

April 27, 2007

The Honorable Susan Schwab
United States Trade Representative
Executive Office of the President
600 17th Street, NW
Washington, DC 20508

Dear Ambassador Schwab:

Pursuant to Section 2104 (e) of the Trade Act of 2002 and Section 135 (e) of the Trade Act of 1974, as amended, we are pleased to transmit the report of the Industry Trade Advisory Committee for Information and Communications Technologies, Services and Electronic Commerce (ITAC 8) on the Korea-U.S. Free Trade Agreement. This report reflects the consensus opinion of ITAC 8 members on the proposed Agreement.

Sincerely,

Steven W. Stewart
Chair, ITAC 8

The Korea – U.S. Free Trade Agreement

Report of the
Industry Trade Advisory Committee for Information and
Communications Technologies, Services and Electronic
Commerce (ITAC 8)

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**Industry Trade Advisory Committee for Information and Communications
Technologies, Services and Electronic Commerce (ITAC 8)**

**Report to the President, the Congress and the United States Trade Representative
on the Korea-U.S. Free Trade Agreement**

I. Purpose of the Committee Report

Section 2104 (e) of the Trade Act of 2002 requires that advisory committees provide the President, the U.S. Trade Representative, and Congress with reports required under Section 135 (e)(1) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the 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 report of the appropriate sectoral or functional committee must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area.

Pursuant to these requirements, the Industry Trade Advisory Committee for Information and Communications Technologies, Services and Electronic Commerce (ITAC 8) hereby submits the following report.

II. Executive Summary of the Committee Report

ITAC 8 views the provisions of the Korea-U.S. Free Trade Agreement (KORUS FTA) (“the Agreement”) that fall under the scope of the Industry Trade Advisory Committee as consistent with the negotiating objectives the committee has established for U.S. trade agreements. ITAC 8 believes the relevant provisions contained in this agreement promote the economic interests of the United States and provide equity and reciprocity for information and communications technology and services firms, and electronic commerce firms.

The KORUS FTA achieves services liberalization beyond that to which Korea is committed in the WTO General Agreement on Trade in Services (GATS) by adopting a comprehensive negative list approach where all sectors are covered except where specific exceptions are made. This is especially helpful in assuring U.S. computer service providers of future market access in this rapidly evolving sector. The Agreement also goes beyond the Information Technology Agreement by eliminating customs duties on a broader range of high-technology products.

The Telecommunication Chapter includes a provision to allow U.S. companies to own up to 100 percent of a telecommunications operator in Korea within two years, a major improvement compared to the current cap of 49 percent. The Agreement includes important commitments that will ensure nondiscriminatory access for U.S. companies to Korea's public telecommunications network, including submarine cable landing stations, and it includes new safeguards to help protect technology choice.

In the area of electronic commerce, ITAC 8 supports the USTR's continued emphasis on the concept of digital products in terms of trade. Our assessment of the e-commerce provisions in the Agreement indicates that it meets our negotiating objectives.

The Government Procurement Chapter reaffirms the countries' rights and obligations under the WTO Government Procurement Agreement and expands the procurements available to U.S. companies, providing an advantage to U.S. companies relative to providers from other countries. The Committee is especially pleased at the inclusion of a provision to establish a working group to address government procurement issues, in particular procurement issues related to information technology, on an ongoing basis. USTR should consider similar provisions in future FTAs.

Technical Barriers to Trade is an area of growing concern for the U.S. high-tech industry. The TBT Chapter of the Agreement contains provisions that emphasize the importance of the WTO Agreement on Technical Barriers to Trade (TBT) and improves upon the WTO Agreement and previous FTAs in certain areas.

The Investment Chapter provides generally strong protection for U.S. investment in Korea, including an important investor-state dispute settlement mechanism. While this is an excellent achievement, the Committee was disappointed at the inclusion of two narrow exceptions to dispute settlement and limited restrictions on certain short-term capital flows. We urge the Administration to avoid similar exceptions in future agreements.

Strong protection for intellectual property rights is very important for U.S. companies that engage in international trade. ITAC 8 finds that the KORUS FTA meets our objectives in this area, and we strongly support this part of the Agreement.

