations, standards and conformity assessment procedures. In

addition, the chapter includes specific provisions for standards and technical regulations related to motor vehicles.

### *Intellectual Property Rights*

The agreement's chapter on intellectual property rights (IPR) provides for strong protection of copyrights, patents, trademarks and trade secrets, including enhanced enforcement and non-discrimination obligations for all types of intellectual property. Through the copyright provisions, Parties will address the challenge of providing protection in the digital environment of the Internet and provide important protection for performers and producers of phonograms. Under the KORUS, the Parties will also provide strong protections for trademarks and limit the grounds for revoking a patent. The chapter provides for streamlined trademark filing processes and improved protection of trademark owners' rights.

### *Services*

The KORUS will provide market access, national treatment and most-favored-nation (MFN) treatment to cross-border service suppliers, across the entire services sector with limited exceptions (based on the "negative list" approach.) The commitments that South Korea has made under the agreement exceed those it has made through the WTO and will require South Korea to dismantle significant services and investment barriers. This will result in increased access for U.S. service suppliers in South Korea's market in a number of sectors, including express delivery services and environmental services. The KORUS also includes provisions that improve the transparency of the Party's respective licensing procedures and rulemaking processes.

### *Investment*

The KORUS establishes a secure, predictable legal framework for U.S. investors operating in South Korea. The KORUS imposes obligations pertaining to non-discrimination (national treatment and MFN treatment), expropriation, free transfers related to covered investments, prohibition of the use of certain performance requirements, minimum standard of treatment and limitations on requirements relating to senior managers. These investor protections are backed by a transparent, binding international arbitration mechanism, under which investors may, at their own initiative, bring claims against either government for an alleged breach of the provisions of the investment chapter.

The KORUS preamble states that the agreement does not provide foreign investors with greater substantive rights with respect to investment protections than domestic investors have under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in the KORUS.

### *Government Procurement*

The KORUS opens opportunities in South Korea's government procurement market for U.S. suppliers that go beyond those South Korea has provided under the WTO Agreement on Government Procurement, to which both the United States and South Korea are parties. The agreement accomplishes this result by lowering significantly the dollar threshold for South Korean procurements on which U.S. suppliers may bid and expanding the South Korean agencies and other entities that will open their procurement to U.S. suppliers. The procurement chapter also incorporates important improvements that reflect emerging practices in procurement. In addition, the chapter clarifies that government agencies may include technical specifications to promote environmental protection or fundamental labor rights.

### *Transparency*

The agreement's transparency chapter requires each Party to ensure that laws, regulations, procedures and administrative rulings of general application on matters covered by the KORUS are published or otherwise made available to the public. In addition, the chapter requires each Party, to the extent possible, to publish in advance any measure it proposes to adopt and provide a reasonable opportunity for interested parties to comment. With respect to regulations at the national level of government, each Party must include in the publication an explanation of the regulations' purpose and rationale and respond to significant substantive comments received during the comment period. The chapter also requires each government to establish and maintain procedures for review and appeal of administrative actions regarding matters covered by the agreement.

### *Trade Remedies*

The KORUS includes provisions that permit each Party to impose bilateral safeguard measures in certain circumstances while providing that each government maintains its rights and obligations under the WTO Agreement on Safeguards. The KORUS also establishes specific procedures for safeguard measures on agricultural and textile goods.

### *Labor*

The agreement's labor chapter reaffirms the Parties' obligations as members of the International Labor Organization (ILO) and commits them to adopt and maintain in their statutes, regulations and practice the fundamental labor rights, as stated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, including for purposes of the labor chapter a prohibition on the worst forms of child labor. The chapter also commits each Party to effectively enforce its labor laws. Procedural guarantees set out in the chapter will ensure that workers and employers will continue to have fair, equitable and transparent access to labor tribunals. All obligations in the chapter are subject to the same general dispute settlement procedures and enforcement mechanisms as obligations in other chapters of the KORUS. The chapter also establishes a mechanism for further cooperation on labor matters.

## *Dispute Settlement*

The agreement includes a government-to-government dispute settlement mechanism. The mechanism sets high standards of openness and transparency, requiring public hearings and the public release of Parties' legal submissions. It provides opportunities for interested third parties, such as non-governmental organizations, to submit views. The agreement provides that if a Party fails to conform with the determination of the arbitral panel convened under the chapter, and the Parties cannot reach a mutually acceptable solution, the complaining Party may have recourse to trade sanctions or, alternatively, the defending Party may pay a monetary assessment.

The agreement's dispute settlement chapter also includes an annex that establishes a Fisheries Committee to promote cooperation between the Parties on fisheries matters. The Committee will comprise representatives of each Party and will meet annually unless the Parties agree otherwise.

## *Exceptions*

For certain chapters, the Parties have incorporated into the KORUS the exceptions provided for in Article XX of the GATT 1994 and Article XIV of the General Agreement on Trade in Services (GATS). The KORUS states that the Parties understand that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of the GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources. The KORUS also states that the Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health. The KORUS also includes a general exception for measures that a Party considers necessary for the protection of its essential security interests.

## **B. The Environment Chapter and Related Environmental Provisions**

Following guidance in the Trade Act and the May 10, 2007 agreement between the Administration and the bipartisan leadership of Congress, the KORUS environment chapter requires each Party: (1) to strive to maintain high levels of environmental protection and to strive to improve those levels; (2) to adopt, maintain and implement laws and all other measures to fulfill its obligations under certain multilateral environmental agreements (MEAs) to which both South Korea and the United States are party ("covered agreements");<sup>9,10</sup> and (3) not to

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<sup>9</sup>The chapter states that to establish a violation of this obligation, a Party must demonstrate that the other Party has failed to adopt, maintain or implement a measure in a manner affecting trade or investment between the Parties.

