

Investor-State Provisions of the Korea-US FTA

Committee in Solidarity with the People of El Salvador

9/27/11

I'm here today representing the Committee in Solidarity with the People of El Salvador, CISPES. Since the ratification of CAFTA, a trade agreement Representative Rothman wisely voted against, CISPES has monitored the impacts of this FTA on El Salvador. As we feared, CAFTA has failed to deliver the economic prosperity it promised to El Salvador, whose real growth rate dropped from 2.5% in 2005 to .7% in 2010, according to the CIA World Factbook. Instead of creating opportunity, CAFTA has become an albatross for El Salvador. CAFTA's NAFTA style investment chapter now has El Salvador in a vise. A Canadian mining company, Pacific Rim, established a small subsidiary in the United States and through that subsidiary is suing El Salvador at the World Bank's International Center for the Settlement of Investment Disputes under CAFTA for \$77 million because El Salvador refused to let the mining company go ahead with a highly unpopular gold mining project that threatened to contaminate the Rio Lempa, the nation's largest river and primary source of drinking water with cyanide and arsenic.

Like NAFTA and CAFTA, the investment chapter of the Korea-US agreement, Chapter 11, provides foreign investors and corporations expansive rights to bypass our domestic courts, allowing investors to seek awards of money damages of unlimited size, in compensation for the cost of complying with our domestic zoning and land use, health, environmental, food safety, and other public interest policies before undemocratic international tribunals designed to encourage international investment. The FTA allows corporations to challenge virtually any law, regulation or even court decision that adversely affects their profit-making potential. If passed, the Korea FTA could even take precedent over future policies designed to combat global warming. Mexico and Canada have lost NAFTA challenges to environmental protections and the United States has spent millions defending itself against suits.

Many of the corporations lobbying on behalf of agreements like the KORUS appear to be motivated by a desire to avoid new environmental and other regulations or tax and royalty adjustments that could affect their expectations for return on investment. They, evidently, want to freeze regulations and revenue measures in place once an investment is made.

The Trade Act of 2002 clearly requires that foreign investors are not accorded greater substantive rights than those found in U.S. law. However, the U.S.-South Korea FTA fails to meet this critical "no greater rights" test. The agreement grants foreign investors procedural rights unavailable under U.S. law. It also allows them to designate expected future profits as a property interest and to assert that environmental or public health measures constitute an "indirect expropriation" of their business interests or violate a "minimum standard of treatment" in a wide range of circumstances that would not be compensable in U.S. courts. Consequently, the agreement gives foreign corporations an advantage over domestic companies who are not granted the right to take their case to these investor-friendly international tribunals and are instead limited to domestic courts, which are more likely to rule in favor of the national interest. This creates an incentive for US corporations to offshore to South Korea, where they can exploit Chapter 11 in cases against the Korean government.

Investor-state dispute mechanisms have become increasingly common in free trade agreements and bilateral investment treaties since the 1990s. Hundreds of cases have been filed costing governments millions in legal fees and arbitration payments. Perhaps an even greater consequence than monetary loss, however, is a chilling effect on good environmental governance when governments choose not to pass legislation that protects citizens and the environment if threatened with an investment dispute.

The South Korea-U.S. FTA specifically allows foreign investors and corporations to bring suit over contracts with the government related to natural resource exploration, extraction and refining; and power generation or distribution services; water treatment or distribution services; and roads, bridges, canals, dams, or pipeline infrastructure. This means that if the U.S. government changes the terms of a contract -- for instance its contract with BP in the wake of the Gulf oil spill -- corporations could use the terms of the free trade agreement to sue. Given how many oil spills, levee breaks, and bridge failures we've seen in recent years, we need to be assured that the private interest is not put ahead of the public interest with such flawed trade agreement provisions.

These international tribunals are not based on precedent, and lack public accountability and standard judicial ethics. This

"investor-state" enforcement was originally included in FTAs with developing countries with no reliable judicial system. Therefore, investor-state provisions are not necessary for an agreement between two developed countries with dependable judicial processes. The U.S.-Australia FTA did not include private enforcement of its investor provisions, and neither does the EU-South Korea FTA.

Currently NAFTA is the only free trade agreement the U.S. has signed with a major capital exporter that includes investor-state arbitration. The vast majority of investor-state challenges to U.S. public interest laws have come from Canadian investors. A major capital exporter, South Korea, is our seventh largest trading partner. This creates a much greater likelihood that U.S. state and federal laws and regulations would be challenged in foreign tribunals, exposing U.S. taxpayers to potential large new liabilities and threatening to undermine important public interest policies. The U.S.-South Korea FTA poses a special threat due to the high number of U.S. and Korean companies cross-established in each other's national markets. If ratified and implemented, at least 1,030 corporations with 2,055 establishments across the United States and South Korea would obtain new FTA rights to demand taxpayer compensation through challenges of U.S. and South Korean federal and state laws in foreign tribunals. The South Korea-U.S. FTA, therefore, poses a new threat to citizens, the environment and good governance.

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

For example, the Korea Electric Power Corporation is invested in Dennison Mines, a Canadian company seeking to mine uranium near the Grand Canyon. The U.S. Bureau of Land Management is proposing to bar new mining claims in a 1 million acre area near the Grand Canyon.

On January 11, 2011, Samsung Engineering, in a joint venture with Dow Chemical and Mitsui, signed a \$411 million contract in a ceremony held in Seoul to build a chlorine plant in Freeport Texas. The factory is expected to be one of the world's largest, producing 816,000 tons of the chemical every year.

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

In conclusion, CISPES implores Representative Rothman to reverse his position on a trade agreement that will undermine our national sovereignty and the hard fought public interest legislation that grassroots movements and Congressional Democrats like Representative Rothman have fought long and hard for.