While the zero tariff coverage provided in the Market Access Chapter is quite broad for information technology products, the Committee notes that the rule of origin for semiconductor products is such that not all semiconductor products fabricated in the United States will receive zero tariff coverage under this agreement.

With regard to Trade Remedies, it is imperative that the Agreement not adversely affect the ability of U.S. companies to either secure or retain relief from unfair trade practices under U.S. law as it is currently administered.

III. **Brief Description of the Mandate of the ITAC 8**

The Industry Trade Advisory Committee for Information and Communications Technologies, Services and Electronic Commerce (ITAC 8) was established as part of a restructuring of the industry trade advisory committee system by the U.S. Department of Commerce and the United States Trade Representative (USTR). The restructuring was undertaken in order to better reflect today's U.S. economy and to better position industry to provide the private sector and civil society the opportunity to advise the Administration on trade issues and objectives.

ITAC 8 performs such functions and duties and prepares reports, as required by Section 135 of the Trade Act of 1974, as amended, with respect to information and communications technologies, services and electronic commerce. ITAC 8 provides detailed policy and technical advice, information, and recommendations to the Secretary of Commerce and the U.S. Trade Representative regarding trade barriers and implementation of trade agreements.

IV. **Negotiating Objectives and Priorities of the ITAC 8**

ITAC 8 supports an ambitious trade agenda that addresses the following issues through all available trade negotiating forums, including multilateral (WTO), regional (e.g., FTAA), plurilateral (e.g., CAFTA) and bilateral agreements. ITAC 8 also emphasizes the need for prompt implementation and effective enforcement of free trade obligations once agreements are concluded.

A. Goods Issues

1. Eliminate tariffs on all information technology products (hardware and software) and components, infrastructure equipment, medical equipment and scientific instruments.
 - Within the WTO, seek to gain new signatories to the Information Technology Agreement (ITA), expedite the phaseout of tariffs under the ITA, ensure that as products covered by the ITA evolve technologically they retain zero duty treatment, and seek to expand the product coverage under the ITA.
 - Alternatively, as part of the Doha Round Non-Agricultural Market Access (NAMA) negotiations, countries should agree on sectoral tariff

elimination that would apply to IT products, including those products not currently covered by the ITA.

2. Eliminate discriminatory taxes that create barriers to trade.
3. Support global, market-led, voluntary standards developed through an open and transparent process. Ensure that standards do not create unnecessary barriers to trade.
4. Reduce technical barriers to trade. Ensure that product testing, licensing and certification requirements, certificate of origin mandates and customs procedures are fair, transparent and streamlined. Eliminate those procedures that are duplicative, increase costs to users and delay the availability of products to market.
5. Where product regulations are deemed necessary they must be nondiscriminatory, based on sound and widely accepted scientific principles and available technical information, and should not impede the effective functioning of the market. Consistent with existing WTO rules, regulations should be the least trade restrictive possible.

B. Services Issues

1. Increase the number of countries with obligations in telecommunication services, and increase the range of services covered in country schedules. Ensure that telecommunication services are liberalized on a technology-neutral basis. Promote independent regulatory authorities and transparency in the regulatory process. Ensure nondiscriminatory access to, and use of, public telecommunication networks and services.
2. Obtain full market access and national treatment for computer and related services. Ensure that technologically evolving IT services, including those that are delivered electronically, continue to be covered by trade agreements and that barriers to these services do not develop.
3. Maximize the liberalization of all services that can be delivered electronically.

C. E-Commerce Issues

1. Electronically delivered goods and services should receive no less favorable treatment under trade rules and commitments than like products delivered in physical form. Trade classification should ensure the most liberal treatment possible. Software and other digital products should be duty free.
2. Make permanent the WTO moratorium on customs duties on electronic transmissions.

3. Support a moratorium on Internet taxes.
4. Monitor other e-commerce issues and take action as required: data privacy, security, consumer protection, spam, and digital signatures.