<sup>10</sup>The covered agreements are: (a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended; (b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as adjusted and amended; (c) the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, done at London, February 17, 1978, as amended; (d) the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar, February 2, 1971, as amended; (e) the Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980; (f) the International Convention for the Regulation of Whaling, done at

waive or otherwise derogate from environmental laws in order to attract trade or investment, except where the waiver or derogation is pursuant to a provision in the Party's law providing for waivers or derogations and is not inconsistent with the Party's obligations under a covered agreement. In addition, the chapter commits each Party not to fail to effectively enforce its environmental laws and its laws, regulations, and other measures to fulfill its obligations under covered agreements through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties. All obligations in the chapter are subject to the same dispute settlement procedures and enforcement mechanisms applicable to obligations in other chapters of the agreement.

To assist in the administration and implementation of the environment chapter, the agreement establishes an Environmental Affairs Council to oversee the implementation of the chapter. The Council will comprise high-level government officials from each Party and will meet annually unless the Parties agree otherwise.

The environment chapter encourages a comprehensive approach to environmental protection. Provisions in the chapter on procedural guarantees promote good environmental governance by obliging each Party to provide appropriate and effective remedies for violations of its environmental laws and to ensure that environmental enforcement proceedings comply with due process and are open to the public, except where the administration of justice requires otherwise. These procedural guarantees are accompanied by provisions that encourage incentives and other voluntary mechanisms to protect the environment, including market-based incentives. Provisions in the chapter on the relationship between the KORUS and MEAs acknowledge the importance of effective domestic implementation of MEAs to which the United States and South Korea are both parties and the contributions that the agreement's Environment Chapter and the ECA can make to achieve the goals of those MEAs. The chapter further provides that in the event of an inconsistency between a Party's obligations under the KORUS and a covered MEA the Party shall seek to balance its obligations under both agreements. The chapter also provides for the Parties to consult, as appropriate, with respect to environmental issues of mutual interest.

The KORUS also highlights the importance of public participation in the successful implementation of the agreement's environment chapter. Under the KORUS, any person of a Party may file a submission concerning the implementation of any provisions of the chapter. Each Party will respond to these submissions in a manner consistent with its domestic procedures. Parties will make these responses easily accessible to the public in a timely manner.

In addition, the Parties have agreed that the Environmental Affairs Council will review the operation of the Chapter's public participation provisions. Based upon this review the Council will prepare and submit a report on the status of the implementation of these provisions to the Joint Committee no more than 180 days after the first anniversary date of the entry into force of the agreement. This report will also be made public.

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Washington, December 2, 1946; and (g) the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington, May 31, 1949.

#### **IV. PUBLIC AND ADVISORY COMMITTEE COMMENTS**

To determine the scope of this review, the Administration considered information provided by the public and solicited comments through notices in the Federal Register and at a public hearing. Section IV.A summarizes the public comments. In addition to providing guidance on the scope of the environmental review, information, analysis and insights available from these sources were taken into account throughout the negotiations and were considered in developing U.S. negotiating positions.

Pursuant to Trade Act requirements (section 2104(e)), advisory committees, including the Trade and Environment Policy Advisory Committee (TEPAC), submitted reports on the KORUS to the President, USTR and Congress within 30 days after the President notified Congress of his intent to enter into the agreement. The TEPAC report is summarized in section IV.B.

##### **A. Public Comments**

This review was formally initiated by publication of a notice in the *Federal Register*, which requested public comment on the scope of a review of the proposed free trade agreement with South Korea (see 71 *Fed. Reg.* 10999 (March 3, 2006)). An earlier notice in the *Federal Register* requested public comments on the overall negotiation and announced a public hearing on the proposed free trade agreement (see 71 *Fed. Reg.* 6820 (Feb. 9, 2006)). Comments and testimony addressing environmental issues received in response to both notices were taken into account in the preparation of this Final Environmental Review. Further public comment was requested in response to an Interim Environmental Review of the proposed free trade agreement with South Korea (see 71 *Fed. Reg.* 75281 (Dec. 14, 2006)).

Comments on the scope of the environmental review are summarized in the Interim Environmental Review. One commenter raised concerns with South Korea's role in wildlife trade, particularly in connection with the use of CITES-protected species in the traditional medicine sector. These comments also drew attention to the incidental killing of whales as bycatch by South Korean fishing vessels. Other commenters raised concerns regarding enforceable environmental protections, the existence and adequacy of environmental and labor regulations and the framework South Korea applies to foreign corporations for the environmental control and registration of chemicals.

Public comments on the Interim Environmental Review generally confirmed that the scope of the review covered the relevant issues to be considered. These comments also emphasized that the final environmental review should identify the manner in which environmental cooperation between the United States and South Korea will address issues identified in the environmental review process. These issues include the general enforcement of regulations to implement CITES, the use of CITES-protected species in traditional medicines, the use of fisheries subsidies, illegal, unreported and unregulated (IUU) fishing and the sale of whale meat bycatch from commercial fishing vessels. Further information on environmental cooperation associated with the KORUS can be found in Section VII.

## **B. Advisory Committee Report**

Under Section 135(e) of the Trade Act of 1974, as amended, advisory committee reports must include advisory opinions as to whether and to what extent an agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives set forth in the Trade Act of 2002. The reports must also include advisory opinions as to whether an agreement provides for equity and reciprocity within the sectoral or functional area of the particular committee. The advisory committee reports are available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/advisory-group-reports-korus-fta>.

A majority of TEPAC members supported the conclusion that the KORUS provides adequate safeguards to ensure that Congressional environmental objectives will be met. The report reiterates TEPAC's view that public participation helps ensure that an agreement operates as intended, while guaranteeing more effective enforcement of environmental laws. The TEPAC majority also noted its pleasure at the inclusion of enhanced public participation mechanisms in the agreement.

A majority of TEPAC members expressed concerns about the expropriation language included in the investment chapter of the agreement and urged that Congress modify it. They believed that the language conflicts with language in the U.S. model Bilateral Investment Treaty and with U.S. Supreme Court precedent and that it could be used to "successful[ly] challenge attempts to implement more stringent bona fide environmental controls."<sup>11</sup> Other TEPAC members had different views. Some felt that the provisions provided strong protections for U.S. investors, while others thought that they weakened traditional protections for U.S. investors. Still others thought that these provisions should be included in a separate agreement.