D. Intellectual Property Issues

1. Seek full implementation of existing TRIPs commitments and encourage ratification of WIPO Copyright Treaties.
2. Combat global software piracy and technology product counterfeiting.
3. Oppose Digital Rights Management legislation calling for government-mandated technological standards to protect digital content. Promote the development and adoption of market-led best practices to protect intellectual property.
4. Oppose the application of levies on information technology products as a way to compensate copyright holders for copying.

E. Government Procurement Issues

1. Seek market access and transparency in government procurement.
 - Seek to expand the membership of the WTO Government Procurement Agreement.
 - Seek a WTO Agreement on Transparency in Government Procurement.
2. Promote global use of electronic publication of procurement information, including notices of procurement opportunities.

F. Other Issues

1. Ensure that all countries comply with their obligations under their free trade agreements.
2. Enable global operations of U.S.-based companies by opening markets abroad and avoiding restrictions in the U.S. on worldwide sourcing.
3. Ensure U.S. trade laws are not weakened to the detriment of U.S. companies.

V. Advisory Committee Opinion on Agreement

ITAC 8 reviewed the chapters on Market Access, Government Procurement, Telecommunications, Cross Border Trade in Services, Electronic Commerce, Technical

Barriers to Trade, Investment and Intellectual Property Rights. For these chapters, ITAC 8 believes the provisions of the agreement meet our objectives, promote the economic interests of the United States and provide equity and reciprocity for our sectors.

Market Access

The agreement calls for the elimination of tariffs and other barriers on a significant basket of high-technology, telecommunications and consumer electronics goods. While Korea had already eliminated tariffs on a number of IT products as a signatory to the Information Technology Agreement, this will benefit U.S. industry by expanding the scope of duty-free technology products and eliminating tariffs, which were generally in the range of eight percent, on many, but not all IT products.

Most of the duties on tariff lines covered by Harmonized Tariff System (HTS) chapters 84, 85, and 90 will be eliminated immediately, with almost all products phased out in three years. While it would have been preferable if all U.S. high-technology, telecommunications, and consumer electronic exports could enter Korea duty-free upon the effective date of the agreement, the agreement nonetheless makes great strides in improving market access for U.S. high-tech exports. Because of the rule of origin for semiconductor products utilized in this agreement, certain multi-chip integrated circuits fabricated in the United States and not currently covered by the existing zero tariff agreement will continue to be subject to eight percent duties when imported into Korea.

Korea is already a major export destination for U.S. high-technology, telecommunications, and consumer electronics products. In 2006 the U.S. exported \$10.6 billion in high-tech goods to Korea. High-tech exports are expected to grow even more as a result of the duty eliminations under this Agreement. Given the demand in Korea for high-technology goods, the agreement will provide U.S. companies whose products are covered an advantage over competitors seeking to sell into the Korea market.

Government Procurement Chapter

In the Agreement, Korea and the United States reaffirm their rights and obligations under the WTO Government Procurement Agreement (GPA). The KORUS FTA expands access to Korean government procurements for U.S. companies by including more covered government agencies and by reducing the threshold for the value of covered procurements compared to the threshold in the GPA.

The Agreement provides for greater certainty relating to the government procurement of digital products. Specifically, the Chapter clarifies that government procurement includes the procurement of digital products as defined in the Electronic Commerce Chapter. This is a welcome clarification and ITAC 8 recommends that a similar clarification be included in all future free trade and government procurement agreements.

The KORUS FTA encourages the use of electronic procurement, which will help to make government procurements more accessible to U.S. companies. The Agreement provides that a procuring entity may reduce the time for submission of tenders where the entity publishes a notice of intended procurement in an electronic medium and provides the tender documentation in an electronic medium.

The Agreement also establishes a working group on government procurement to address related issues, in particular those related to information technology. This will provide an additional useful forum in which companies can raise concerns about, and seek resolution of, government procurement issues. The Committee especially appreciates this new provision and urges USTR to consider establishing similar working groups in future FTAs.

Telecommunications Chapter

The Telecommunications Chapter should be read with a recognition that Foreign Direct Investment (FDI) in facilities-based telecommunications providers in Korea is currently subject to a 49% limit. This severe limitation on market access is addressed well in the Services Chapter, which includes a commitment that, as of two years after the Agreement enters into force, U.S. companies will be able to own up to 100% equity in Korean entities, which in turn can own 100% of a facilities-based licensee. Many of the commitments in the Telecommunications Chapter provide rights only to facilities-based providers; these rights will fully benefit U.S. companies once the transition period is complete. Both Korea Telecom and SK are excluded from the improved opportunity for indirect foreign ownership. While this commitment is more modest than those seen in most other Free Trade Agreements and therefore should not be seen as precedent, it represents major progress in access to the very large Korean market.

The Telecommunications Chapter includes a number of very important commitments that should foster a more open and liberalized telecommunications market in Korea. The Chapter ensures that U.S. providers will have access to and use of the public telecommunications network, including leased circuits, on reasonable and nondiscriminatory terms and conditions. The Chapter also includes strong “WTO-plus” obligations for all telecommunications suppliers, including interconnection and dialing parity, and appropriately more rigorous commitments for major suppliers, including competitive safeguards, resale and cost-oriented interconnection. The Chapter also includes important commitments related to ensuring access to submarine cable landing stations controlled by major suppliers. These commitments (which cover international circuits, backhaul, collocation and cross-connect links) are more comprehensive than in other agreements and represent significant progress in areas critical to the provision of cross-border telecommunications services.

The Chapter commits Korea to ensure transparency with respect to regulatory processes applicable to the telecommunications sector. These include a commitment that its regulatory body is separate from, and not accountable to, any supplier of public

telecommunications services and that the regulatory body does not hold a financial interest or operating role in any supplier. The Chapter provides for enforcement authority, guarantees recourse to regulatory bodies, and specifies an appellate process for resolution of domestic telecommunications disputes, all of which are important to providing effective market access for U.S. providers. The Chapter includes an annex that clarifies the commitments for rural telephone suppliers. This annex provides definitions for rural suppliers and specific terms for exempting suppliers of public telecommunications services from several elements of the Telecommunications Chapter.

The Chapter also includes important new safeguards on restrictions that regulators can impose on operators' technology choice, particularly in wireless technologies. Technology neutrality is a critical issue for the telecommunications sector. The Agreement goes beyond other FTAs in this regard by limiting the conditions under which parties can specify technology and thereby helps to avoid the arbitrary denial of technology choice.

Cross Border Trade in Services Chapter

The Agreement ensures full market access and national treatment for most services by adopting a "negative list" approach and by including limited reservations. The Agreement covers cross-border delivery, including by electronic means such as the Internet, for computer and related services, management consulting and other services. Importantly, the negative list approach also ensures that rapidly evolving computer services, driven by continual advances in technology, will be covered by commitments contained in the Agreement. Without some agreement that these services are covered, computer and related services definitions and commitments could quickly become obsolete as new ways of delivering these services are introduced.

By employing a negative list approach, the Agreement ensures full market access and national treatment for a broad range of services that can be delivered electronically. These services commitments are complemented by the commitments contained in the Electronic Commerce Chapter.

Electronic Commerce Chapter

The KORUS FTA contains an Electronic Commerce Chapter that essentially continues the concept of "digital products" in terms of trade as defined in previous agreements. The Chapter affirms the importance of avoiding e-commerce barriers and the applicability of WTO rules. The Chapter assures the non-discriminatory treatment of digital products.

In the Agreement, the parties agreed not to impose customs duties, fees or other charges on digital products transmitted electronically. This provision is similar to the WTO Moratorium on Customs Duties on Electronic Transmissions. ITAC 8 seeks to make the

Moratorium permanent and values the inclusion of the customs duties provision in this FTA. The E-Commerce Chapter reflects digital product development in the last two decades and the need for predictability in how digital products are treated in terms of trade. Korea has also agreed to duty-free treatment for digital products imported on a physical medium.

Korea agreed to non-discriminatory treatment of digital products, providing a broad national treatment and most-favored nation provision. ITAC 8 appreciates the importance of this provision and believes it is consistent with our objective to ensure the most liberal treatment possible of electronically delivered goods and services.