A majority of the Committee's members were pleased that environmental issues were integrated into the drafting of the free trade agreement. This majority also expressed the view that trade agreements can create opportunities to enhance environmental protection. The TEPAC noted, however, that trade can create and amplify adverse externalities that require enhanced regulatory oversight.

A majority of TEPAC members expressed the view that the ECA provides a reasonable basis for meeting Congressional objectives concerning capacity building and sustainable development. The TEPAC was also pleased with the detailed draft work program that was negotiated in 2007 for implementation under the ECA. The Committee noted that a majority of its members was concerned about CITES implementation, and that it was pleased that the draft work program provided a framework for addressing the issue.<sup>12</sup> In addition, a majority of the TEPAC believes that the ECA would be improved if it were an integral part of the agreement and had available a dedicated source of funding.

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<sup>11</sup> TEPAC report at 2.

<sup>12</sup> Regarding the work program, see Part VII below.

In addition, a majority of the TEPAC expressed the view that the KORUS would be improved if it included statements on biological diversity and promoting sound corporate stewardship. Finally, a majority of the TEPAC expressed concern that language in a side letter on environmental dispute resolution was unclear.

A minority of TEPAC members raised concerns, including that the agreement places excessive reliance on trade as a means of advancing environmental objectives; and that the public participation provisions are too broad.

### **C. Public Outreach in South Korea**

In addition to providing opportunities for written comments and testimony in response to notices in the *Federal Register*, U.S. officials held meetings with environmental organizations, the private sector and representatives of other non-governmental organizations in South Korea. These meetings were held in Seoul in March of 2006 and provided an opportunity for participants to raise questions, express concerns and share ideas. Participants in the meetings represented a variety of local, regional and international organizations. The South Korean government worked to ensure that its civil society was actively consulted and engaged during the negotiation of the environment chapter of the KORUS and the associated ECA.

## **V. POTENTIAL ECONOMICALLY DRIVEN ENVIRONMENTAL IMPACTS**

### **A. Potential Impacts in the United States**

The impact of the KORUS on total U.S. production through changes in U.S. exports appears likely to be very small. Although South Korea is a major trading partner of the United States, exports to South Korea currently account for only three percent of total U.S. exports and a very small portion of total U.S. production. In its analysis of the potential economy-wide effects of the KORUS, the U.S. International Trade Commission (USITC) estimated that on full implementation of the agreement, U.S. exports to South Korea may increase by \$10 to \$11 billion and U.S. GDP may increase by 0.1 percent from the impact of the tariff and tariff-rate quota related provisions of the KORUS.<sup>13</sup> Although small changes in production and exports in environmentally-sensitive sectors could provide a basis for concern regarding the KORUS's direct environmental effects in the United States, no instances warranting such concerns were identified and none were raised in public comments or the reports of Advisory Committees (see Section IV). Increases in exports are expected to be in sectors and products whose production does not raise specific environmental concerns. Based on this information and analysis, the Administration has concluded that changes in the pattern and magnitude of trade flows and production attributable to the KORUS will not have any significant economically driven environmental impacts in the United States.

The Interim Environmental Review identified air and water pollution at U.S. ports as a possible concern. Air and water pollution at maritime ports result from the concentration and cumulative

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<sup>13</sup> The USITC report on the KORUS is available at: <http://www.usitc.gov/publications/332/pub3949.pdf>.

effects of emissions from ships, trucks, trains and goods-moving equipment associated with international trade.<sup>14</sup> Increases in trade associated with the KORUS could exacerbate existing environmental concerns associated with trade-related goods movement, but the extent of any incremental increase in the volume of trade associated with the KORUS is difficult to quantify. The USITC provides estimates of the change in the value of bilateral trade which must be converted to a volume basis (for example, changes in numbers of containers or ships). The USITC's analytical approach also does not provide information needed to identify possible changes in the value of trade passing through specific U.S. ports. However, the USITC's report does provide information on the extent to which their estimates of changes in U.S. imports from South Korea are accompanied by decreases in U.S. imports from other sources.<sup>15</sup>

The USITC estimates that total U.S. goods trade (exports and imports) with South Korea may increase by \$16-18 billion as a result of full implementation of the KORUS. This is about 0.6 percent of the value of all U.S. goods trade. Taking into account decreases in U.S. imports from other sources and the fact that changes in the volume of goods trade is likely to be smaller than changes in the value of goods trade, the Administration estimates that the KORUS will have a very small net effect on the volume of U.S. goods trade. Therefore, based on the information available, the Administration concludes that any incremental air and water pollution at U.S. ports resulting from increases in trade attributable to the KORUS is likely to be small.

The Interim Environmental Review also identified invasive species as a domestic environmental concern related to the KORUS.<sup>16</sup> Goods trade can provide pathways for invasive species, and the introduction of invasive species can result in harmful effects on the environment and economy of the host country.<sup>17</sup> The risk of introduction of invasive species varies across traded commodities and across trading partners.<sup>18</sup>

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<sup>14</sup> In addition to information in the Interim Environmental Review of the KORUS (note 11), this topic is discussed in detail in the Interim Environmental Review of the U.S.-Thailand Free Trade Agreement. That document is available at: <http://www.ustr.gov/sites/default/files/Thailand%20interim%20review.pdf>.

<sup>15</sup> For example, more than 50 percent of the estimated increase in U.S. imports of South Korean motor vehicles and parts, and more than 85 percent of the estimated increase in U.S. imports of textiles and apparel from South Korea are expected to be diverted from other import sources.

<sup>16</sup> The term "invasive species" refers to species not native to a particular ecosystem that are intentionally or unintentionally introduced as a result of human activities and cause, or are likely to cause, harm to ecosystems, economic systems or human health.

<sup>17</sup> For the United States, Executive Order 13112 (February 3, 1999) established the National Invasive Species Council and commits federal agencies to conducting research on invasive species issues, taking reasonable actions to discourage the introduction of these species into the United States and elsewhere, and undertaking international cooperation aimed at addressing this issue.