The E-Commerce Chapter includes a non-binding statement in which the parties recognize that consumers should be able to access and use services and digital products of their choice, run applications of services of their choice, and connect their choice of devices to the Internet. This hortatory statement reflects the FCC's broadband policy statement and was included to encourage commercial resolution of an allegation of VoIP port blocking in South Korea. These principles may be fully realized through competition and market forces, rather than regulation, as a letter in an annex recognizes by affirming the validity of contractual and commercial arrangements in this regard. The Agreement also promotes the use of e-commerce by: facilitating the use of electronic authentication, providing for cooperation in consumer protection, and promoting paperless trading.

Technical Barriers to Trade Chapter

Technical barriers to trade worldwide are a longstanding and increasingly serious, concern of the U.S. high technology industry because they play a significant role in limiting the sale of U.S. high-tech products. As ITAC 8 has noted in our review of earlier FTAs, increasingly, the IT sector is experiencing more complicated and difficult technical barriers worldwide, including unique encryption standards, unique wireless standards, data privacy barriers, software preference mandates, and chemical content requirements for IT products, among others. Strong enforcement of the WTO Agreement on Technical Barriers to Trade (TBT) and reinforcement of its principles through FTAs are therefore critically important, particularly in Korea, given the high degree of government-driven, versus market-driven, regulations.

Against this backdrop we have considered whether the TBT section of KORUS FTA 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, and have concluded that it does.

In reaching this conclusion we initially looked at key provisions of the WTO TBT agreement, reaffirmed by Korea and the United States in the KORUS FTA, in order to determine to what extent, if any, the Agreement improves upon the WTO TBT. In

numerous critical aspects, we find that the TBT Chapter does, in fact, provide for significant benefits to U.S. manufacturers as compared to the WTO TBT.

For example, the KORUS FTA creates substantially increased transparency in the development and application of technical standards, technical regulations and conformity assessment procedures, as well as providing for “national treatment” to U.S. conformity assessment bodies (i.e., testing laboratories). Significantly, the TBT section of the Agreement permits direct participation by U.S. persons on a non-discriminatory basis in the development of Standards-Related Measures, which is not covered by WTO rules (*cf.* NAFTA 909.7). We note, as well, that these KORUS FTA terms represent improvements over previous FTAs to which the U.S. is a party. ITAC 8 commends U.S. negotiators for achieving these significant advances.

Further on increased regulatory transparency, the KORUS FTA requires an explanation of the objectives of proposed Government regulations and allows 60 days for written comments. Significantly, the Korean Government will now publish notices of proposed and final regulations in a single official journal and respond to comments in the final regulation. The Committee appreciates the success of U.S. negotiators in obtaining these important improvements over previous FTAs and the WTO TBT.

Another achievement of the Agreement of particular importance to ITAC 8 advisors is that it establishes a timetable for essentially privatizing the conformity assessment of telecommunications hardware equipment. Within a year the Korean Government will publish regulatory changes necessary in order to implement the APEC Mutual Recognition Arrangement for telecom equipment. This Committee commends U.S. negotiators for achieving this breakthrough in the certification of telecom equipment.

Another significant improvement in the Agreement over previous FTAs is seen in the Korean Government’s agreeing to apply immediately the transparency and TBT obligations in the KORUS FTA as soon as the agreement goes into effect, instead of permitting a five-year implementation period as is the case in other FTAs. ITAC 8 appreciates the success of U.S. negotiators in gaining immediate application of these obligations.

We are pleased to note that the KORUS FTA creates an ongoing Committee on Technical Barriers to Trade that is empowered to monitor implementation of the TBT chapter of the Agreement and address any issue that relates to the development, adoption, application or enforcement of standards, technical regulations or conformity assessment procedures. The TBT Committee is also charged with the task of improving mutual understanding of the Korean and U.S. conformity assessment systems and discussing possible reforms to facilitate trade between the Parties. ITAC 8 believes that such an ongoing forum is essential to successful implementation of the KORUS FTA, particularly in addressing TBTs, and encourages U.S. negotiators to actively involve ITAC 8 members in such TBT Committee to the maximum extent possible.