<sup>18</sup> Trade-related pathways that involve a risk of invasive introductions include the movement of vehicles used in transporting commodities (e.g., ballast water in ships), or the transport of products and packaging that contain potentially invasive organisms (e.g., grains that contains weed seeds). Some invasive species are also introduced on ornamental plants, fruits, aquarium fish, and through other commonly traded products. Associated pests and pathogens may arrive as "hitch-hikers" in shipments of biological materials.

The United States and South Korea have a number of similar climatic zones, and this increases vulnerability to the establishment and spread of invasive species. This review identified a baseline risk that invasive species may move between South Korea and the United States, but it is difficult to quantify the extent or the magnitude of the KORUS's likely effect on this risk. The net change in the volume of trade and the associated "commodity pathways" for invasive species appears likely to be small (see above). However, change in the volume of trade and, as a consequence, the number of possibly invasive species that may be transported is only one factor in a broad-scale assessment of the risk of introducing invasive species.

The KORUS does not alter either country's regulatory framework for managing risks associated with the introduction of invasive species. The KORUS also does not alter related regulations, such as those prohibiting or regulating agricultural and other trade for the purpose of protecting against the introduction of agricultural pests or diseases. In addition, through the agreement's cooperation mechanism, the KORUS and the associated ECA between the United States and South Korea provide the opportunity for the two countries to enhance their efforts to cooperate to monitor and assess risks associated with invasive species. Control of invasive species has already been identified as an area of work (see section VII) under the ECA.

## **B. Transboundary and Global Issues**

While the environmental impacts of expected economic changes in the United States attributable to the KORUS are expected to be minimal, the Administration examined a large number and wide variety of environmental issues with potential global and transboundary impacts in determining the scope of this review. These were provisionally identified through public comments in response to a notice in the *Federal Register* (see Section IV.A) and through an open-ended scoping process among agencies with environment, trade and economic expertise. The Administration subsequently eliminated topics from further and more detailed analysis when initial findings revealed that there was no identifiable link to the KORUS. The following topics warranted further consideration.

### **Economically Driven Environmental Effects in South Korea**

As compared to its effects in the United States, the KORUS may have relatively greater impacts on the economy of South Korea and, through those impacts, effects on its environment. Although this review did not examine the possible effects of the KORUS on South Korea, South Korea conducted a review of the economically driven environmental effects of the KORUS in its territory. Using an analytical approach that is similar to that used by the USITC, South Korea estimated that removal of all import duties by both countries would increase South Korea's income by 0.35 percent.<sup>19</sup> This estimate of change in South Korea's economic activity was used to estimate changes in air and water pollution. Because changes in total production are estimated

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<sup>19</sup> Korea's estimate of the change in U.S. income is 0.1 percent.

to be small and mixed (production decreasing slightly in some sectors), estimated changes in pollution are also mixed and small.<sup>20</sup>

## **Wildlife Trade**

Trade in a wide variety of wildlife products (animals and plants) has been conducted in South Korea, including trade in both CITES-listed and non-CITES-listed species, with certain cases of illegal trade documented in the past,<sup>21</sup> including Appendix I species. The import trade is primarily for the traditional medicine and food markets, although there are pet and manufactured products markets as well. Public comments raised concerns with illegal shipments of wildlife entering South Korea in connection with traditional medicine. There are also concerns that South Korean travelers returning from China may be illegally importing bear and tiger medicinal products which they purchase while vacationing or on business trips.

Currently, South Korea is listed as a “Category 1” country by the CITES Secretariat’s National Legislation Project, meaning that South Korea has legislation in place that adequately implements the Convention’s obligations. Nevertheless, South Korean authorities face difficulties enforcing CITES trade controls, and illegal trade of endangered species continues, particularly in products used in traditional medicine.<sup>22</sup> The illegal trade is not primarily associated with the United States, however. U.S. imports of CITES-listed species from South Korea are limited.<sup>23</sup> In 2004, approximately 110 illegal medicinal products imported from South Korea (primarily bear and horned mammal products) were seized on entry. In recent years a relatively low number of shipments (on the order of two to three dozen) have been refused clearance. In 2004, U.S. exports and re-exports of CITES-listed animal species to South Korea comprised a variety of species, including American alligator, crocodile, lizard skin and coral products. All of this trade appears to have been conducted in accordance with CITES requirements.

Current U.S. tariffs on wild plants and animals imported from South Korea are already low or zero; therefore, the KORUS is not likely to contribute to an increase in trade of wildlife or endangered species. Instead, the KORUS and its associated ECA will offer opportunities for increased collaboration between the United States and South Korea to address wildlife trade concerns, including efforts to reduce illegal trade in wildlife. Cooperation related to CITES-

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<sup>20</sup> For example, overall air pollution is estimated to decrease by 0.35 percent, gross emission of industrial waste water to decrease by 0.08 percent and the “overloading dose of (water) pollution” to increase by 1.02 percent.

<sup>21</sup> For additional information, see Kang, S., and Phipps, M. (2003), *A Question of Attitude: South Korea’s Traditional Medicine Practitioners and Wildlife Conservation*. TRAFFIC East Asia, Hong Kong. Document available at: <http://www.traffic.org/medicinal/>.

<sup>22</sup> For example, the OECD Environmental Performance Review: Korea (2006) cites continuing challenges controlling the illegal trade of endangered species and a need for increased manpower trained to detect illegal traffic (see pages 25 and 237 [www.oecd.org](http://www.oecd.org)).

<sup>23</sup> South Korea exports a significant volume of non-CITES-listed species to the United States, including live fish, butterflies, feather products, leather products and (farmed) turtles.

listed species and wildlife trade has been identified as one potential area for work under the ECA (see section VII).

### **Invasive Species**

Just as species originating in South Korea may raise environmental concerns in the United States, species originating in the United States may potentially have harmful effects in South Korea. The Red-eared Slider, Black Bass, Bluegill and White Snakeroot are all examples of species indigenous to the United States that are invasive in South Korea. As discussed above, the KORUS's potential incremental effect on these risks is difficult to quantify, although the change in the volume of trade and the associated "commodity pathways" for invasive species appear likely to be small. The KORUS does not alter either country's regulatory framework for managing risks associated with the introduction of invasive species. As noted above, the KORUS also does not alter related regulations, such as those prohibiting or regulating agricultural and other trade for the purpose of protecting against the introduction of agricultural pests or diseases. In addition, the United States and South Korea will have the opportunity through the ECA to enhance their efforts to cooperate to monitor and assess risks associated with invasive species. Control of invasive species has already been identified as an area of work under the ECA (see section VII).

### **Environmental Goods and Services**

South Korea was the eighth largest export destination for U.S. environmental goods in 2005, with nearly \$1.2 billion in imports from the United States. However, high tariffs on many environmental goods limit opportunities for U.S. exporters and restrict access in South Korea to potentially beneficial technologies. Certain industrial sectors, including goods movement industries, are potential direct beneficiaries of increased trade in environmental goods and services. For example, in 2010 South Korean shipyards were the top world producers of merchant cargo vessels, and the vast majority of vessels built in South Korea are exported to foreign customers. While South Korean production is at the vanguard of the industry, the complex design and construction of new vessels offers continual challenges requiring the adoption of more advanced and efficient technologies, which are often more environmentally benign.<sup>24</sup> The KORUS may provide opportunities to promote to South Korean shipbuilders the use of advanced, more environmentally friendly technologies and operating strategies that are produced by U.S. companies. Similarly, the KORUS may provide opportunities to promote to South Korean port authorities, terminal operators and others involved in international goods movement the use of more environmentally friendly technologies and operating strategies. Many American maritime ports and carriers, perhaps most notably the Ports of Los Angeles and Long Beach, are demonstrating real leadership in these technologies and strategies.

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<sup>24</sup> New vessels will need to improve performance in the face of significant bunker fuel cost increases over the last year, as well as the need to meet more rigorous global ship air pollution standards under the International Maritime Organization's MARPOL Annex VI.

## Marine Fisheries

South Korea's fishing fleets are no longer able to meet domestic demand for fish and seafood, and as a consequence South Korea has become a net importer of fish and seafood. In 2010, South Korea was the fourth largest market for U.S. fishery product exports. Rising demand has also encouraged the expansion of domestic production through marine aquaculture, and the South Korean government seeks to raise the production ratio of aquaculture to wild catch from 27 percent in 2000 to 45 percent in 2030. Although aquaculture may reduce pressure on wild stocks, production has also been associated with environmental damage such as nutrient loading and the loss of genetic diversity of natural fish stocks, resulting in a greater risk from diseases, parasites or invasive species. The United States had been collaborating closely with South Korea on the development of less environmentally damaging and more productive off-shore aquaculture techniques.<sup>25</sup>

South Korea is a member of relevant regional fisheries management organizations with responsibility for waters where South Korean vessels are fishing. In 2008, South Korea acceded to the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Opportunities exist for further collaboration in the protection of wild fish stocks, for example through the International Network for the Cooperation and Coordination of Fisheries-Related Monitoring, Control, and Surveillance.

In addition, the Administration examined the issue of the sale of whale meat "bycatch" by South Korean commercial fishing vessels, a concern raised in public comments. In South Korea, accidental bycatch can be legally sold in the domestic market. A minke whale can command prices of \$20,000-50,000 dollars. Public comments and publicly reported data indicate that the South Korean bycatch of large whales per area of fishing waters is the largest in the world. All of the by-caught whales are of the "J" stock minke whales in North Pacific waters, the stock that the International Whaling Commission (IWC) Scientific Committee has determined is in decline. The J-stock is found in coastal waters around Japan and South Korea, was highly depleted by commercial whaling prior to 1986 and is now subject to both bycatch and research whaling. The Scientific Committee has advised that the current annual removal level (including research whaling) is likely to adversely impact the already depleted status of this genetically distinct stock.

In January 2011, the South Korean Ministry of Food, Agriculture, Forestry, and Fisheries announced stricter rules on whaling and the processing of whale meat. The new rules require fishermen to immediately report the discovery of by-caught or stranded whales. These whales are only allowed to be processed at state-designated facilities and only those with state permits will be allowed to trade whale meat. All by-caught or stranded whales will have DNA samples taken which will be provided to the IWC to allow the tracing of the origins of all whale meat in

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<sup>25</sup> See the Interim Environmental Review for additional information on recent cooperation between the United States and Korea.

South Korea. This is a change from the previous practice of fishermen processing the by-caught whales on board their vessels prior to arriving in port. However, the same legislation also outlines a procedure for permitting lethal scientific whaling.

The bycatch of minke whales and the sale of this meat is an important conservation issue in the IWC, and the United States will continue to work bilaterally with South Korea on this issue. Most recently, a U.S. whale disentanglement panel expert participated in the International Symposium on the Marine Protected Species held in South Korea in November 2010 and the United States hosted a South Korean scientist in March 2011 to observe the National Oceanic and Atmospheric Administration's protected species research and management activities in Hawaii.

The KORUS offers an opportunity to enhance cooperation and information exchange on bycatch minimization policies and techniques, better control of IUU fishing, and greater collaboration on improved aquaculture techniques. In addition to opportunities for cooperation under the ECA (see section VII), the KORUS establishes a Fisheries Committee to promote cooperation between the Parties regarding fisheries matters. The topics identified for discussion by the Fisheries Committee include each Party's policies on commercial activities within its Exclusive Economic Zones, cooperation on scientific research on fisheries matters of mutual concern and global fisheries issues of mutual concern.