Investment Chapter

The Agreement's investment chapter includes generally strong protections for U.S. investors and investment in Korea, including with respect to national and most-favored-nation treatment, compensation for expropriation, restrictions on performance requirements, fair and equitable treatment, full protection and security, and the free transfer of capital. Very importantly, the Agreement includes an investor-state dispute settlement mechanism, which applies to breaches of the core investment protections and breaches of an investment agreement or authorization. Korea negotiated two very narrow exceptions for measures necessary to protect the public order and for services supplied in the exercise of governmental authority where there is no agreement between the government and the investor. The Committee notes that these exceptions can only be applied in narrow circumstances; it also urges that similar exceptions not be included in future agreements. The Committee is disappointed by the inclusion of provisions that allow limited restrictions on certain short-term capital flows and similarly urges the Administration to avoid including similar provisions in future agreements.

Intellectual Property Rights Chapter

The KORUS FTA is the second FTA in the recent series of FTAs that has been agreed to with a country in an advanced stage of development. ITAC-8 believes that, taken as a whole, the intellectual property provisions of this agreement are very strong. ITAC-8 commends the U.S. negotiators for a job well done. This agreement is broadly consistent with the negotiating goals and objectives contained in the Trade Act of 2002 and those of the U.S. intellectual property-based industries, creators and innovators. ITAC-8 strongly supports the chapter on intellectual property.

Trade Remedies

With regard to Trade Remedies, it is imperative that the agreement not adversely affect the ability of U.S. companies to either secure or retain relief from unfair trade practices under U.S. law as it is currently administered. In particular, the provisions in the agreement providing for additional opportunities for pre-initiation consultations should not alter the Commerce Department's current practice regarding evaluating petitions for initiation, nor increase in any way the burden placed on domestic industries seeking trade relief. Nor should the provisions regarding consideration of requests for suspension agreements alter in any way the Commerce Department's existing practice regarding suspension of investigations. The Department should not allow trading partners or their industries to utilize consultations to prevent the completion of investigations unless the domestic industry supports the negotiation of a suspension agreement.

VI. Membership of the Committee

1. Mr. Steven W. Stewart (Chairman) IBM Corporation
2. Ms. B. Anne Craib (Vice-Chairman) Semiconductor Industry Association
3. Mr. Robert J. Mulligan (Vice-Chairman) American Electronics Association
4. Mr. Arun K. Bhumitra Arjay Telecommunications
5. Mr. Mark F. Bohannon, Esq. Software and Information Industry Association
6. Mr. Anthony Caldwell XSelData
7. Ms. Susan D. Chapman General Motors Corporation
8. Mr. Calman J. Cohen Emergency Committee for American Trade
9. Mr. Tod H. Cohen, Esq. eBay Inc.
10. Ms. Holly A. Evans, Esq. Advanced Micro Devices
11. Mr. Mark E. Foster, Esq. Transaction Network Services, Inc.
12. Ms. Meredith L. Golemon-Anderson Oracle Corporation
13. Mr. John P. Goyer Coalition of Service Industries
14. Mr. Christopher G. Hankin Sun Microsystems, Inc.
15. Ms. Tania W. Hanna Harris Corporation
16. Mr. Christopher J. Hirth Intuit, Inc.
17. Ms. Elizabeth A. Hyman, Esq. Consumer Electronics Association
18. Mr. John D. Kania IPC - Association Connecting Electronics Industries
19. Mr. David M. Leifer, Esq. American Council of Life Insurers
20. Mr. Charles B. O'Hara Procter and Gamble Company
21. Ms. Wendy E. Owens AbleMedia, LLC
22. Mr. Daniel J. Peterson Cook Group, Inc.
23. Mr. David K. Rensin Reality Mobile LLC
24. Ms. Jacquelynn Ruff, Esq. Verizon Communications, Inc.
25. Ms. Laura S. Sallstrom Dell, Inc.
26. Ms. Loretta Schmitzer The Boeing Company