## **VI. Potential Regulatory Impacts**

### **A. Regulatory Review**

Consistent with Executive Order 13141 and its Guidelines, this review included consideration of the extent to which the KORUS might affect U.S. environmental laws, regulations, policies or international commitments. Within the range of KORUS obligations, those related to investment, services and TBT can have particular significance for domestic regulatory practices concerning the environment, health and safety. Previous environmental reviews, including the interim and final reviews for U.S. free trade agreements with Jordan, Chile, Singapore, Morocco, Australia, the Dominican Republic and Central American countries, Bahrain, Oman, Peru and Colombia, have considered potential impacts on the U.S. regulatory regime with respect to all of these obligations and have found that the respective trade agreements were not anticipated to have a negative impact on U.S. legal or regulatory authority or practices. Further, the reviews noted the potentially positive impact that the agreements could have on the U.S. environmental regulatory regime as a result of the agreements' commitments concerning effective enforcement of U.S. environmental laws, not waiving U.S. environmental laws to attract trade or investment, and providing for high levels of environmental protection in U.S. environmental laws and policies. As a result of the May 10, 2007 agreement between the Administration and the bipartisan Congressional leadership, the KORUS and other trade agreements pending at that time include strengthened environmental provisions.

Based on this previous analysis, and given that the core obligations in these areas are either similar to or stronger than those undertaken in the previous free trade agreements, the

Administration concluded that the KORUS will not have a negative impact on the ability of U.S. government authorities to enforce or maintain U.S. environmental laws or regulations.

For a more in-depth analysis of general free trade agreement commitments and their potential regulatory impacts in the United States, see the previous reviews at: <http://www.ustr.gov/trade-topics/environment/environmental-reviews>.

## **B. Investment**

Investment provisions in free trade agreements were a matter of intense debate during Congress' consideration of the Trade Act. The central question was the appropriate balance that should be struck between protecting the rights of U.S. investors abroad and preserving the ability of the federal government and state and local governments to regulate with respect to health, safety and the environment.

In the Trade Act, Congress recognized that securing a stable investment climate and a level playing field for U.S. investment abroad are important objectives of U.S. trade policy. By fostering economic growth and job creation, investment can bring important benefits, including potential benefits to the environment: as wealth grows and poverty decreases, more resources become available for environmental protection, with potential benefits for developing countries, particularly as they develop constituencies in favor of increased environmental protection. Congress, however, also gave weight to concerns that arbitral claims brought by investors against governments (through "investor-State" arbitration) could be used inappropriately to challenge U.S. domestic laws and regulations, including those concerning the environment. As the Conference Report accompanying the Trade Act states: "[I]t is a priority for negotiators to seek agreements protecting the rights of U.S. investors abroad and ensuring the existence of a neutral investor-State dispute settlement mechanism. At the same time, these protections must be balanced so that they do not come at the expense of making U.S. Federal, State, and local laws and regulations more vulnerable to successful challenges by foreign investors than by similarly situated U.S. investors."<sup>26</sup>

The Trade Act strikes a balance between these two goals by prescribing U.S. trade negotiating objectives that clarify several substantive investment obligations of particular concern (notably, provisions on expropriation and "fair and equitable treatment"). The objectives seek to ensure that foreign investors in the United States are not accorded greater substantive rights than U.S. investors in the United States, while also securing for U.S. investors abroad core protections that are comparable to those that would be available to them under U.S. law. Other objectives in the Trade Act addressed concerns that investor-State arbitration be conducted efficiently and that arbitral tribunals interpret substantive obligations in a consistent and coherent manner. After enactment of the Trade Act, the Administration consulted extensively with Congress, the business community and environmental non-governmental organizations in order to clarify provisions, to develop new procedures, and to ensure that those provisions and procedures fully

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<sup>26</sup> See H.R. Rep. No. 107-624, at 155 (2002).

satisfied the Trade Act's objectives. These provisions and procedures were ultimately incorporated into each of the free trade agreements negotiated under the Trade Act.

Previous environmental reviews of free trade agreements have examined free trade agreement investment provisions in detail, particularly those clarifications and improvements included in free trade agreements negotiated after the Trade Act was enacted.<sup>27</sup> The Administration concluded that the investment provisions should not significantly affect the ability of the United States to regulate in the environmental area.<sup>28</sup> In this review, the Administration has re-examined that conclusion in light of public and advisory committee comments and the most recent experience.

### **Relevant KORUS Investment Provisions**

The KORUS investment chapter includes the following post-Trade Act substantive clarifications and procedural innovations with relevance to the environment. These provisions were developed based on careful consideration of Trade Act guidance and consultations with interested constituencies:

- *Expropriation.* The agreement's expropriation provisions have been clarified in two annexes to ensure that they are consistent with U.S. legal principles and practice, including a clarification that non-discriminatory regulatory actions designed and applied to protect the public welfare (including to protect the environment) do not constitute indirect expropriation "except in rare circumstances." To determine whether an indirect expropriation has occurred, the annex directs tribunals to examine several factors, which derive from the analysis of the U.S. Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the seminal case on regulatory expropriation. The annex also clarifies that only tangible or intangible property rights or interests in an investment are subject to the KORUS obligations with respect to expropriation.
- *Minimum standard of treatment/"fair and equitable treatment."* The minimum standard of treatment obligation included in the agreement's investment chapter, including the obligation to provide "fair and equitable treatment" and "full protection and security," is subject to a clarification that these concepts do not require treatment in addition to or beyond that contained in customary international law, and do not create additional rights. Specifically, the chapter defines "fair and equitable treatment" to include the obligation not to "deny justice" in criminal, civil or administrative adjudicatory proceedings, in accordance with "due process" protections provided in the principal legal systems of the

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<sup>27</sup> See, for example, final reviews of the Singapore, Chile, Morocco, and CAFTA-DR free trade agreements, and the U.S.-Peru Trade Promotion Agreement, available at: <http://www.ustr.gov/trade-topics/environment/environmental-reviews>.

<sup>28</sup> The full text of the investment chapters included in U.S. free trade agreements currently in force can be accessed through: <http://www.ustr.gov/trade-agreements/free-trade-agreements>. Additional information can also be found in the interim and final environmental reviews available at: <http://www.ustr.gov/trade-topics/environment/environmental-reviews>.

world, including that of the United States. An annex gives further guidance concerning the Parties' understanding of the term "customary international law."

- *Increased transparency in the investor-State mechanism.* The investment chapter of the KORUS provides that all substantive documents submitted to or issued by an arbitral tribunal shall promptly be made public and that hearings are open to the public, subject to provisions ensuring the protection of classified and business confidential information. It also expressly authorizes *amicus curiae* submissions, allowing the public to present views on issues in dispute.
- *Elimination and deterrence of frivolous claims.* The investment chapter includes an expedited procedure to allow for the dismissal of frivolous investor-State claims (based on Rule 12(b)(6) of the Federal Rules of Civil Procedure, *i.e.*, dismissal on the basis that the claimant has failed to state a claim upon which relief may be granted) and for the dismissal of claims based on jurisdictional objections. The chapter also expressly authorizes awards of attorneys' fees and costs after a tribunal decides, as a preliminary question, whether to dismiss a claim for lack of jurisdiction or for failure to state a claim on which relief may be granted.
- *Promoting consistency and coherence of arbitral decisions.* The agreement's investment chapter allows interim review of draft tribunal decisions by litigants and by the non-litigating Party. The litigants may comment on the draft decision.

In addition to these improvements developed specifically in response to the Trade Act, the KORUS includes several provisions, similar to those in previous agreements, that accommodate the flexibility that environmental regulators need to do their job and demonstrate the Parties' intent that the investment obligations should be interpreted in a manner consistent with each Party's right to regulate in the environmental area:

- *National treatment and MFN treatment for investors and their investments "in like circumstances."* As in earlier U.S. bilateral investment treaties (BITs) and in Chapter 11 of the North American Free Trade Agreement (NAFTA), the national treatment and MFN obligations in the KORUS investment chapter apply to investors "in like circumstances." This means that domestic regulation (including environmental regulation) may, in furtherance of non-discriminatory policy objectives, distinguish between domestic and foreign investors and their investments, as well as among investors of different countries and their investments, without necessarily violating the national treatment and MFN obligations. For example, regulators in appropriate circumstances may apply more stringent operating conditions to an investment located in a wetland, or in a more heavily polluted area, than to an investment located in a less environmentally sensitive area.
- *Relationship to other provisions.* The KORUS includes provisions making clear that in the event of any inconsistency between the agreement's investment chapter and any other chapter (including the environment chapter), the other chapter will prevail to the extent of the inconsistency. While the Administration does not believe there to be any

inconsistencies between the investment chapter and any other chapters, this provision clarifies the Parties' intentions with respect to the relationship between different chapters. The investment chapter also provides that nothing in the chapter shall be construed to prevent a Party from taking measures otherwise consistent with the investment chapter to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. Furthermore, in the agreement's environment chapter each Party commits not to waive or derogate from its environmental laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the Parties, except where the waiver or derogation is provided for in its law.

### **Potential Environmental Regulatory Impacts**

The Administration has been unable to identify any concrete instances of U.S. environmental measures that would be inconsistent with the KORUS's substantive investment obligations, and none have been called to the Administration's attention by commenters. No claims have ever been brought against the United States under the almost 40 BITs that are currently in effect or under any of our free trade agreements other than the NAFTA. In the 17 years that the NAFTA has been in effect, 15 cases have been brought against the United States by investors. The United States has prevailed in all of the cases that have been decided to date.

The Administration also considered the views of the TEPAC and other commenters on investment issues (see Section IV). The TEPAC majority was very concerned about the expropriation language included in the investment chapter of the agreement and urged that Congress modify it. They believed that the language conflicts with language in the U.S. model BIT and with U.S. Supreme Court precedent and that it could be used to "successful[ly] challenge attempts to implement more stringent bona fide environmental controls." Other TEPAC members had different views. Some felt that the provisions provided strong protections for U.S. investors while others thought that they weakened traditional protections for U.S. investors. Still other thought that these provisions should be included in a separate agreement.

On the basis of the Trade Act, U.S. model investment chapters (and model BIT) reflect a carefully negotiated balance between providing U.S. investors protections abroad and ensuring that federal, state and local governments can regulate to protect the public welfare in such areas as the environment, public health and public safety. Many of the innovations developed as a result of the Trade Act – including in the areas of expropriation, the minimum standard of treatment, and performance requirements – serve as safeguards to ensure that legitimate public interest regulation is fully protected. As in virtually all U.S. investment negotiations, the challenge in the negotiation with South Korea was to address South Korea's substantial concerns regarding investment in a manner that maintained this critical balance. While the final text differs from the U.S. model, the Administration strongly believes that the final text has maintained the balance that is at the heart of U.S. investment policy. A response to specific TEPAC concerns is set out below.

*Tests for indirect expropriation.* The TEPAC majority argues that Annex 11-B of the agreement allows investor-State arbitration tribunals to find a regulatory action to be an indirect expropriation if it is either “extremely severe” or “disproportionate in light of its purpose or effect.” First, the TEPAC majority argues that these concepts have no basis in U.S. or international law. Second, it asserts that these concepts provide excessive discretion to tribunals to strike down U.S. environmental, health and safety laws. Third, it argues that the concepts provide foreign investors greater rights than U.S. investors have under U.S. law because, “for example, the U.S. Supreme Court has never held that an expropriation or taking can be found simply because judges believe that the measure is disproportionate.” The Administration disagrees with these arguments.

In the Administration’s view, the new language in Annex 11-B is fully consistent with U.S. law and customary international law jurisprudence on indirect expropriation. Indeed, the concepts of both “severity” and “disproportionality” are expressly discussed in the seminal U.S. Supreme Court case on indirect expropriation, *Penn Central*, and in related cases as relevant aspects of the legal test for indirect expropriation. Moreover, that legal test is fundamentally about the “purposes” of government action and its “effects” on foreign investors, and thus those ideas flow directly from the jurisprudence as well. The legal test of this provision would not be applied any differently from the *Penn Central* analysis under U.S. law.

*Missing first paragraph of Annex 11-B.* The TEPAC majority expressed concern that the agreement omits model paragraph 1 of the Expropriation Annex, which states that “Article 6.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.” The TEPAC majority believes that this omission is important because that language sets the context for the entire expropriation analysis, placing it firmly within customary international law and thus providing boundaries to the analysis and to arbitrators’ power to declare environmental, health and safety regulations to be expropriations requiring compensation.

For the following reasons, the Administration does not believe that this omission will have the effect the majority of the TEPAC asserts:

- First, the deleted language is not a rule of interpretation. While it clarifies one characteristic of model Article 6.1, its presence or absence does not change the fact that model Article 6.1 reflects customary international law or that the Annex reflects the customary international law test for an indirect expropriation. Nothing about how one analyzes whether an expropriation has occurred changes by the removal of paragraph 1.
- Second, the agreement’s investment chapter contains a footnote derived from the model text that states, “Article 11.6 shall be interpreted in accordance with Annexes 11-A and 11-B.” Thus, a tribunal will know that it is to analyze the question of whether an expropriation has occurred in light of Annex 11-A, which discusses customary international law, and Annex 11-B, which (in paragraph 3(a)) lays out the U.S. law and customary international law test for an indirect expropriation.

- Third, Article 11.22 (Governing Law) provides the same interpretive guidance to tribunals as that in the model text. In particular, Article 11.22.1 provides that a tribunal shall decide claims of a breach of the investment chapter “in accordance with this Agreement and applicable rules of international law,” which includes customary international law principles regarding expropriation.
- Finally, paragraph 1 of the model text is not designed to narrow or limit protections that exist in U.S. law. The language of Article 11.6.1 continues to reflect both customary international law and U.S. law.

*Confirming letter on property rights.* The TEPAC majority argues that the confirming letter on property rights appended to the agreement “provides that all contract rights are property rights and thus are eligible to be investments subject to arbitration.” The Administration disagrees with this interpretation. The letter neither states nor implies that all contract rights are “property rights” (and thus are investments capable of being expropriated and are subject to investor-State arbitration). The letter provides only that the term “tangible or intangible property right” includes rights under contract. It does not provide that all contract rights are “property rights.”

Based on the above considerations, and given that U.S. environmental measures can be challenged in U.S. courts under current law, the Administration does not expect the KORUS to result in an increased potential for a successful claim relating to such measures. The KORUS’s innovations (like those of all post-Trade Act U.S. free trade agreements) should further reduce the risk that arbitral tribunals will misapply the investment provisions of the KORUS. The Administration will continue to review the potential impact of investment provisions on environmental measures, however, as it implements the KORUS and other trade agreements with similar provisions.

## **VII. ENVIRONMENTAL COOPERATION**

As discussed in Section I.A, the Trade Act establishes that a principal U.S. negotiating objective is to strengthen the capacity of U.S. trading partners to protect the environment through the promotion of sustainable development. In addition, the Trade Act calls for U.S. negotiators to seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science. South Korea has a well-developed system for the protection of its environment and natural resources.

In conjunction with the negotiation of the KORUS, the United States and South Korea negotiated an ECA similar to those negotiated in parallel with other free trade agreements the United States has concluded in recent years. As previously noted, the ECA establishes a Commission to oversee the implementation of cooperative activities. The Commission will comprise government representatives with environmental responsibilities from the United States and South Korea, and will be led by one high-level official each from the U.S. Department of State and South Korea’s Ministry of the Environment.

The United States and South Korea share common concerns and similar responsibilities for protecting and conserving the environment and have a long history of cooperation in addressing environmental challenges. The United States and South Korea also have a common interest in promoting global environmental improvement and protection and in using science and technology to address environmental challenges. In the ECA, the Parties acknowledge that they can play an important role both regionally and globally in promoting environmental protection and the sustainable management of resources.

As noted above, in 2007, the Parties negotiated a draft work program to guide cooperation under the ECA. The Commission will review, update, and finalize this draft work program as appropriate after entry into force of the ECA. It also will review and assess cooperative activities undertaken pursuant to the final work program, and recommend ways to improve cooperation under the ECA. The Commission will meet within one year after the ECA enters into force and as appropriate thereafter.

In the ECA, the Parties have identified 13 areas in which they may cooperate. These areas include: developing, implementing and enforcing environmental and natural resource conservation laws; implementing and enforcing MEAs to which both Parties are party (including, for example, CITES); sharing information about imports that fail to meet the importing Party's environmental standards with a view towards facilitating compliance with the relevant laws and standards; protecting, conserving and managing in a sustainable and integrated manner various ecosystems, including through the conservation of endangered species and the control of invasive alien species; and implementing measures to ensure that maritime vessels and related port activities are compatible with and supportive of environmental protection and the sustainable management of natural resources. Under the ECA, the Parties may agree to cooperate in additional areas.

Other areas of possible cooperation identified in the ECA include: the development of joint initiatives to combat illegal logging and associated trade, as well as the illegal harvest and sale of wildlife and wildlife parts; the reduction of air and water pollution through pollution prevention and resource conservation; the development and use of environmentally sound production methods and technologies; the development of cleaner sources of energy; and the promotion of greater public awareness of environmental issues.

Public participation is an important element for the success of the ECA. Consequently, the ECA calls for the Parties to promote opportunities for public participation in the development and implementation of cooperative environmental activities. The ECA also provides that unless the Parties decide otherwise there will be a public session at each Commission meeting.

## ANNEX

### Organizations Providing Comments<sup>29</sup>

#### **Received in response to 71 *Fed. Reg.* 10999 (March 3, 2006)**

Humane Society International (March 31, 2006)

#### **Received in response to 71 *Fed. Reg.* 6820 (Feb. 9, 2006)**

American Federation of Labor and Congress of Industrial Organizations (Public Hearing, March 24, 2006)

U.S.-Korea Business Council and the American Chamber of Commerce in Korea (March 24, 2006)

American Chemistry Council Comments (March 29, 2006)

#### **Received in response to 71 *Fed. Reg.* 75281 (December 14, 2006)**

Humane Society International (January 17, 2007)

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<sup>29</sup> See Section IV for additional information.